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PUNITIVE DAMAGES AND STRICT PRODUCTS LIABILITY: AN ESSAY IN OXYMORON

ELLEN WERTHEIMER*

I. INTRODUCTION

Courts have frequently awarded punitive damages in strict products liability/design defect cases.¹ This Article argues that such awards are not consistent with the goals of strict products liability or with the principles of fairness that strict products liability doctrine is designed to serve.² Quite simply, there can be no punitive dam-

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¹ See, e.g., Acosta v. Honda Motor Co., 717 F.2d 828, 839 (3d Cir. 1983) (defective motorcycle case stating that punitive damages may be awarded for "outrageous conduct"); Dorsey v. Honda Motor Co., 655 F.2d 650, 657-58 (5th Cir. 1981) (holding that punitive damages could be awarded against automobile manufacturer found to have been wanton or reckless), modified, 670 F.2d 21 (5th Cir.), cert. denied, 459 U.S. 880 (1982); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46-47 (Alaska 1979) (allowing punitive damages where defendant gun manufacturer knew of revolver's defective design and that injury and deaths would result from defect, but nonetheless continued to market product), modified, 615 P.2d 204 (Alaska 1980), cert. denied, 454 U.S. 894 (1981); Toole v. Richardson-Merrell Inc., 60 Cal. Rptr. 398, 418 (1967) (affirming award of punitive damages in case involving MER/29, a high cholesterol drug); Palmer v. A.H. Robins Co., 684 P.2d 187, 218 (Colo. 1984) (holding that punitive damages could be awarded in case involving Dalkon Shield IUD (intrauterine device)); Cantrell v. Amarillo Hardware Co., 602 P.2d 1326, 1331 (Kan. 1979) (permitting punitive damages against defendant manufacturer of aluminum stepladder on showing of reckless disregard of plaintiff's rights); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 799 (Minn.) (holding that evidence of wanton disregard of plaintiff's rights warranted award of punitive damages against defendant manufacturer of children's cotton flannelette nightgown), cert. denied sub nom. Riegel Textile Corp. v. Gryc, 449 U.S. 921 (1980); Rinker v. Ford Motor Co., 567 S.W.2d 655, 668 (Mo. Ct. App. 1978) (stating, in case regarding defective automobile carburetor, that "there is no fundamental reason for excluding products liability cases from the cases in which punitive damages may be recovered"); Wangen v. Ford Motor Co., 294 N.W.2d 437, 444 (Wis. 1980) (stating, in case regarding defective automobile fuel tank, that "[a]warding punitive damages in a product liability case is a natural, direct outgrowth of basic common law concepts of tort law and punitive damages"); Wussow v. Commercial Mechanisms, Inc., 298 N.W.2d 897, 906 (Wis. 1980) (holding that defendant manufacturer of defective baseball pitching machine was liable for punitive damages where defendant had actual knowledge of defect).

² Some courts and commentators believe that punitive damages and strict products liability are theoretically incompatible. See Restatement (Second) of Torts § 908(2) (1977) (stating that "[i]n assessing punitive damages, the trier of fact can properly consider the character of defendant's act . . . . "). Contra David G. Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1268-71 (1976) (concluding that theoretical incompatibility argument is erroneous)
ages without fault. Thus, if a plaintiff can make a case for the imposition of punitive damages, that plaintiff will be able to prove that the defendant was at fault, and should have no need to invoke strict products liability. Conversely, if a plaintiff would lose in the absence of strict products liability doctrine, that plaintiff, by definition, will be unable to make a case for the imposition of punitive damages on the particular defendant, because that plaintiff will be unable to prove fault.

This Article focuses on the relationship between design defects and punitive damages because of the potential for widespread liability that a design defect creates. This potential means that

3. The argument has been recently made that the section 402A of the Restatement (Second) of Torts was primarily designed to apply to manufacturing defects. See James A. Henderson, Jr. & Aaron D. Twerski, Essay: Will a New Restatement Help Settle Troubled Waters: Reflections, 42 AM. U. L. Rev. 1257, 1260 (1993) (stating that drafters of section 402A did not foresee products liability actions based on design defects and failures to warn). It is difficult to see how this argument could be correct. Section 402A was in large part based upon Greenman v. Yuba Power Products, the parent of strict liability, which was itself a design defect case. See Greenman v. Yuba Power Prods., 377 P.2d 897, 900-01 (Cal. 1963) (establishing strict liability in tort of manufacturer of defective woodworking machine). Nor does the language of section 402A lend itself to such a narrow reading. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. i & k (1964) (listing products such as sugar, whiskey, tobacco and rabies vaccine because of their essential nature, not because of the risk that they will embody a manufacturing defect).

4. In a design defect case, the plaintiff argues that all of the units in the product line share an identical defect. Design defects thus threaten equally all those who come into contact with the particular product, and therefore bring with them the potential for widespread injury and liability. Failure to warn cases resemble design defect cases, even in those jurisdictions that do not treat the failure to warn as a design defect, because the failure to warn applies to all of the products in the particular line.

The potential for widespread design defect liability is demonstrated by the facts that the number of claims filed in actions involving the Dalkon Shield IUD and Agent Orange has exceeded 250,000, and that the number of asbestos claims is rapidly approaching—if it has not already exceeded—this number. The AMERICAN LAW INSTITUTE, REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 385-86 (1991) [hereinafter ALI REPORTERS' STUDY]. Further, approximately 1,500 suits were filed by plaintiffs who suffered injuries as a result of their use of the drug MER/29, and hundreds of more claims were settled before a com-
courts should be especially cautious before awarding punitive damages in design defect cases.5 Because a design defect affects all of the product units equally, a single design defect may have an impact upon a large group of persons. The primary focus of tort damages should lie with their compensatory function. Because the ability of subsequent plaintiffs to recover compensatory damages may depend on the manufacturer remaining solvent, punitive damages are a luxury that courts should avoid awarding in order to protect the broader-based right of all claimants to compensatory payment.6 Thus, plaintiffs as a group should oppose the awarding of punitive damages in strict products liability cases.

A further reason exists for plaintiffs to oppose the award of punitive damages in strict products liability cases. The introduction of fault concepts via punitive damages doctrine lends credence to, and may even encourage, those who would argue—largely for the defense—that liability for design defects should not attach in the

5. Suits based on design defects are not, of course, the only type of strict products liability lawsuit. Other types include manufacture and failure to warn—if the jurisdiction does not treat failure to warn as a design defect. In a mismanufacture case, the plaintiff argues that the particular product unit was a “lemon” different from the other units on the assembly line, and does not attack the entire product line. Punitive damages are less of a practical problem in this context, because the whole product line is not at risk. Perhaps the classic mismanufacture case is Escola v. Coca Cola Bottling Co. of Fresno. 150 P.2d 436, 439-40 (Cal. 1944) (holding bottling company strictly liable for damages caused by explosion of defective Coke bottle). The argument in Escola was that there was something wrong with that particular bottle, and not a problem with Coke bottles generally. Id.

6. There is some disagreement as to whether there is a punitive damages “crisis.” Compare Teresa Moran Schwartz, Punitive Damages and Regulated Products, 42 Am. U. L. Rev. 1335, 1363 (1993) (concluding that no crisis exists) with Victor E. Schwartz & Mark A. Behrens, Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip, 42 Am. U. L. Rev. 1365, 1385 (1993) (concluding that trend is towards punitive damages “run wild”). For the purposes of this Article, it is irrelevant whether there is a crisis. This Article argues that punitive damages should not be part of any strict products liability case, and does not rely exclusively, or even primarily, upon the havoc—or lack thereof—caused by their availability.
absence of fault. Strict products liability doctrine, designed to ensure that plaintiffs have an opportunity for compensation in the absence of fault, is under siege in the name of fault-based liability.\(^7\) Any argument against punitive damages that depends upon the fault-free nature of strict products liability loses its force to the extent that negligence becomes part of the basis of recovery. Transforming strict products liability into a negligence doctrine opens the floodgates to fault concepts generally, including those attached to punitive damages doctrine. Those who would transform strict products liability into negligence-based liability create the basis for allowing punitive damages to play an increased role. If fault replaces strict products liability, there is no reason to foreclose plaintiffs from seeking punitive damages.

Punitive damages are fault-based. For those who would keep all fault out of strict products liability and allow it to remain strict, the presence of any fault concepts would be anathema.

II. STRICT PRODUCTS LIABILITY AND PUNITIVE DAMAGES FOR DESIGN DEFECTS: THE PHILOSOPHICAL CONTRADICTION

As their name suggests, punitive damages are designed to punish certain forms of conduct, such as gross disregard for human life.\(^8\) Broadly speaking, an award of punitive damages is intended

\(^7\) See, e.g., Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence (to Warranty) to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 643, 649 (1980) (rejecting no-fault liability in favor of "reasonableness" standard); David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 704 (1992) (stating that "[i]n hindsight, the law's infatuation... with a rule of strict liability, in opposition to a rule of fault or negligence, is now beginning to take on an air of quaintness, reflecting the exuberant excesses of youth").

\(^8\) "An enterprise should be liable for punitive damages only when there is clear and convincing evidence of reckless disregard for the safety of others in the decisions made by management officials or other senior personnel." ALI REPORTERS' STUDY, supra note 4, at 264. Many courts and commentators have discussed the purposes of punitive damages. See Gillham v. Admiral Corp., 523 F.2d 102, 104 n.1 (6th Cir. 1975) (stating that punitive damages are intended to "reward" plaintiff in rare cases where defendant's actions amount to willful misconduct), cert. denied, 424 U.S. 913 (1976); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979) (arguing that punitive damages are designed not only to punish wrongdoer, but also to deter him or her and others from similar wrongdoing in future), modified, 615 P.2d 204 (Alaska 1980), cert. denied, 454 U.S. 894 (1981); LINDA L. SCHLUTER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.2, at 24-31 (2d ed. 1989) (contending that in most United States jurisdictions, purpose of punitive damages is nonremunerative); Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 4-7 (1985-86) (stating that purposes of punitive damages include punishment, preservation of public order, additional compensation and deterrence); Thomas C. Galligan, *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 7-9 (1990) (arguing that new role of punitive damages is to deter); David G. Owen, *Problems in Assessing
to convey to the particular defendant, and to all similar defendants who might commit similar sins, that society will not tolerate what the particular defendant has done. In order to recover punitive damages, a plaintiff must show that the defendant has not only been at fault, but at grievous fault. This fact, in itself, proves that strict liability—liability without fault—and punitive damages simply do not mix.

The premise of strict products liability, in sharp contrast to that of punitive damages, is that there are cases in which a manufacturer of a product should be held liable, even though that manufacturer has not been at fault. This premise is completely inconsistent with the premise of punitive damages, which is that the manufacturer should be punished when that manufacturer has been egregiously at fault.

Strict products liability is not wholly, or even primarily, an economic doctrine; at its core is an idea of fairness. The fairness concept of strict products liability lies in its role in ensuring that manufacturers pay for the injuries that their products cause.11 This

Punitive Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. 1, 7-10 (1982) (considering punitive damages essential to punish defendant and deter defendant and others from similar misbehavior); Schuster, supra note 2, at 772-76 (noting that historically, punitive damages have been used to compensate, punish and deter wrongdoers).

9. In order to collect punitive damages, most courts require a plaintiff to establish that the defendant’s conduct was willful, wanton, malicious, conscious or in reckless disregard for the rights or safety of others. See, e.g., Dorsey v. Honda Motor Co., 655 F.2d 650, 658 (5th Cir. 1981) (citing Florida law which requires “wantonness or reckless indifference to the rights of others”), modified, 670 F.2d 21 (5th Cir.); Dorr v. Wham-O Mfg. Co., 373 F. Supp. 608, 610 (E.D. Wis. 1974) (stating necessity of “showing of tortious conduct attended with malice or wanton or reckless disregard of personal rights allows the assessment of punitive damages”); Day, 594 P.2d at 46 (instructing jury of need for defendant’s “reckless indifference toward the safety of . . . acts . . . maliciously or wantonly done”); Ford Motor Co. v. Home Ins. Co., 172 Cal. Rptr. 59, 63 (1981) (stating punitive damages only available for conscious disregard of safety of others); Moore v. Remington Arms Co., 427 N.E.2d 608, 617 (Ill. App. Ct. 1981) (mandating “flagrant indifference to the public safety” (quoting David G. Owens, Punitive Damages in Products Liability Litigation, 74 MICH. L. REV. 1257 (1976))); Rinker v. Ford Motor Co., 567 S.W.2d 655, 667 (Mo. Ct. App. 1978) (requiring defendant’s “complete indifference to or conscious disregard for the safety of others for liability”); see also RESTATEMENT (SECOND) OF TORTS § 908(2) (1977) (stating that “[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others”).

10. Liability results even where “the seller has exercised all possible care in the preparation and sale of his product.” RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1964).

11. Comment c to section 402A of the Restatement (Second) of Torts outlines many of the purposes of the strict liability doctrine and states:

On whatever theory, the justification for the strict liability has been said
fairness depends not upon fault, but upon responsibility.\footnote{12} In a true strict liability case, neither party is at fault. In a negligence action, on the other hand, holding one party liable is a relatively straightforward proposition, because liability follows fault. The defendant is simply being made to pay for the impact of its blameworthy action on the plaintiff. This is morally satisfying, as the person paying the damages is a wrongdoer who failed to take adequate care to avoid injury to those using its products. In a case meriting the award of punitive damages, the moral nature of recovery becomes even more apparent than in negligence, as the paying defendant was not only negligent, but also evil.

In true strict liability cases, however, fault is not at issue. In the absence of wrongdoing, a different rationale is needed to justify placing liability on the manufacturer. The question becomes one of deciding which of two faultless parties should bear the cost of the injury. Those who are wedded to fault concepts find themselves in an unbearable dilemma in answering this question, and thus in the absence of fault have a tendency to let the loss stay where it is—on the plaintiff.\footnote{13}

to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

\textit{Restatement (Second) of Torts} § 402A cmt. c; see Barker v. Lull Eng’g Co., 573 P.2d 443, 455 (Cal. 1978) (stating that “[o]ne of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of the onerous evidentiary burdens” of establishing a negligence case); Greenman v. Yuba Power Prods., 377 P.2d 897, 901 (Cal. 1963) (stating that “[t]he purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the markets rather than by the injured persons who are powerless to protect themselves”); W. Page Keeton, \textit{Product Liability and the Meaning of Defect}, 5 St. Mary’s L.J. 30, 35 (1973) (observing that “[a] fourth and perhaps the major reason ordinarily given for strict liability in this area is that those engaged in the manufacturing enterprise can serve effectively as risk distributors by accepting responsibility for accidental losses attributable to the dangerousness of products as a cost of doing business”).

\footnote{12} \textit{See} \textit{Restatement (Second) of Torts} § 402A cmt. c (stating that “the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it”).

\footnote{15} \textit{See}, \textit{e.g.}, Owen, \textit{supra} note 7, at 717-18 (discussing strict liability and stating...
There is, however, another way of looking at this fault-free dilemma, as a matter of responsibility. The manufacturer has put the product on the market, is responsible for its presence in the plaintiff’s hands, and has profited from its availability. Thus, even in the complete absence of fault, a strong fairness argument supports the conclusion that the loss should fall on the party who is responsible for the product, the manufacturer. The injuries a defective product causes are part of the true cost of that product. Further, a manufacturer who profits from a product without paying for the injuries caused receives a windfall because the accident costs of that product become part of its profit.

This argument survives analysis even in the most faultless context, that of unknowable dangers. Arguably, if a danger is unknowable, the manufacturer has not been able to: (1) price its product to reflect a known risk or spread the cost in a forward-looking manner, (2) insure against that risk and (3) avoid that risk. That manufacturer is nonetheless responsible for the presence of the product on the market. Leaving the loss on the plaintiff essentially does to the plaintiff what those who oppose true fault-free liability refuse to do to the defendant: it makes the plaintiff pay the costs of the defective product. Because the defendant is, at least, responsible for the presence of the product on the market, this result is more unfair to the plaintiff than placing the cost of the injuries on that “[i]f the goal of punishment is to vindicate and discourage improper harms, punishment is plainly inappropriate to when the harm at issue was . . . proper”).


15. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (stating that “public policy demands that the burden of accidental injuries caused by products . . . be treated as a cost of production”).

16. If followed out to its conclusion, this argument leads to the result that a manufacturer should pay all of the costs generated by its product, whether that product is defective or not. Such a conclusion is beyond the scope of this Article. The fact that a product must be found defective before it can be the source of liability provides protection for the manufacturer who is making a socially useful product, such as certain vaccines, in which the unavoidable dangers are heavily outweighed by the social utility. Not all dangerous products are defective; if the utility of the product outweighs its dangers, that product is not defective and the manufacturer will not be liable for the injuries it causes. The specter of absolute liability is just that: a specter. See Ellen Wertheimer, Azzarello Agonistes: Bucking the Strict Products Liability Tide, 66 TEMP. L. REV. 419, 437-38 (1993) (discussing impact of confusing “danger” and “defect”).

the defendant is to the defendant. In the case of an unknowable
danger, neither party has been able to avoid or insure against the
particular hazard. Therefore, liability should fall on the manufac-
turer, the party responsible for the product's presence on the
market.

Thus, strict products liability serves the fairness goal by making
the party responsible for the product pay for the damage it causes.
In order to accomplish this goal, strict products liability enables
plaintiffs to prevail without proving negligence or fault of any kind
on the part of defendants. Any injection of fault principles into
strict products liability doctrine dilutes its nature and renders it su-
perfluous. A plaintiff who can prove negligence on the part of the
defendant does not need to invoke strict products liability in order
to win because that plaintiff may rely on fault as the basis for liabil-
ity. The only plaintiffs who need to invoke strict products liability
doctrine are those who cannot prove fault on the part of the
defendant.

The existence of the fairness concerns discussed above means
that success at meeting economic goals is only part of the standard
for measuring the success of strict products liability doctrine. As
Dean Calabresi has stated:

Nor would we be surprised if distributional goals will fairly
frequently lead to liability results under a strict liability test
which are pretty clearly wrong if one considers primary
cost avoidance alone. . . . To say that this is wrong would
be to conclude that once a liability test is chosen the role
of the courts is to give effect only to efficiency. . . . This
conclusion is not . . . a necessary one.

This passage refutes the argument that strict products liability doc-

18. Strict liability applies even when "the seller has exercised all possible care
in the preparation and sale of his product." Restatement (Second) of Torts
§ 402A(2)(a) (1964).

19. In comment c to section 402A, the drafters listed four policies behind
strict products liability. Only one of these is economic. Restatement (Second)
of Torts § 402A cmt. c. For a further discussion of the policies behind strict prod-
ucts liability, see supra note 11 and accompanying text.

20. Guido Calabresi & Jon T. Hirschoff, Toward a Test for Strict Liability in Torts,
81 Yale L.J. 1055, 1084 (1972). Strict products liability law was designed to pro-
mote fairness by requiring that the manufacturer, not the consumer, pay for inju-
ries caused by the product involved. See Greenman v. Yuba Power Prods., 377 P.2d
897, 901 (Cal. 1963) (stating that purpose of strict liability "is to ensure that the
costs of injuries resulting from defective products are borne by the manufacturer
that puts such products on the market rather than by the injured persons who are
powerless to protect themselves").
trine is indefensible as a matter of pure economic theory and should therefore be abandoned. The fact that economic theory cannot, by itself, justify strict products liability is not enough to warrant abandoning the doctrine unless it was adopted for purely economic reasons in the first place, which it demonstrably was not.

By definition, for a plaintiff to prevail in a suit for punitive damages, the plaintiff must prove that the defendant has been guilty of some form of "outrageous conduct." Even a defendant who has been guilty of negligent conduct may not be held liable for punitive damages, unless the negligence descends to the level of evil required by the criteria for punitive damages awards. Also by definition, faultless defendants cannot be held liable for punitive damages, though they may be held liable for damages in strict liability.

A fortiori, a plaintiff who can prove that the defendant should be liable for punitive damages has no need for strict products liability doctrine in making his or her case. He or she will have ample evidence that the defendant was not only at fault, but at egregious fault. Thus, punitive damages have no place in a true strict products liability case. If the plaintiff proves entitlement to punitive damages, the case is no longer one in strict liability, because in a strict products liability case, there is nothing to punish. Because punishment is the sole focus of punitive damages, their availability in a strict products liability case is a contradiction in terms. The availability of punitive damages may also detract from the fault-free nature of strict products liability by shifting the focus from the absence of fault to its punishment-worthy presence.

III. PUNITIVE DAMAGES AND STRICT LIABILITY FOR DESIGN DEFECTS: THE LEGAL CONTRADICTION

The first section of this Article outlined the reasons why strict


23. For examples of the level to which defendant's conduct must sink in order for a court to award punitive damages, see supra note 9 and accompanying text.

24. See Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1037-38 (Ore. 1974) (stating that "[a]n article can have a degree of dangerousness which the law of strict liability will not tolerate even though the actions of the designer were entirely reasonable in view of what he knew at the time he planned and sold the manufactured article" (quoting Roach v. Kononen, 525 P.2d 125, 129 (Ore. 1974))).
products liability and punitive damages are philosophically inconsistent. Briefly put, strict products liability is based upon the absence of fault, and punitive damages require its presence. However, there are also legal arguments that support the position that punitive damages have no place in strict products liability cases. Punitive damages are unique in several ways, all of which are inconsistent with strict products liability.

A. Size of Award

The amount awarded as punitive damages has no necessary connection with the damage done;\(^{25}\) rather, the award depends on the size of the defendant and the degree of evil its conduct represents.\(^{26}\) Strict products liability doctrine was developed to ensure that plaintiffs would be compensated for their injuries, a goal that is exceeded when plaintiffs receive both compensatory and punitive damages.\(^{27}\)

Design defect cases, with their widespread impact, also bring with them the potential for awards of punitive damages to different multiple plaintiffs.\(^ {28}\) The compensatory goal of strict products liability may be vitiated entirely when repeated punitive damages

\(^{25}\) See, e.g., TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2714 (1993) (upholding award of $19,000 compensatory and $10 million punitive damages, or 526 times amount of compensatory damages, in slander of title action); see also Maxey v. Freightliner Corp., 450 F. Supp. 955 (N.D. Tex. 1978) (awarding $150,000 compensatory and $10 million punitive damages, or approximately 67 times amount of compensatory damages, in action involving defective design of fuel system of truck tractor), aff'd, 623 F.2d 395 (5th Cir. 1980), aff'd on reh'g, 665 F.2d 1367 (5th Cir. 1982) (remitting punitive damages to $450,000). For a general discussion of the history and purpose of punitive damages, see Schwartz & Behrens, supra note 6, at 1368-70.

\(^{26}\) See RESTATEMENT (SECOND) OF TORTS § 908(2) (stating that "[i]n assessing punitive damages, . . . consider . . . the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause"). The exact proof necessary to support an award of punitive damages varies among states. Most require gross negligence, willfulness or wantonness. For a discussion of the level of a defendant's evil conduct necessary to award punitive damages, see supra note 9 and accompanying text.

\(^{27}\) See Greenman v. Yuba Power Prods., 377 P.2d 897, 901 (Cal. 1963). Greenman itself states that "[t]he purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Id. Punitive damages are not part of the costs of the injuries.

\(^{28}\) Many defendants have argued that multiple or excessive punitive damage awards violate their constitutional right to due process of law. See e.g., TXO, 113 S. Ct. at 2720 (plurality upholding award of punitive damages 526 times greater than amount of compensatory damages and noting that there is no bright line or mathematical test for determining whether punitive damage award violates due process); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18-24 (1991) (outlining three-
awards render a defendant unable to pay compensatory damages to future plaintiffs. 29

One of the goals of strict products liability is cost-spreading. This goal is defeated by the award of punitive damages. In a case where the dangers of the product are known, the manufacturer prices the product accordingly, setting up what amounts to an insurance fund to pay for injuries caused by the product. Because punitive damages awards are so large and so unpredictable, it is impossible for the manufacturer to take such awards into account when pricing its product. Thus, to the extent that strict products liability is intended to serve cost-spreading, punitive damages have no place in the doctrine because they completely defeat this goal.

Further, as was discussed above, cost-spreading may be impossible in cases where the danger is unknowable. 30 Strict products liability has more than one goal, however. Where the danger is knowable, the twin goals of fairness and cost-spreading trump any societal justification for the award of punitive damages. Where the danger is unknowable, the fairness rationale takes center stage and overcomes the absence of cost-spreading to justify strict products liability.

B. Recipient of Award

The identity of the particular plaintiff who receives a punitive

29. This is, of course, a particularly strong concern in design defect cases, because future plaintiffs are inevitable. For a discussion of the widespread liability inherent in design defect cases, see supra notes 4-5 and accompanying text.

30. For a discussion of the difficulty of cost-spreading in cases where the danger of a product is unknowable, see supra note 17 and accompanying text.
damages award is largely a matter of chance. In the context of design defects, a plaintiff prevails by showing that the particular defendant has been guilty of evil conduct in the course of designing its product. Since design defect cases focus on an aspect of the product that affects all of those who are exposed to it, the evil conduct at issue exists not with respect to any particular person, but rather with respect to that class of persons who have been or will be exposed to the product. The fact that a particular plaintiff proves an entitlement to punitive damages has little to do with the particular plaintiff, and everything to do with the conduct of the defendant towards a much larger group of people. Thus, there is no compelling reason why a particular plaintiff should receive the punitive damages award, any more than any other plaintiff who has been injured by the product. Indeed, the class of persons entitled to punitive damages should arguably include more than just those actually injured by the product. Punitive damages are awarded against defendants who have created a risk, and the class of those affected includes all those exposed to the risk by use of the product, and not just those injured thereby.

31. See, e.g., Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 383-84 (Ct. App. 1981) (noting that potential liability existed for punitive damages awards in other cases for identical design defect in Ford Pinto's fuel system which had resulted in punitive damage award of $125 million, remitted to $3.5 million on appeal). In a recent examination of products liability actions, the American Law Institute (A.L.I.) expressed concern over the possibility of unlimited punitive damage awards in similar design defect cases:

If a defectively designed product is unduly hazardous, it may injure hundreds or even thousands of purchasers and users. If liability for punitive damages can be established for any of the resulting tort claims, then such an award should be available for all the claims arising out of the [same] corporate misdeed.

ALI REPORTERS' STUDY, supra note 4, at 260 (emphasis added).

32. Some jurisdictions have resolved this problem by enacting statutes that declare that plaintiffs will not, in fact, receive all, or sometimes any, of the punitive damages award themselves. See, e.g., COLO. REV. STAT. § 13-21-102(4) (1987) (one-third of all reasonable exemplary damages collected in civil actions are to be paid into state General Fund; although this statute was found to be unconstitutional in Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991), to date it has not been repealed); FLA. STAT. ANN. § 768.73(2)(a)-(b) (West Supp. 1993) (in civil actions based on personal injury or wrongful death, 35% of punitive damages are to be paid to Public Medical Assistance Trust Fund; in all other civil actions, 35% of punitive damages are to be paid to General Revenue Fund); GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1993) (75% of any punitive damage award, after payment of attorneys' fees and costs, is to be paid into state treasury through Fiscal Division of Department of Administrative Services; although this statute was found to be unconstitutional in McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990), to date it has not been repealed); ILL. ANN. STAT. ch. 110 para. 2-1207 (Smith-Hurd Supp. 1991) (trial court has discretion to determine how much, if any, of punitive damage award is to be paid to Illinois Department of Rehabilitation Services); IOWA CODE ANN. § 668A.1.2 (West 1987) (if defendant's conduct is
Nor is there any reason why one particular plaintiff should receive an award of punitive damages rather than others who have suffered or will suffer the same injury. The defendant may have made a reprehensible design decision. If so, it was equally reprehensible with respect to all of those adversely affected by the product. Because no company will be able to pay punitive damages indefinitely, awarding punitive damages only to those who simply ask first allows the legal system to fall victim to inertia and to the kindergarten rationale of first come, first served. Moreover, as was discussed above, awarding punitive damages to first comers may deprive those who have not yet been injured of compensatory damages. A compensated plaintiff who receives an award of punitive damages in no sense “deserves” it. Such a plaintiff has been fully compensated, and receives the punitive damages award solely by reason of the defendant’s conduct, not by reason of anything that has happened to him or her as an individual.

Indeed, the design defect context presents the strongest argument against awarding punitive damages, simply because of the potential for enormous numbers of plaintiffs such a defect may generate. The award of punitive damages may prevent strict products liability from serving its cost-spreading and compensatory goals by bankrupting the defendant company before it has had the opportunity to compensate all of those injured by the product.

directed specifically at plaintiff, then full amount of punitive damages is payable to plaintiff; otherwise, at least 75% of punitive damage award is to be paid into civil reparations trust fund; award may be reduced by up to 25% for payment of costs and fees); Kan. Stat. Ann. § 60-3402(e) (Supp. 1992) (50% of punitive damages is to be paid to State’s Health Care Stabilization Fund); Mo. Ann. Stat. § 537.675 (Vernon 1988) (50% of any punitive damage award, after payment of attorneys’ fees and expenses, is to be paid to state’s Tort Victims’ Compensation Fund); Or. Rev. Stat. § 18.540 (Supp. 1992) (50% of all punitive damage awards, after payment of attorneys’ fees, is to be paid to Criminal Injuries Compensation Account); Utah Code Ann. § 78-18-1(3) (1992) (50% of punitive damages in excess of $20,000, after payment of attorneys’ fees and costs, is to be paid to state’s General Fund).

33. Inertia in this situation is represented by the position that punitive damages have always been done this way. This article takes the position that the legal system must continually justify how it operates. If the award of punitive damages to first comers makes no sense in the design defect context, then the policy should be changed.

34. The idea of “first come, first served” until all assets are depleted seems inappropriate in the context of punitive damages awards, where conduct has been equally culpable towards all of those who are affected by the product. Cf. ALI Reporters’ Study, supra note 4, at 260 (stating that all punitive damage claims stemming from one corporate misfeasance should be honored, if one plaintiff can establish corporate liability for act).

35. For a discussion of the effect of punitive damage awards on future plaintiffs, see supra note 29 and accompanying text.
Punitive damages are based on the value of the defendant company. This concept is sound if one is dealing with an issue involving only a single lawsuit. If one is dealing with a design defect, which has the potential to reach large numbers of people, however, a new problem emerges. At some point, the defendant company will run out of assets, and not all of those injured by the product will be able to collect compensatory, let alone punitive, damages. The United States Court of Appeals for the Fifth Circuit, in determining whether punitive damages were appropriate in an asbestos case, expressed concern over the possibility that future plaintiffs might be unable to collect even compensatory damages:

36. The defendant's size and wealth is a factor to be considered by the jury in their determination of punitive damages. See Restatement (Second) of Torts § 908(2) (1977) (stating that "[i]n assessing punitive damages, the trier of fact can properly consider . . . the wealth of the defendant"). The rationale behind this is "that it takes more to punish a rich [person] than a poor one." Owen, supra note 8, at 9.

Many juries believe the theory that a larger award is necessary for wealthier companies, in order for them to feel the sting of the punishment. See id. at 20 (discussing jury's rationale in assessing large punitive damage award against multimillion dollar company). For example, in 1976, Ford Motor Company had a net worth of $7.7 billion and after-tax income of $983 million. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 388-89 (Ct. App. 1981) (action involving defective fuel tank of Ford Pinto automobile). The jury in Grimshaw v. Ford Motor Co. awarded punitive damages of $125 million. Id. at 389. In doing so, the jurors believed that such a large award was necessary to "teach a meaningful lesson to a company 'making' millions of dollars every day." Owen, supra note 8, at 46. More recently, in Dunn v. Hovic, plaintiff's counsel told the jury to "have courage to tell [the defendant] multi-national company that it's not going to . . . hurt people and lie about it." 1 F.3d 1371, 1376 n.4 (3d Cir.), modified in part, 1 F.3d 58 (3d Cir.), cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn, 114 S. Ct. 650 (1993). By doing so, the attorney hoped to recover a larger punitive damage award, based on the size of the defendant. Id. Although the punitive damage award was remitted to $1 million on appeal, the jury awarded the plaintiff $25 million in punitive damages. Id. at 1391. In addition, the Dunn court, in upholding the punitive damage award, alluded to the great wealth of the defendant, Owens-Corning Fiberglas Corporation, whose net earnings average almost $200 million. Id. at 1383.

37. An example of such conduct might be gross negligence with respect to a medical malpractice suit. See Cash v. Kim, 342 S.E.2d 61 (S.C. Ct. App. 1986) (upholding punitive damages award in medical malpractice case where defendants were found to have been grossly negligent).

38. A products liability action has the potential to generate hundreds or thousands of punitive damage claims. "In a products liability context [the prospect] of punitive damages is particularly disturbing to the manufacturer who distributes his product to thousands, and sometimes millions of users." 3 L. Frumer & M. Friedman, Products Liability § 33.01(7), at 302 (1978). For a list of products resulting in numerous punitive damage awards, see supra note 1 and accompanying text; see also Alan Schulkin, Mass Liability and Punitive Damages Overkill, 30 Hastings L. J. 1797, 1797-1800 (1979).
prizes to meet future compensation liabilities . . . commands consideration of the whole picture. . . . If the enterprise should fail, early victims would receive compensation but others whose latency periods were longer would receive no compensation at all. At the point where awards of punitive damages destroy the viability of the enterprises necessary to accomplish loss distribution, the remedy of punitive damages becomes incompatible with the strict liability cause of action. The later victims, not the enterprise, effectively bear the punishment. 39

It is obvious that all plaintiffs cannot each receive a separate award of punitive damages. The first few might receive such an award, but at some point the assets of the defendant would become so depleted that the plaintiffs would be unable to recover compensatory damages, let alone punitive damages.40 Eventually, after repeated punitive damages awards, the evidence of declining corporate worth provided to the jury might itself protect the defendant from further punitive damages verdicts.41 However, this would not occur until there has been significant asset depletion, compromising the ability of the corporation to compensate future plaintiffs.

Thus, not only do punitive damages make little sense in the context of strict products liability, there are affirmative reasons why


40. Judge Friendly expressed concern over the problem of multiple punitive damages awards when he stated that "[w]e 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." Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967).

Most courts, however, have refused to strike down an award of punitive damages simply because of the problem of "overkill." See, e.g., Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 402-07 (5th Cir.) (refusing to rule as matter of law that punitive damages should not be awarded in mass tort cases), cert. denied, 478 U.S. 1022 (1986); Neal v. Carey Canadian Mines, 548 F. Supp. 357, 376-77 (E.D. Pa. 1982) (holding that punitive damages are recoverable so long as conduct exhibited with respect to individual plaintiff can be termed outrageous), aff'd sub nom. Van Buskirk v. Carey Canadian Mines, 760 F.2d 481 (3d Cir. 1985).

41. In considering whether to assess multiple punitive damages against a single defendant, the United States Court of Appeals for the Third Circuit noted that "a jury might decide that a defendant's financial position, as a result of other awards of punitive damages for the same conduct, is so precarious that a sizeable award of punitive damages would be inappropriate." Acosta v. Honda Motor Co., 717 F.2d 828, 839 n.17 (3d Cir. 1983).
punitive damages and strict products liability/design defect litigation simply should not be found in the same case.

IV. PUNITIVE DAMAGES AND STRICT PRODUCTS LIABILITY: THE PRACTICAL CONTRADICTION

This Article has already demonstrated that punitive damages and strict products liability share no common ground as a matter of legal philosophy or theory. The barriers to combining the two, however, go beyond the metaphysical. It is clear that defendants oppose this combination. This part of the Article will demonstrate that plaintiffs as a group should oppose it as well. Two arguments support this position. First, the availability of punitive damages may vitiate the compensatory function of strict products liability. Second, using fault concepts in the award of punitive damages undercuts strict products liability theory as a whole.

A. Vitiation of the Compensation Function of Strict Products Liability

Design defects have the potential to injure multiple persons. The desire to compensate those injured by such defects constitutes perhaps the main reason why strict products liability was developed and adopted. This goal may be defeated by the imposition of punitive damages, however.

The imposition of punitive damages can vitiate the goal of compensating injured persons in several ways. First, punitive damages can interfere with the ability of the defendant to pay compensatory damages in the future. When one is dealing with a design

42. For examples of multiple claims arising out of a single design defect, see supra note 4 and accompanying text.
43. The American Law Institute has characterized compensatory damages as a "fundamental tort right." ALI REPORTERS' STUDY, supra note 4, at 260-61.
44. In Jackson v. Johns-Manville Sales Corp., the court refused to award punitive damages. 727 F.2d 506 (5th Cir. 1984), cert. denied, 478 U.S. 1022 (1986). The court's primary reason was its concern for the continued financial viability of the defendant, which was necessary to insure compensation for future asbestosis claimants. James B. Sales & Kenneth B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 VAND. L. REV. 1117, 1143-44 (1984) (arguing that "purpose of the punitive damages doctrine has never been and never shall be the economic destruction of business entities").

Some courts have failed to sufficiently consider this when awarding punitive damages. For example, in Wangen v. Ford Motor Co., the court affirmed an award of punitive damages and concluded that "the loss of investment and the decline in value of investments are risks which investors knowingly undertake." 294 N.W.2d 437, 453-54 (Wis. 1980). However, the Wangen court supported its holding only with respect to the loss to owners and stockholders. Id. The court failed to consider future plaintiffs, who could collect neither compensatory nor punitive damages from a bankrupt company.
defect, inevitably some of the injuries lie in the future. If awarding punitive damages interferes with the ability of the corporation to remain solvent, then these future plaintiffs will be deprived of any recovery. As a group, plaintiffs are ill-served by weakening the defendant to such an extent that its ability to pay compensatory damages may become nonexistent.

A design defect may on occasion be so serious or so pervasive that the manufacturer is driven out of business in the process of paying compensatory damages. However, if liability is restricted to compensatory damages only, far more plaintiffs will receive payment than would have been the case had punitive damages been allowed. Indeed, a financially shaky defendant may necessitate judicial creativity. For example, a defendant might set up a fund so that some fairness in the distribution process may be maintained. In

The Third Circuit recently expressed concern over the need for a defendant to remain viable in Dunn v. HOVIC, 1 F.3d 1371 (3d Cir.), modified in part, 1 F.3d 58 (3d Cir.), cert. denied sub nom. Owens-Corning Fiberglas v. Dunn, 114 S. Ct. 650 (1993). The Dunn court upheld an award of punitive damages against defendant, Owens-Corning Fiberglas Corporation, although the award was remitted to $1 million. Id. at 1391. In its decision to uphold the award, the court specifically referred to the wealth of the defendant. See id. at 1390 (noting that defendant had $1.26 billion in unexhausted products liability insurance coverage). The wealth of the defendant and its ability to pay other damage claims were factors to be used in determining the appropriateness of a punitive damage award. Id. at 1391. In upholding the punitive damage award in this case, the Dunn court noted that the defendant failed to show “that it will not be able to pay future awards of either compensatory or punitive damages.” Id. at 1390.


46. This problem is particularly apparent in asbestos cases. For example, Johns-Manville Corporation filed for Chapter 11 reorganization on August 26, 1982. John P. Burns, et al., Special Project, An Analysis of the Legal, Social, & Political Issues Raised by Asbestos Litigation, 36 VAND. L. REV. 573, 691 n.716 (Charles D. Maguire, Jr. ed. 1983). During 1981 and the first half of 1982, 10 punitive damage verdicts averaging $616,000 each had already been assessed against Johns-Manville. In addition, Unanco and Amatex Corporation filed for bankruptcy under Chapter 11 of the Bankruptcy Reform Act of 1978. Id. at 807-08. Each company stated that litigation expenses, as well as compensatory and punitive damages relating to asbestos cases were the primary reasons for its bankruptcy. Id. at 808.

47. Indeed, the prospect of paying compensatory damages to large numbers of people may in itself drive a corporation into bankruptcy. Some of the same arguments as set forth above with respect to punitive damages may be used to justify a class action system for compensating those injured by a product, if enough people have been seriously injured so as to threaten the corporation’s financial existence. Of course, care will need to be taken to ensure that corporations do not use the threat of bankruptcy to justify paying less than the corporation is capable of paying in damages.
such a situation, punitive damages are a luxury that the plaintiffs, considered as a group, can ill afford.

Second, punitive damages also constitute a windfall to a particular plaintiff. Plaintiffs as a group, however, should have their priorities focused on the need to compensate. Punishment is, in a sense, a luxury that is not affordable unless and until injured persons have been compensated. Nor is punishment necessary. It is unlikely that the omission of punitive damages in strict products liability cases will encourage corporations to be evil. If the corporation is evil, the case should not be sounding in strict products liability, and punitive damages may be awarded. Moreover, if a design defect is sufficiently egregious, it is likely that a large pool of plaintiffs will eventually demand compensatory damages, even if punitive damages are not available. This in itself will serve as a disincentive for any evil corporate conduct in allowing a grossly defective product onto the market. To bring the argument full circle: If the defendant has engaged in truly evil conduct such that punitive damages are warranted, the plaintiff will have no need to use strict products liability in making his or her case, and the question of mixing the two theories should not arise.

B. Aiding and Abetting the Attack on Strict Liability

In the years since its inception, strict products liability has become riddled with fault concepts to such an extent that its very existence as a basis for recovery has been threatened, if not destroyed. The defense side has discharged its ammunition effectively, terrifying courts into replacing strict products liability with negligence-based liability in the face of a parade of horribles. The availability of punitive damages, while in theory being beneficial to plaintiffs, injects fault into a doctrine in which fault does not belong. Both negligence principles and punitive damages disserve

48. For example, according to Sheila Birnbaum, there are 95,000 asbestos suits currently pending. Sheila L. Birnbaum, Remarks at the Villanova Law Review Symposium: Punitive Damages Awards in Product Liability Litigation: Strong Medicine or Poison Pill? (Oct. 30, 1993) (transcript on file with the Villanova Law Review).


50. See Brown v. Superior Court, 751 P.2d 470, 479 (Cal. 1988) (strict products liability threatens development of new and necessary drugs and causes price increases in and shortages of needed vaccines).

51. As was discussed above, strict products liability does not benefit plaintiffs as a group, although the individual plaintiff who is lucky enough to collect such damages will certainly be benefitted. For a complete discussion of the effects of
strict products liability by transforming it into a fault-based theory. In order to serve its fairness function, strict products liability should remain pure and uncontaminated by any fault concepts whatsoever. In short, punitive damages have no place in strict products liability.

Ironically, defense arguments that liability should be based on fault, and that strict products liability should be abandoned, provide support for the availability of punitive damages. Once strict products liability has been transformed back into a negligence doctrine, there is no doctrinal reason to eliminate the possibility of an award of punitive damages in appropriate cases. On the other hand, strict products liability precludes such an award as long as it remains pure and fault-free. If fault is once again to be the basis of recovery, there is no purity-of-doctrine argument against punitive damages, as such damages simply represent the consequences of extreme fault. On the other hand, those arguments that support keeping strict products liability free of fault also support eliminating punitive damages as an unacceptable route for the re-entry of fault concepts into what should be a doctrine free from blame.

V. CONCLUSION

Plaintiffs' advocates argue against the interest of plaintiffs as a group when they support the availability of punitive damages in strict products liability litigation. Such damages open the door to fault concepts generally and violate the principles behind the adoption of strict products liability in the first place. On the other hand, defense advocates who argue that fault-based liability should replace liability without fault themselves open the door to punitive damages. The difference between the fault involved in negligence and the fault involved in punitive damages is one in degree, not in kind. Once the barrier against fault concepts has been eliminated, there can be no doctrinal basis for excluding punitive damages awards from products liability suits.

punitive damages on plaintiffs, see supra notes 31-32 and accompanying text. Nor does the availability of punitive damages in strict products liability cases help society as a whole by deterring evil business practices. If the business practices at issue are sufficiently evil to trigger liability for punitive damages, the plaintiff will have no need for strict products liability doctrine in making his or her case. It may be necessary to protect society by making punitive damages available. What is not necessary is to make them available in strict products liability cases.

52. Of course, products liability suits may be filed under theories other than strict products liability. The inconsistency lies in allowing punitive damages in strict products liability suits, and not in products liability suits generally.