Loyola of Los Angeles International and Comparative Law Review

Volume 17
Number 4 *Symposium on Punitive Damages*

Article 5

10-1-1995

Punitive Damages and the Spill Felt Round the World: A U.S. Perspective

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I. INTRODUCTION

JURY AWARDS $3.5 MILLION PUNITIVE DAMAGES IN COFFEE SPILL CASE!

In recent years, headlines such as this have grabbed the attention of the U.S. public and fanned the flames of tort reform, creating the now widely held perception that punitive damage awards have run amuck in the United States. The accuracy of this perception is open to question. Empirical studies assessing the impact of punitive damage awards in product liability actions generally have concluded that such awards are infrequent.[1] Nevertheless, tort reform advocates have launched frontal attacks on the punitive damages remedy at both the state and federal level, citing it as a prime example of the lawsuit abuse that "saps

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1. *See, e.g.*, MARK PETERSON ET AL., PUNITIVE DAMAGES—EMPIRICAL FINDINGS (The RAND Corp., Institute for Civil Justice) (1987) (finding few awards of punitive damages in product liability cases in locations studied); American Bar Foundation Project, Study of Punitive Damages (1987) (suggesting punitive damages awards are relatively rare in product liability cases); MICHAEL RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES: A SURVEY OF A QUARTER CENTURY OF TRIAL VERDICTS (The Roscoe Pound Foundation) (Lee Hays Romano ed., 1991) (suggesting punitive damage awards are rarely awarded in products liability cases, are even more rarely paid, and frequently are reduced by settlement and appeals); Richard C. Reuben, *Plaintiffs Rarely Win Punitives, Study Says*, A.B.A. J., Oct. 1995, at 26 (discussing a 1995 U.S. Department of Justice report that concluded that plaintiffs were awarded punitive damages in only six percent of the cases they won, and received more than $50,000 in only half of those cases).

our economy, eliminates jobs, pits neighbor against neighbor and injures our country's global competitiveness."[2]

Business interests contend that punitive damage awards are "unpredictable bolts of lightning wielded by vengeful juries inflamed by prejudice versus large corporations, untutored in how to calculate the appropriate fine and egged on by greedy plaintiffs' lawyers salivating at the prospect of huge contingency fees."[3] Consumer-advocates insist, however, that punitive damages are "a necessary remedy against the abuse of power by economic elites."[4] A resolution of this argument is beyond the scope of this Article, which considers how a U.S. appellate judge would review a multi-million dollar punitive damage award assessed against one of the world's largest fast food chains after a consumer suffered serious burns from spilling coffee on himself. Nevertheless, appellate courts do not render decisions in a vacuum. Any U.S. judge reviewing a $3.5 million punitive damage award in a coffee spill case would be well aware that his or her decision will be the subject of intense scrutiny.

II. "REMEMBER MCDONALDS"

Indeed, a U.S. judge addressing the issue today has the example of what happened in a strikingly similar case. In the now-famous McDonald's coffee spill case, a jury awarded $2.9 million in punitive damages.[5] The trial judge reduced the punitive damage award to $480,000, but it was the jury award that made "Remember McDonalds" the rallying cry for the latest round of U.S. tort reform. It is against this backdrop that an appellate judge would review the award of punitive damages in *Smith v. MegaFood.* At first glance, the punitive damage award in this case might appear to be a stark example of all that is amiss in the U.S. tort system. Nevertheless, a judge reviewing the award on appeal

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2. Neil A. Lewis, *House Votes to Help Medical Profession in Court*, N.Y. TIMES March 10, 1995, at A1 (quoting Rep. Henry Hyde, sponsor of "Common Sense Legal Reforms Act"). *See also*, Janet Fix & Jessica Lee, *Liability Reform on Today's Agenda*, USA TODAY, March 10, 1995, at A4.

3. Ruth Marcus, *Are Punitive Damage Awards Fair to Firms? Supreme Court Finally Agrees To Referee High-Stakes Dispute*, WASH. POST, Sept. 23, 1990, at H1.

4. Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1276 (1993).

5. Liebeck v. McDonald's Restaurants, No. CV-93-02419, 1994 WL 360309, at *1 (N.M. Dist. Ct. Apr. 18, 1994).

must carefully address a host of issues to decide whether the punitive damages award was justified.

The judge must go through a multi-step process to resolve those issues.[6] As a preliminary matter, the judge should determine whether any policy concerns or constitutional considerations might preclude punitive damages. If satisfied that none do, the judge must examine the procedures and standards employed by the trial court to determine whether the jury had sufficient guidance on the punitive damages issue. If the procedures and standards were adequate, the court must examine the record to see whether the evidence supported the jury's conclusion regarding the punitive damages issue. If the judge concludes that the jury's decision to award punitive damages was justified, the judge also must decide whether the amount of punitive damages awarded by the jury should stand or whether it should be reduced.

Before determining whether the award and its amount were appropriate, however, it is necessary to make some assumptions about the law that is applicable to punitive damages in the jurisdiction in which the judge will be rendering his or her opinion. Approaches to punitive damages in the United States vary considerably from jurisdiction to jurisdiction. Although the doctrine of punitive damages generally is a product of the common law, some state statutes address the subject. Several states have enacted specific tort reform measures affecting punitive damages. This Article assumes that no tort reform measures affecting punitive damages have been adopted. This Article also states assumptions about the procedures and standards employed by the trial court at relevant points in the discussion.

III. Reviewing the Punitive Damages Award

A U.S. appellate judge probably would begin his or her review of the punitive damage award assessed against MegaFood by recalling the purpose of awarding punitive damages in tort cases. Although the primary function of tort damages is to compensate victims of tortious conduct, all but a few U.S. jurisdictions[7] permit

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6. In an actual appeal, of course, the judge would be aided by briefs from the parties. In this case, however, the judge is limited to the information in the record provided and to his or her knowledge of the applicable legal principles.

7. Louisiana, Massachusetts, Nebraska and Washington prohibit punitive damages. *See* Killebrew v. Abbott Lab., 359 So. 2d 1275, 1278 (La. 1978); City of Lowell v.

awards of punitive or exemplary damages against defendants whose conduct has been especially blameworthy. Although courts in a few jurisdictions have held that punitive damages serve a compensatory purpose,[8] it generally is agreed that the function of punitive damages is to punish the defendant for particularly outrageous conduct and to deter the defendant and others from similar misconduct in the future.[9]

A. The History of Punitive Damages

A judge with an academic bent might recall the history of the remedy. The practice of assessing punitive damages to punish particularly blameworthy conduct is centuries old. The *Code of Hammurabi*,[10] the *Old Testament*,[11] Roman law,[12] and Blackstone's *Commentaries on the Law of England*[13] make references to such a remedy. By the late eighteenth century, the doctrine had made its way to the United States.[14] As the Industrial Revolution evolved and U.S. industry flourished, so did the potential for oppressive conduct by powerful corporations against individuals. The doctrine of punitive damages kept pace. By the end of the nineteenth century, punitive damage awards to punish and deter particularly egregious corporate misconduct had become commonplace in the United States.[15]

Massachusetts Bonding & Ins. Co., 47 N.E.2d 265, 271 (Mass. 1943); Abel v. Conover, 104 N.W.2d 684, 686 (Neb. 1960); Stanard v. Bolin, 565 P.2d 94, 98 (Wash. 1977).

8. *See, e.g.*, Collens v. New Canaan Water Co., 234 A.2d 825, 831-32 (Conn. 1967) (asserting that punitive damage award is compensatory); Jackovich v. General Adjustment Bureau, Inc., 326 N.W.2d 458, 464 (Mich. Ct. App. 1982) (finding punitive damages compensate plaintiff for plaintiff's humiliation and indignity caused by defendant's tort).

9. *See* RESTATEMENT (SECOND) OF TORTS § 908(1) (1965).

10. *See* 1 LINDA SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 3 n.1 (2d ed. 1989) (noting punitive damages found in CODE OF HAMMURABI).

11. *See, e.g.*, *Exodus* 22:4 (requiring double restitution for theft); *Luke* 19:8 (stating payment of four times damages caused is penalty for fraud or theft).

12. *See* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 210 (1969) (noting distinction between actions requiring compensatory damages and actions requiring more than compensatory damages).

13. WILLIAM BLACKSTONE, COMMENTARIES 1683 n.16 (William C. Jones ed., 1916). *See also* Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763); Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763).

14. *See* Genay v. Norris, 1 S.C.L. (1 Bay) 6, 6 (1784).

15. *See* Seymour D. Thompson, *Liability of Corporations for Exemplary Damages*, 41 CENT. L.J. 308 (1895).

B. The Controversy Behind Punitive Damages

The judge, however, also would be aware that in spite of its venerable history, the doctrine of punitive damages always has been controversial. Critics have objected to the absence of procedural safeguards to protect a defendant from a punishment that is very much like a criminal fine,[16] from the almost unfettered discretion given juries in determining the propriety and amount of awards,[17] and from awards which actually are undeserved windfalls for plaintiffs.[18] Although these general criticisms may trouble the judge, they have not been sufficient to prevent the doctrine of punitive damages from finding acceptance in most U.S. jurisdictions. Thus, the judge in the *MegaFood* case may be assumed to be rendering his or her decision in a jurisdiction that has recognized the validity of the punitive and deterrent functions of punitive damages.

IV. THE CRITICISMS OF PUNITIVE DAMAGES IN PRODUCT LIABILITY CASES

Because *Smith v. MegaFood* is a product injury case the judge also would take note of the specific criticisms leveled at the doctrine of punitive damages in the product liability context. Although these criticisms have been variously stated,[19] they may be reduced to five recurring concerns: (1) punitive damages against corporations punish shareholders of defendant corporations rather than the actual wrongdoer; (2) punitive damages in product liability actions do not serve the goals of punishment and deterrence associated with such awards; (3) punitive damages in product liability actions are not necessary to achieve optimal product safety; (4) the fault basis of punitive damages is incompatible with the fault-free theories of strict liability and breach of warranty; and (5) the number of potential claims causes overpunishment which

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16. *See* Bob Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975).

17. *See, e.g.*, David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1314-19 (1976).

18. *See, e.g.*, Walker v. Sheldon, 179 N.E.2d 497, 501, (N.Y. 1961) (Van Voorhies, J., dissenting opinion); Kink v. Combs, 135 N.W.2d 789, 798 (Wis. 1965).

19. *See, e.g.*, Owen, *supra* note 17, at 1258 (1976); Richard D. Schuster, Note, *Punitive Awards in Strict Products Liability Litigation: The Doctrine, the Debate, the Defenses*, 42 OHIO ST. L. J. 771 (1981).

leads to adverse social and economic consequences. Before addressing the particulars of the case, the judge should address these concerns to decide whether, as a matter of policy, punitive damages should not be awarded in product liability cases against corporate defendants.

A. The Suffering Shareholder

The concern that the innocent shareholder suffers where punitive damages are assessed against a corporation proceeds on the assumption that, while the corporation acts through its officers and employees, it is the corporation that pays when those acts justify the imposition of punitive damages.[20] Ultimately, those who pay when punitive damages are assessed are the shareholders who, in all likelihood, have had no direct involvement in the corporate misconduct. Thus, in the *MegaFood* case, even though the corporate decision-makers mandated that coffee be kept at a temperature capable of causing third degree burns, and that no warning of this fact be given to consumers, they would not be punished by a punitive damage award. Instead, the shareholders of MegaFood would bear the cost. Nevertheless, an appellate judge seeking guidance from other courts would find that most have not been persuaded by the "innocent shareholder" argument. Instead, courts have stressed that losses to shareholders occasioned by punitive damages should encourage shareholders to take an active role in overseeing corporate activity and choosing corporate officers and policy.[21]

B. The Unrealistic Goal of Deterrence

Another criticism, related to the "innocent shareholder" concern, is that punitive damage awards against corporate defendants in product liability cases do not serve the punishment and deterrence goals usually associated with awards of punitive damages. The judge may be aware that this concern has elicited substantial commentary.[22] Although it may be intuitively appeal-

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20. For the circumstances under which liability for punitive damages can be imposed vicariously on the principal, see RESTATEMENT (SECOND) OF TORTS § 909 (1965).

21. *See, e.g.*, Martin v. Johns-Manville Corp., 469 A.2d 655, 666-67 (Pa. 1983); Wangen v. Ford Motor Co., 294 N.W.2d 437, 453-54 (Wis. 1980).

22. *See, e.g.*, Symposium, 40 ALA. L. REV. 687 (1988-89); Symposium, 56 SO. CAL. L. REV. 1 (1982-83); Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1 (1985-86); Gary T. Schwartz, *The*

ing, the argument that punitive damage awards are effective to punish and deter corporate misconduct is open to question. For example, a punishment rationale arguably seems inappropriate where the individual wrongdoer does not personally suffer the sanction imposed. In a product liability case, the ultimate costs of punitive damages are not assessed against the corporate officers or employees actually responsible for the injury. Rather, they are shifted to consumers through higher prices or to the shareholders. Similarly, punitive damage awards are unlikely to deter future misconduct of the present defendant, or others, if those sought to be deterred are not the ones who pay. Furthermore, the punishment and deterrence potential of punitive damages is undercut if manufacturers insure against such losses.[23] Although the judge would find support for the notion that punitive damages are a deterrent against manufacturer misconduct,[24] the judge would find frequent challenges to their efficacy at achieving that goal.[25] Nevertheless, it seems unlikely that a judge would find this controversy sufficient ground not to award punitive damages in a product liability case.

C. Safety Concerns

The judge also should consider the claim that punitive damage awards in product liability cases do not further the goal of improving product safety beyond what would be achieved by imposing compensatory damages alone. Accident reduction is a legitimate goal of tort liability in general, and product liability in particular. Product suppliers have an economic incentive to reduce the risks of their products, at least to the point where improving

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Myth of the Ford Pinto Case, 43 RUTGERS L. REV. 1013 (1991).

23. About half of U.S. jurisdictions do not permit insurability of punitive damages on the basis that such insurance is against public policy. *See, e.g.*, Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 434-42 (5th Cir. 1962); St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc., 777 P.2d 1259, 1267-69 (Kan. 1989); Home Ins. Co. v. American Home Products Corp., 550 N.E.2d 930, 935 (N.Y. 1990). *See also* 11 *The Insurability of Punitive Damages, The Risk Report* (Sept. 1988 - Aug. 1989). A number of jurisdictions permit insurance where punitive damages are imposed on the insured. *See* U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983).

24. *See, e.g.*, Michael C. Garrett, Comment, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1971-1972); David A.J. Richards, Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303 (1980).

25. *See, e.g.*, Ausness, *supra* note 22; E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989).

safety does not exceed accident costs, because, if they do not, they will be found negligent[26] or their products will be found defective.[27] Thus, it is appropriate for manufacturers to make conscious risk-benefit or cost-benefit analyses to determine the point at which the cost of reducing product risks exceeds the costs of paying for injury. If they err in their analyses, they must pay compensation to the injured plaintiff. The argument is that, in order to avoid having to pay compensation, product suppliers attempt to minimize the risks posed by their products and accidents are reduced. Thus, the threat of liability in negligence or strict liability is sufficient to encourage product suppliers to reduce product risks to an acceptable level.

Sometimes, however, where a product with a significant but reducible risk is highly profitable, the threat of punitive damages does not hamper corporate decision-makers. As a result, decision-makers may be tempted to tip the cost-benefit balance so as to trade safety for profits. In such cases, the threat of compensatory damages alone might not be enough to induce elimination or reduction of the risk. Product suppliers may argue that the unpredictability of punitive damages, with respect to when they will be awarded and in what amount, has the effect of overdeterrence by discouraging product suppliers from engaging in appropriate cost-benefit decisions that optimize product safety. That same unpredictability, however, may also serve to discourage inappropriate cost-benefit decisions by cutting into the profits they create.

The appellate judge researching this point would find that courts generally have taken a dim view of conscious risk-taking by manufacturers where the value of life and limb is a part of the cost-benefit analysis. The court in *Wangen v. Ford Motor Co.*, for example, noted that "punitive damages may be particularly appropriate in a product liability case because . . . [s]ome may think it cheaper to pay damages or a forfeiture than to change a business practice."[28] Similarly, in *Grimshaw v. Ford Motor Co.*, the court permitted a $3.5 million punitive damage award because the defendant "decided to defer correction of the [Pinto's]

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26. *See, e.g.*, Exum v. General Electric Co., 819 F.2d 1158, 1162 (D.C. Cir. 1987); United States v. Carroll Towing Co., 159 F.2d 169, 172-73 (2d Cir. 1947).

27. *See, e.g.*, Nichols v. Union Underwear Co., 602 S.W.2d 429 (Ky. 1980).

28. 294 N.W.2d 437, 451 (Wis. 1980).

shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profit."[29]

D. The Incompatibility of Punitive Damages and Strict Liability

Another criticism of punitive damages in product liability is that the doctrine is incompatible with strict product liability. The record in this case indicates that the plaintiff "filed a lawsuit on a product liability theory." It is not clear, however, which of the many possible product liability theories the plaintiff's attorney chose. In a typical product liability lawsuit, the plaintiff proceeds on theories of negligence, strict liability, and breach of implied warranty. If strict liability is the basis of this case, the judge might consider the argument that the at-fault basis of punitive damages is inconsistent with the fault-free theory of strict liability. Liability in a strict product liability case arises from a finding that the product is defective, not from a finding of faulty conduct. On the other hand, an award of punitive damages requires a finding of extreme misconduct.[30] Thus, the theoretical foundations of strict product liability and punitive damages liability are arguably incompatible. A number of courts have addressed this incompatibility issue.[31] Although an occasional court has reached a different result,[32] most have found no theoretical incompatibility between punitive damages and strict liability. Rather, they have concluded that as long as the plaintiff proves the requisite misconduct to justify the award of punitive damages, the theory of the underlying cause of action is irrelevant.[33]

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29. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 813 (1981). *But see* Schwartz, *supra* note 22 (suggesting that the court either misrepresented or misinterpreted Ford's cost-benefit analysis).

30. For a discussion of standards for punitive damages, see Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297 (D.N.J. 1990); Leonen v. Johns-Manville Corp., 717 F. Supp. 272, 280-81 (D.N.J. 1989); Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517, 1535-38 (D.C. Minn. 1989); Racich v. Celotex Corp., 887 F.2d 393, 399 (2d Cir. 1989).

31. *See, e.g.*, Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, (1981); Palmer v. A.H. Robins Co., 684 P.2d 187, 217-19 (Colo. 1984); Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983); Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980).

32. *See, e.g.*, Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482, 483 (D.N.J. 1981); Butcher v. Robertshaw Controls Co., 550 F. Supp. 692, 705 (D.C. Md. 1981); Barnwell v. Barber-Colman Co., 393 S.E.2d 162, 163 (S.C. 1989).

33. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 399-400 (5th Cir. 1986); Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1569-70 (6th Cir. 1985); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46-49 (Alaska 1979), *modified*, 615 P.2d 621, 623 (Alaska

E. Potential Overpunishment

Finally, critics of punitive damages in product liability actions often assert that the number of potential claims against a single corporate defendant results in overpunishment, which may lead to adverse social and economic consequences. This scenario arises in product liability where a corporate entity may, through a single course of conduct, put a dangerous product on the market with the potential for injuring hundreds, or even thousands, of people far into the future. If the misconduct is sufficient to justify an award of punitive damages, the potential for multiple punishment is obvious. Based on the nature of the misconduct and the wealth of the defendant, the jury in the first product liability case presumably will award an amount sufficient to communicate to the defendant the error of its ways. Nothing, however, will prevent later juries, in actions based on the same conduct, from subjecting the defendant to additional assessments of punitive damages. In *Roginsky v. Richardson-Merrell, Inc.*,[34] an early case considering the propriety of awarding punitive damages in product liability cases, the court expressed grave doubts about whether "claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."[35]

The "overkill" problem is particularly troubling in cases where the corporate defendant's past misconduct in putting a dangerous product on the market has created the potential for numerous injuries that extends far into the future. That, however, is not the situation in the *MegaFood* case. Although numerous lawsuits arising out of coffee burns have been filed in the past decade, the potential for future lawsuits does not depend upon MegaFood's misconduct in the past because injuries based on past misconduct already have occurred. Rather, future lawsuits depend upon its future misconduct. If MegaFood cures the product defect by

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1980), *on reh'g.*, 627 P.2d 204, 205 (Alaska), *cert. denied*, 454 U.S. 894 (1981); Palmer v. A.H. Robins Co., 684 P.2d 187, 213-14 (Colo. 1984); Masaki v. General Motors Corp., 780 P.2d 566, 568 (Haw. 1989); Fischer v. Johns-Manville Corp., 512 A.2d 466, 470-72 (N.J. 1986).

34. 378 F.2d 832 (2d Cir. 1967). This case involved the drug MER/29, developed to lower blood cholesterol levels. The manufacturer of the drug knew that it caused users to develop cataracts yet continued to market it with no warning as to its potential ill effects. *Id.* at 834-36.

35. *Id.* at 839.

changing its corporate coffee policy, either by lowering the temperature of the coffee or by providing adequate warnings to customers of the risks posed by the coffee, its exposure to punitive damages will cease. Thus, while a judge reviewing the award of punitive damages in the *MegaFood* case would no doubt recognize the validity of the "overkill" criticism of punitive damages, the judge would also recognize that it is not applicable to the case.

F. Conclusions Regarding the Criticisms

Although the particular difficulties posed by permitting punitive damage awards may be a matter of concern, it is unlikely that a judge would consider them sufficient reason to conclude that punitive damages should never be permitted in a product liability case. That conclusion, however, does not end the judge's preliminary inquiries in this case. Numerous challenges to punitive damages in product liability cases have been based on constitutional grounds. Thus, the judge also must consider whether there are constitutional concerns that would impede a punitive damages award in product liability cases generally and, if not, whether there are constitutional restrictions that would preclude, or require reduction of, the award in this case.

V. CONSTITUTIONAL CONSIDERATIONS

A. Introduction

A variety of constitutional attacks have been waged against punitive damages, including claims that punitive damages in product liability violate constitutional protections against double jeopardy and excessive fines, as well as constitutional rights to procedural and substantive due process. For the most part, however, demands for constitutional restraints on punitive damages have been unsuccessful. The U.S. Supreme Court has specifically rejected challenges to punitive damages based on claims that they violate prohibitions against double jeopardy[36] and constitute excessive fines.[37] The extent, however, to which

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36. The Supreme Court has stated that "protections of the Double Jeopardy clause are not triggered by litigation between private parties." United States v. Halper, 490 U.S. 435, 451 (1989).

37. In Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), the Court held that the excessive fines clause was intended to curb only governmental action and,

due process requirements may limit punitive damages is less clear. While the Supreme Court has indicated that due process may place restraints on punitive damages,[38] it so far has declined to impose specific limitations on most due process grounds. With the matter in doubt, both procedural and substantive due process challenges persist.

B. Procedural Due Process

As to procedural due process, defendants have made a variety of claims. They frequently have asserted that the standards used at trial to determine an award are too vague to adequately guide the jury, particularly when no statutory provision exists to limit the amount of punitive damages that may be awarded.[39] The thrust of such arguments is that standards of conduct used to determine punitive damages, such as "wanton" or "reckless," do not provide the jury with constitutionally sufficient guidance in determining what kind of behavior merits an award of punitive damages or how much the amount of the award should be. Responding to such arguments, some courts have concluded that the traditional standards for determining the propriety of punitive damages are not sufficiently vague to offend due process.[40] Others have refused to hold common law standards unconstitutional because imposition of a uniform standard "is best left to Congress or for higher judicial authority."[41]

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thus, does not limit the award of punitive damages to private parties in civil actions. *Id.* at 258.

Courts have taken the same approach where defendants have challenged state constitutional excessive fines provisions. *See, e.g.*, King v. Armstrong World Indus., 906 F.2d 1022 (5th Cir. 1990) (applying Texas law); Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297, 1304 (D.N.J. 1990) (applying New Jersey law).

38. In Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), the Supreme Court declined to consider the question of whether the due process clause limits punitive damages. All nine justices, however, expressed concern over the due process issue, and some specifically indicated that they might look favorably upon a challenge to punitive damages in product liability cases. 492 U.S. at 276.

39. *See, e.g.*, Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297 (D.N.J. 1990).

40. *See, e.g., id.*; Leonen v. Johns-Manville Corp., 717 F. Supp. 272, 280-81 (D.N.J. 1989); Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517, 1535-38 (D.C. Minn. 1989).

41. Racich v. Celotex Corp., 887 F.2d 393, 399 (2d Cir. 1989).

1. Undue Jury Discretion

Although it has not established rules or guidelines in this area, the U.S. Supreme Court has rejected a procedural due process challenge to punitive damages based on claims of insufficient guidance and undue jury discretion. In *Pacific Mutual Life Insurance Co. v. Haslip*,[42] the Court refused to rule that the Alabama common law method of determining punitive damages, which included instructing the jury on the purposes of punitive damages and providing a multifactor test for trial court review of punitive damages, violated due process. While the Court conceded that unlimited discretion might "jar one's constitutional sensibilities," it nevertheless concluded that no "bright line between the constitutionally acceptable and the constitutionally unacceptable"[43] could be drawn to fit every case. It further noted that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."[44]

2. Excessive Awards

As to the issue of excessive awards, the Court in *TXO Production Corp. v. Alliance Resources Corp.*[45] refused to hold that a punitive damage award over five hundred times greater than the compensatory award violated procedural due process. The defendant asserted that its due process rights were violated because it had no advance notice that the jury might be allowed to return such a large award. The Supreme Court responded that the notice requirement of the due process clause is satisfied "if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct."[46] Additionally, the Court refused to address the defendant's claim that the jury should not have been instructed that it could consider the defendant's financial position in assessing punitive damages because the issue had not been properly preserved. Instead, the

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42. 499 U.S. 1 (1991).

43. *Id.* at 18.

44. *Id.* at 2. With this in mind, the Court looked to whether the Alabama procedures for awarding punitive damages provided sufficient objective criteria for the jury and trial court and concluded that they did. *Id.* at 20-22.

45. 113 S. Ct. 2711, 2724 (1993).

46. *Id.*

Court noted that in *Pacific Mutual* it had cited the financial position of the defendant as a factor that could be taken into account in determining punitive damages.[47]

In *Honda Motor Co. v. Oberg*,[48] the lone product liability case involving punitive damages decided by the Supreme Court, the Court held that a provision in the Oregon Constitution permitting only very limited judicial review of the amount of punitive damages awarded by a jury violated due process.[49] Noting that "[j]udicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded,"[50] the Court examined the history of judicial review of punitive damage awards and concluded that the scope of review permitted in Oregon differed dramatically from the scope under the common law. Unlike the common law, the Oregon procedure provided no assurance that punitive damages would not be arbitrary. According to the Court, due process does not permit the state to commit the decision on the amount of punitive damages to the unreviewable discretion of a jury. Thus, state procedures must include trial court review of the amount of the award. The Court, however, did not address what it considered "the more difficult question of what standard of review is constitutionally required."[51]

3. Burden of Proof

The penal nature of punitive damage awards has given rise to claims that due process requires use of a more stringent burden of proof, such as "clear and convincing evidence," rather than the

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47. *Id.* at 2722.

48. 114 S. Ct. 2331, 2346-47 (1994).

49. The amended Article VII, § 3 of the Oregon Constitution provided:

> In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict.

OR. CONST. art. VII, § 3 (amended 1995).

50. 114 S. Ct. at 2335.

51. *Id.* at 2341 n.10. The Court, however, did give some indication that a variety of standards might be acceptable. The Court said:

> Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review which focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence."

Id.

"preponderance of the evidence" burden traditionally used in civil cases.[52] Numerous jurisdictions have raised the standard of proof for punitive damage awards to "clear and convincing evidence," either by judicial opinion[53] or by statute,[54] and the Supreme Court in *Oberg* recognized it as "an important check against unwarranted imposition of punitive damages."[55] Nevertheless, no court has held that this higher standard is constitutionally required, nor has any court concluded that procedural due process considerations require bifurcation of the trial.[56]

C. Substantive Due Process

1. Multiple Awards Against a Single Defendant

The most frequently asserted substantive due process complaint against punitive damages in the product liability context is the potential for multiple punitive damage awards against a single defendant for conduct relating to a single product. Closely related to the "overkill" argument previously discussed,[57] the claim in due process terms is that the aggregate of all potential punitive damage awards arising out of a single course of conduct will result in a punishment grossly disproportionate to the misconduct. This result, arguably, is at odds with the concept of fundamental fairness inherent in the notion of substantive due process.[58] Although courts have not denied punitive damages on substantive due process grounds, their approaches to the issue have varied. Some have treated the problem as raising only procedural due process issues and have found the trial court affords procedural safeguards that sufficiently provide due pro-

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52. *See, e.g.*, Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1099 (5th Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992); Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 282 (2d Cir. 1990), *cert. denied*, 497 U.S. 1057 (1990).

53. *See, e.g.*, Wangen v. Ford Motor Co., 294 N.W.2d 437, 458 (Wis. 1980).

54. *See, e.g.*, IND. CODE ANN. § 34-4-34-2 (West 1990); MONT. CODE ANN. § 27-1-221(5) (1987).

55. 114 S. Ct. at 2341.

56. In jurisdictions employing the bifurcated trial, liability issues are presented at the first stage and punitive damage issues are considered at the second.

57. *See supra* Part IV.E.

58. *See, e.g.*, Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990), *cert. denied*, 497 U.S. 1057 (1990); Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990); *cert. denied*, 498 U.S. 920 (1990); Tetuan v. A.H. Robins Co., 738 P.2d 1210 (Kan. 1987).

cess.[59] Others have disposed of the issue by concluding that the defendant's conduct did not constitute a single course of conduct.[60] At least one court has held that multiple punitive damage awards in mass tort or product liability litigation violate due process,[61] though it vacated this ruling on reconsideration because of the inability to fashion a workable remedy.[62] The court reluctantly concluded that "[u]ntil there is uniformity either through Supreme Court decision or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated."[63]

2. When an Award Constitutes a Taking

Defendants also have claimed that either an excessive punitive damages award or a large disparity between the compensatory damage award and the punitive damage award constitutes a taking of property without due process and exceeds the substantive limits for penalties imposed by due process. Such an argument was made by the defendant in *TXO Production Corp. v. Alliance Resources Corp.*,[64] in which the jury awarded punitive damages greatly in excess of the compensatory award. The Supreme Court, examining the award with "reasonableness in mind,"[65] determined that it could not say "that the award was so 'grossly excessive' as to be beyond the power of the State to allow."[66] In *Honda Motor Co. v. Oberg*,[67] although the Supreme Court treated the issue of judicial review of the amount of punitive damage awards as an issue of procedural due process, the Court specifically stated:

> Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damage awards.

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59. *See, e.g.*, Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1571 (6th Cir. 1985) *cert. denied*, 478 U.S. 1021 (1986); Wangen v. Ford Motor Co., 294 N.W.2d 437, 466 (Wis. 1980).

60. *See, e.g.*, Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 281 (2d Cir. 1990), *cert. denied*, 497 U.S. 1057 (1990); Puppe v. A.C. & S., Inc., 733 F. Supp. 1355, 1361 (D.N.D. 1990); Tetuan, 738 P.2d at 1245.

61. Juzwin v. Amtorg Trading Corp., 705 F. Supp 1053, 1065 (D.N.J. 1989); *but see* Loenen v. Johns-Manville Corp., 717 F. Supp. 272, (D.N.J. 1989).

62. Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1234 (D.N.J. 1989).

63. *Id.* at 1235.

64. 113 S. Ct. 2711 (1993).

65. *Id.* at 2720.

66. *Id.* at 2723.

67. 114 S. Ct. 2331 (1994).

> [citations omitted] Although they fail to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable," [citations omitted] a minority of the Justices agreed that the Due Process Clause imposes a limit on punitive damages.[68]

The Court, however, noted that the case did not require consideration of "the character of the standard that will identify unconstitutionally excessive awards."[69]

3. Conclusions Regarding Substantive Due Process

Although it appears unlikely that the U.S. Supreme Court will provide further guidance in the way of specific procedures or substantive criteria essential to satisfy due process, the response of the Oregon Supreme Court to the U.S. Supreme Court's holding in *Oberg* may be instructive to the judge reviewing the punitive damage award in *Smith v. MegaFood.* On remand, the Oregon Supreme Court stated that "[t]here is a range of punitive damages that a reasonable jury may assess in a given case, and an assessment of damages that exceeds that range results in a deprivation of property that is a substantive due process violation."[70] The Court devised a standard of review for post-verdict judicial review that required "the award of punitive damages [to be] within the range that a rational juror would be entitled to award in light of the record as a whole."[71] The court, nevertheless, concluded that, given the record in the case, a $5 million punitive damage award against a company with $4.9 billion in assets where the compensatory award was $900,000 was not grossly excessive.

VI. REVIEW OF THE *MEGAFOOD* PUNITIVE DAMAGE AWARD

Although nothing in the constitutional caselaw suggests that the award of punitive damages against MegaFood is per se unconstitutional, the *MegaFood* appellate judge nonetheless must consider constitutional issues. Additionally, the judge will be

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68. *Id.* at 2335.

69. *Id.*

70. Oberg v. Honda Motor Co., 888 P.2d 8, 11 (Or. 1995).

71. *Id.* at 12. For a more extensive discussion of the standard, see Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297 (D.N.J. 1990); Leonen v. Johns-Manville Corp., 717 F. Supp. 272, 280-81 (D.N.J. 1989); Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517, 1535-38 (D.C. Minn. 1989); Racich v. Celotex Corp., 887 F.2d 393, 399 (2d Cir. 1989).

affected by, and thus must consider, the current political climate. Because *MegaFood* is a product liability case wherein punitive damages were assessed against a U.S. corporation, tort reformers and consumer advocates alike will closely scrutinize the case. With all of this in mind, the judge must set about the dual task of determining whether an award of punitive damages was justified in this case and, if so, whether the amount awarded should be reduced.

A. Standards for the Jury

To that end, the judge will review carefully the record from the trial court. One of the judge's primary concerns is the standard the jury used to evaluate MegaFood's conduct. Defendants challenging punitive damage awards regularly have claimed that the standards used at trial for determining both the propriety and amount of awards are too vague or are inadequate to guide the jury, particularly when nothing limits the amount of damages that may be awarded.[72]

U.S. courts generally have agreed that punitive damages in tort cases should only be awarded where the character of the conduct and the defendant's mental state had an outrageous quality. Terms such as fraud, malice, intent to injure, reckless indifference to safety, willful misconduct, wantonness, and conscious misconduct all have been used to describe the kind of conduct that justifies punitive damages.[73] According to the Restatement (Second) of Torts, "[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."[74]

Obviously, in the product liability context, a finding of outrageous conduct will rarely, if ever, be based on evil motive or an actual intent to injure. Nevertheless, in product liability cases involving punitive damage claims, courts typically have not modified the language of the standards used in torts cases to fit the product manufacturing and marketing setting. Instead, courts have changed the meaning of the words to fit the product liability

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72. *See, e.g.*, Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297, 1302 (D.N.J. 1990).

73. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 212-14 (5th ed. 1984); James D. Ghiardi & John J. Kircher, PUNITIVE DAMAGES L. & PRAC. § 5.01. (Cum. Supp. 1994).

74. RESTATEMENT (SECOND) OF TORTS, § 908(2) (1965).

context. Thus, courts in jurisdictions requiring a finding of "malice" for a punitive damage award have held that the concept of malice includes not only actual ill will but also a reckless or conscious indifference to the potential for serious injury.[75] One court wrote:

> We believe that in products liability cases the equivalent of the "evil motive," "intent to defraud," or "intent to injure," which generally characterizes "actual malice," is actual knowledge of the defect and deliberate disregard of the consequences. Therefore, in order for actual malice to be found in a products liability case, regardless of whether the cause of action for compensatory damages is based on negligence or strict liability, the plaintiff must prove (1) actual knowledge of the defect on the part of the defendant, and (2) the defendant's conscious or deliberate disregard of the foreseeable harm resulting from the defect.[76]

B. The Owen Factors

In 1976, Professor David Owen wrote the first significant scholarly consideration of the role of punitive damages in product liability actions. He suggested that the standard for determining the appropriateness of punitive damages in product liability cases should ask whether the defendant has demonstrated "a flagrant indifference to the public safety."[77] To ascertain whether the defendant's conduct rose to this level, Professor Owen recommended using the following factors:

> (1) the magnitude of the danger to the public;
> (2) the cost and feasibility of reducing the danger to an acceptable level;
> (3) the manufacturer's awareness of the danger, of the magnitude of the danger, and of the availability of a feasible remedy;
> (4) the nature and duration of, and the reasons for, the manufacturer's failure to act appropriately to discover or to reduce the danger; and
> (5) the extent to which the manufacturer purposefully created the danger.[78]

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75. *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 786-88 (1981); Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 175-76 (Iowa 1990).

76. Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 653 (Md. 1992).

77. Owen, *supra* note 17, at 1368.

78. *Id.* at 1369.

Although U.S. courts rarely have identified the above factors so specifically, most courts actually do require proof of some combination of these factors to sustain a punitive damages award in a product liability case.

The *Smith v. MegaFood* record does not reveal what standard of conduct the trial court used or how the judge instructed the jury with respect to the standard. For the purposes of this Article, I will assume that the jury was instructed to award punitive damages only if it found that MegaFood's conduct displayed a "flagrant indifference to public safety."[79] I will assume further that the judge instructed the jury to consider the above factors in determining whether MegaFood's conduct met that standard.

The first two factors, the magnitude of the danger to the public and the cost and feasibility of reducing the danger to an acceptable level, do not speak directly to the nature of the defendant's conduct. Nevertheless, I will address them first because rarely, if ever, are punitive damages justified in a product liability context if the product does not pose a significant danger to the public or if the cost or feasibility of reducing the danger is prohibitive.

1. The Magnitude of the Risk

To determine the magnitude of the risk, the appellate judge must look both to the severity of the potential injury and to the likelihood that it will occur. The trial court found that MegaFood's policy was to keep liquid at a temperature that causes third degree burns within two to seven seconds. Since third degree burns are extremely painful and cause permanent disfigurement and lengthy disability, the severity of the potential injury is unquestionable.

At first glance, the "likelihood" that a person will be burned by MegaFood's coffee seems low. MegaFood sells millions of cups of coffee a year, and only a fraction of those have resulted in severe burns. Nevertheless, the marketing methods employed by MegaFood increase the likelihood of coffee spills. MegaFood's marketing techniques actively encourage drive-through customers, and a large percentage of the millions of cups of coffee sold by MegaFood each year are sold at drive-through windows. Despite

79. *Id.* at 1368.

the risk involved with drinking very hot beverages in a moving automobile, doing so is common practice among Americans.

While only a small percentage of MegaFood coffee sales have resulted in severe burns, seven hundred fifty lawsuits have been filed nationwide for severe burns from coffee spills in the last ten years. These statistics indicate that coffee spills occur with some regularity and, thus, pose a significant hazard on a national scale. In light of the seriousness of potential injuries and the regularity with which the injuries have occurred nationwide, a judge reviewing *Smith v. MegaFood* reasonably could conclude that a jury could have found the magnitude of the risk to be significant.

2. The Cost and Feasibility of Reducing the Danger

Although the cost and feasibility of reducing the danger to an acceptable level sometimes are difficult to determine in a product liability case, they are relatively easy to assess in *Smith v. MegaFood*. MegaFood had two alternatives. First, it could have altered the "design" of its product by reducing the temperature of its coffee. Because this "design" change would require only that MegaFood inform its company store managers and franchisees of a change in the corporate policy on coffee temperature, this alternative does not appear to be costly.

Arguably, however, the "design" alternative would not be cost free. The record states that most consumers prefer their coffee at 180 degrees Fahrenheit, and that MegaFood's competitors serve their coffee at a temperature fifteen to twenty percent cooler. Thus, MegaFood may have gained a competitive advantage by serving its coffee at the temperature most consumers prefer. Although the record does not indicate that MegaFood conducted market studies to determine the extent of that advantage, the jury may have assumed the advantage of serving hotter coffee to be significant. Thus, the jury could conclude that while a change in coffee "design" was feasible, it may have been costly in terms of corporate profits.[80]

As an alternative to changing the temperature of its coffee, MegaFood could have provided adequate warnings about the risks

80. Putting consumers at risk in order to maximize profits has not been viewed favorably by courts. Whether such a consideration is appropriate will be discussed under Owen's fourth factor. *See infra* Part VI.B.4.

posed by coffee spills. Although some scholars disagree,[81] providing adequate warnings of product risks generally is considered to be a low cost method of curing a product defect. MegaFood, at little actual cost, could have posted signs at its drive-through windows, in its restaurants, and even on its cups, warning that the coffee was hot enough to cause serious burns if spilled.

As with the "design" alternative, the impact of such a warning on coffee sales is difficult to assess accurately. If MegaFood's consumers actually prefer their coffee very hot, it is unlikely that many would decide to purchase coffee elsewhere in order to avoid the risk of injury. On the other hand, if these consumers patronize MegaFood for reasons other than the temperature of the coffee, they may be more likely to go elsewhere. Because we have no information on the motivation of MegaFood coffee customers, the real cost of adequate warnings is difficult to assess. Lacking this information, a jury reasonably could have concluded that warnings in this case were feasible and that they may or may not have been costly.

3. MegaFood's Awareness of the Danger

Using Professor Owen's factors, once the jury established that the magnitude of the risk is great and the cost of reducing it to an acceptable level is minimal, it would look to the product supplier's awareness of the danger, its magnitude, and the availability of a feasible remedy.[82] This phase looks at the blameworthiness of the defendant's conduct. To justify a conclusion that the conduct in question exhibited a "flagrant indifference for public safety," courts generally have required that the product manufacturer had knowledge of the hazard and its potential for harm.

Ordinarily, evidence that the defendant was aware of prior incidents, which resulted in the same kind of injury suffered by the plaintiff in the present case, satisfies the knowledge requirement.[83] Courts disagree on whether the defendant's knowledge must be actual or whether constructive knowledge suffices.

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81. *See* James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 296-98 (1990).

82. Owen, *supra* note 17, at 1369.

83. *See, e.g.*, Tetuan v. A. H. Robins Co., 738 P.2d 1210, 1224-25 (Kan. 1987). *But see* Loitz v. Remington Arms Co., 563 N.E.2d 397, 417-19 (Ill. 1990) (finding evidence of ninety-four previous incidents reported to defendant was insufficient to establish actual knowledge).

Although most courts have required actual knowledge,[84] some have taken the approach suggested in the Restatement (Second) of Torts. The Restatement permits punitive damages where the defendant has "reason to know"[85] of the risk posed by the product but no actual knowledge.[86] A few courts have suggested that punitive damages may be assessed in cases in which the defendant's conduct was simply negligent, such as when the defendant "should have known" of the danger posed by the product.[87] For a jury to conclude, however, that a defendant

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84. For example, the Maryland Court of Appeals in Owens-Illinois, Inc. v. Zenobia stated:

> The knowledge component, which we hold is necessary to support an award of punitive damages, does *not* mean "constructive knowledge" or "substantial knowledge" or "should have known." More is required to expose a defendant to a potential punitive damages award. The plaintiff must show that the defendant *actually* knew of the defect and of the danger of the product at the time the product left the defendant's possession or control.

601 A.2d 633, 653-54 (Md. 1992) (emphasis in original). *See also* Mosser v. Freuhauf Corp., 940 F.2d 77, 85 (4th Cir. 1991); Sealover v. Carey Canada, 793 F. Supp. 569 (M.D. Pa. 1992); Lane v. Amsted Indus., 779 S.W.2d 754, 758 (Mo. Ct. App. 1989); School District v. U.S. Gypsum, 750 S.W.2d 442, 444-46 (Mo. Ct. App. 1988).

85. Comment b of § 908 refers to § 500 which states:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS § 500 (1965). Section 12 of the Restatement defines "reason to know" as "information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists." *Id.* § 12.

86. *See, e.g.*, Acosta v. Honda Motor Co., 717 F.2d 828, 841-44 (3d Cir. 1983); Catasauqua Area Sch. Dist. v. Raymark Indus., 662 F. Supp. 64, 65-66, 69-70 (E.D. Pa. 1987); Wooderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038, 1049-50, 1058 (Kan. 1984).

87. In Loudermill v. Dow Chemical Co., 863 F.2d 566 (8th Cir. 1988), in which a worker suffered injuries from chemical exposure, the court stated that "[i]nferred malice requires that the defendant knew or *should have known* of the potential harm, but proceeded anyway with conscious indifference to the possibility of injury." *Id.* at 571 (emphasis added). Because the court in *Loudermill* concluded that the defendant had actual knowledge of the danger posed by its product, it is not evident what the court would have found sufficient to satisfy a "should have known" requirement. *Id.*

See also Bryant v. Muskin Co., 873 F.2d 714, 715 (4th Cir. 1989) (finding it is not always necessary that particular defendant realize he is invading the rights of another if a person of ordinary prudence would come to that realization); Johnson v. Colt Indus. Operating Corp., 797 F.2d 1530, 1533-36 (10th Cir. 1986) (finding from an early date that the industry was or should have been aware of risk of drop-fire).

displayed "flagrant indifference to public safety"[88] where the defendant was simply negligent in being unaware of the danger, seems inappropriate.

In *Smith v. MegaFood*, even if the judge requires actual knowledge to allow the imposition of punitive damages on MegaFood, punitive damages may be justified. Over the past decade, MegaFood has been sued by hundreds of people because of coffee burn injuries. Thus, MegaFood would be hard pressed to claim that it did not have actual knowledge of the risk and its magnitude. Additionally, MegaFood had two feasible, though not necessarily low cost, options to reduce the risk. It could have lowered the coffee temperature or provided an adequate warning. MegaFood chose to do neither.

4. The Reasons Behind MegaFood's Failure to Reduce the Danger

While knowledge or some degree of awareness of the danger is necessary for an award of punitive damages, it alone is usually insufficient to sustain the award. Professor Owen's fourth factor also must be satisfied. This factor addresses "the nature and duration of, and the reasons for the manufacturer's failure to act appropriately to discover or to reduce the danger."[89] Thus, what the defendant did or failed to do in the face of the known risk, as well as the defendant's motives for its action or inaction, also are relevant in determining whether the character of its conduct justifies the imposition of punitive damages. The record indicates that, in the face of knowledge that its coffee was causing serious injuries to consumers and that consumers were unaware of these risks, for at least ten years MegaFood failed to alter the "design" of its coffee or to warn consumers of the risks. Failure both to redesign a product[90] and to inform potential product users of

88. Owen, *supra* note 17, at 1368.

89. *Id.* at 1369.

90. *See, e.g.*, Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979), *modified on other grounds*, 615 P.2d 621 (Alaska 1980); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 807-10 (1981); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 739 (Minn. 1980).

known dangers, once the danger is known,[91] has influenced some courts to impose punitive damages.

The important question becomes why a product supplier has elected not to redesign or to warn. For example, the reason for not redesigning may be perfectly acceptable. Presumably, design decisions are made only after balancing the burden of redesigning against the benefits, in the face of anticipated risks. A change in design that would reduce the risk also might impair the utility of the product or make the product too expensive to be marketable.

The decision to market a product in spite of its risks is an economic one that product suppliers are expected to make. The fact that a product supplier is motivated to maintain a riskier design by a desire to make a profit should not be sufficient in itself to justify punitive damages. Thus, courts should proceed cautiously where the only evidence favoring the imposition of punitive damages is the defendant's knowledge of the risk and a decision to preserve the original design of the product due to factors of marketability and profit.

Some manufacturers, however, go beyond a healthy consideration of economics, and become fixated on profit margins despite the dangerousness of their products. Courts have not hesitated to impose punitive damages on defendants who go to extremes to maximize corporate profits at the expense of safety.[92] Thus, where a product design proves far more dangerous than anticipated, and design changes are feasible, a court may be justified in concluding that the failure to redesign is evidence of "a flagrant indifference to safety,"[93] particularly where the decision not to redesign was prompted by greed.[94]

Courts respond similarly to companies who fail to warn customers of a known risk out of greed.[95] In MegaFood's case, it probably did not change the temperature of its coffee in order to maintain its competitive edge over other fast-food chains. Although the decision not to change its "design" probably would

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91. *See, e.g.*, Tratchel v. Essex Group, Inc., 452 N.W.2d 171 (Iowa 1990); Fischer v. Johns-Manville Corp., 512 A.2d 466, 480 (N.J. 1986); Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 642 (Va. 1992); Wangen v. Ford Motor Co., 294 N.W.2d 437, 462 (1980).

92. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d at 813.

93. Owen, *supra* note 17, at 1368.

94. *See, e.g.*, Gryc v. Dayton-Hudson Corp., 297 N.W.2d at 740.

95. *See, e.g.*, Wangen v. Ford Motor Co., 294 N.W.2d 437, 449-51 (Wis. 1980).

not justify imposition of punitive damages, MegaFood also decided not to provide warnings about the risk. The two decisions taken together, as well as the motivation behind the decisions, present a strong case for punitive damages. Thus, a judge reviewing the punitive damages award here would find evidence from which a jury could have concluded that MegaFood's conduct was particularly blameworthy.

5. Did MegaFood Create the Danger?

The final factor in determining whether conduct demonstrates a "flagrant indifference to public safety"[96] is "the extent to which the manufacturer purposefully created the danger."[97] Although MegaFood had no intent to injure consumers with its coffee, MegaFood made conscious decisions to keep its coffee at a dangerous temperature and not to inform consumers of that fact. Additionally, although MegaFood could claim that the coffee would not spill if handled with reasonable care and, therefore, it did not create the accidents, MegaFood marketed the coffee in a way that made spills inevitable.

C. The Excessiveness of the Amount of the Award

Based on all of the above factors, the *MegaFood* appellate judge reasonably could conclude that a jury could have found MegaFood's conduct exhibited a "flagrant indifference to public safety."[98] Thus, an award of punitive damages was justified according to the Owen factors. That conclusion, however, does not end the judge's responsibility in reviewing the case. Once the judge has decided that the jury could have found that the defendant displayed a "flagrant indifference to public safety,"[99] thus justifying an award of punitive damages, the judge must determine if the amount of the award was excessive.

The judge's decision as to the excessiveness of the damages is perhaps the most difficult issue, in light of the contemporary corporate outcry against punitive damages in product liability cases. This outcry is prompted by the perception that juries, moved by sympathy for injured consumers and by prejudice

96. Owen, *supra* note 17, at 1368.
97. *Id.* at 1369.
98. *Id.* at 1368.
99. *Id.*

against corporations, frequently assess punitive damages in excessive amounts.

Despite this current concern, determining the amount of punitive damages traditionally has been, and remains, left to the discretion of the jury. The amount awarded is based on the jury's evaluation of the blameworthiness of the defendant's conduct and its assessment of how much money it will take to punish the defendant and to deter future misconduct by the defendant and others.

1. The Blameworthiness of MegaFood

As to the nature of MegaFood's conduct, ample evidence shows that MegaFood had notice that serious injuries could result from the temperature of its coffee. In the face of this knowledge, MegaFood, motivated by profits, refused to change its coffee policy or to warn consumers. Thus, the jury could have concluded that the defendant's conduct was highly blameworthy.

2. "Stinging MegaFood"

The record is silent with respect to what amount of money it would take to "sting" the defendant sufficiently and to deter it and others from similar misconduct in the future. No evidence of MegaFood's wealth was introduced at trial. The record does state that MegaFood is "the world's largest fast food chain," but it contains no information about MegaFood's net worth. We can assume, however, that the jury was aware that "the world's largest fast food chain" would have an extremely large net worth. Given MegaFood's wealth, the appellate judge may not see the jury's award of $3.5 million as excessive.

Ordinarily, evidence of the defendant's wealth is introduced in order to help the jury determine how much it will take to "sting" the defendant. In fact, a few states, most notably California, require evidence of the defendant's wealth on the theory that the information is necessary for appellate review of excessiveness claims.[100] Critics claim that such evidence encourages juries to vent their ire against big corporations by awarding huge punitive damage awards. Thus, on appeal, the reviewing judge for *MegaFood* also should determine whether the jury's punitive

100. *See, e.g.*, Adams v. Murakami, 813 P.2d 1348, 1351 (Cal. 1991).

damage award was motivated by inappropriate factors such as sympathy for the plaintiff or prejudice against the defendant.

The Supreme Court's decision in *Honda Motor Co. v. Oberg*,[101] requiring post-verdict review by trial courts, allows us to assume that the trial court already conducted a post-verdict review of this award. Thus, the appellate judge in *MegaFood* will be the second judge to review the excessiveness of the punitive damage award.

D. Guidance From the Supreme Court

The record contains no information about the standard the trial court might have used in reviewing the award in this case. In *Oberg,* the Supreme Court did not specifically address the question of what standard a trial court should apply in reviewing the amount of a punitive damage award. Nevertheless, the Court provided some guidance. In rejecting the plaintiff's argument that Oregon provided adequate post-verdict review, the Court stated: "What we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing."[102] Moreover, in a footnote the Court stated:

> This case does not pose the more difficult question of what standard of review is constitutionally required. Although courts adopting a more deferential approach used different verbal formulations, there may not be much practical difference between review which focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All of these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia,* (citation omitted) [which discussed] whether "no rational trier of fact could have" reached the same verdict.[103]

Based on the above quote, the Oregon Supreme Court devised the following standard for post-verdict review:

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101. 114 S. Ct. 2331 (1994). In this decision the Supreme Court considered evidence that showed that jurors are likely to grant inappropriate awards against wealthy defendants. *Id.* at 2340.

102. *Id.* at 2339.

103. *Id.* at 2341 n.10.

> A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue.[104]

We can assume that the *MegaFood* trial court applied this standard in its post-verdict review of the amount of the punitive damages. Because the *MegaFood* trial court did not order a remittitur in this case, the trial court must have concluded that the jury's punitive damages award fell "within the range that a rational juror would be entitled to award in light of the record as a whole," and that the award was based on "the statutory and common law factors that allow an award of punitive damages for the specific claim at issue."[105]

E. Traditional Deference or Heightened Review?

Traditionally, appellate courts have given great deference to trial court determinations of excessiveness. The trial judge oversees the trial and, therefore, is in a far better position than an appellate judge to determine whether a jury verdict was prompted by inappropriate factors such as undue sympathy for the plaintiff or prejudice against the defendant. Thus, in most jurisdictions, an appellate court ordinarily will not overturn a trial judge's decision not to reduce a punitive damages award in the absence of evidence that the trial court abused its discretion.[106] Although the amount of the punitive damages awarded against MegaFood is large, nothing in the record indicates that the trial court abused its discretion in allowing the award to stand.

Contrary to the traditional deference, however, a recent empirical study indicates that in product liability cases as many as half of the punitive damage awards that go to appeal are reduced significantly.[107] Thus, the current appellate trend appears to be a heightened level of review of punitive damages in product

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104. Oberg v. Honda Motor Co., 888 P.2d 8, 10 (Or. 1995).

105. *Id.*

106. *See, e.g.*, Holcroft v. Missouri-Kan.-Tex. R.R. Co., 607 S.W.2d 158, 164 (Mo. Ct. App. 1980).

107. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 57 (1992).

liability cases. Appellate courts no longer are reluctant to reduce or reverse punitive damages awards. This recent phenomenon may be due in part to appellate judges who favor big business defendants.[108] The only multi-million dollar punitive damage awards to be upheld on appeal have been cases involving aggravated misconduct that resulted in serious injury or death.[109]

Whether the *MegaFood* reviewing judge will deem this award excessive depends upon a variety of factors including how the judge views the roles of the appellate court, jury, and trial judge. An appellate judge with faith in the U.S. jury system and the sound discretion of U.S. trial judges might well conclude that the amount of the punitive damage award was "within the range that a rational juror would be entitled to award in light of the record as a whole."[110]

On the other hand, the appellate judge may share the concerns of tort reformers who worry about the negative impact of large punitive damage awards in product liability cases. Given current trends, an appellate judge may likely decide that the amount of the award was excessive. Thus, without having a familiarity with the specific judge's viewpoint, predicting whether the reviewing judge will reduce the *MegaFood* punitive damages award is impossible.

If the judge determines that the award was excessive, the judge generally has the option of ordering a new trial on the issue or a remittitur of part of the award. Assuming that the amount of the award was the only error in the case, the judge probably would grant a remittitur rather than require the parties to undergo the expense of a new trial.

The amount of the reduction of the award, however, is difficult to assess. In *Grimshaw v. Ford Motor Co.*,[111] the California Court of Appeal reduced a $125 million award to $3.5 million. In this famous case, Ford Pinto allegedly balanced the cost of lives lost in fiery automobile crashes against the expense of a recall. Despite the "outrageousness"[112] of the conduct, the punitive damages award was greatly reduced. In *MegaFood*,

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108. *See* Theodore Eisenberg & James A. Henderson Jr., *Inside the Quiet Revolution in Products Liability*, 39 U.C.L.A. L. REV. 731, 743 (1992).

109. *See, e.g.*, Oberg v. Honda Motor Co., 888 P.2d at 13.

110. *Id.* at 10.

111. 119 Cal. App. 3d 757 (1981).

112. RESTATEMENT (SECOND) OF TORTS § 908(2) (1965).

neither the injuries suffered as a result of MegaFood's misconduct nor the nature and degree of the misconduct rises to the level of the defendant's conduct in the *Grimshaw* case. Thus, if other appellate decisions are an accurate gauge, the reviewing judge may be inclined to reduce the *MegaFood* award quite drastically.

The recent approach of tort reformers, of capping punitive damages at some multiple of compensatory damages, may also influence the judge, though, this approach seems a strange way to assess the amount of damages needed to punish and deter sufficiently. It is likely to be inaccurate because the amount of compensatory damages is not always a reliable indicator of the character of the conduct resulting in liability for punitive damages. Taking a different approach, the reviewing judge could simply pick a round number such as $500,000 or even $1,000,000 to send a clear message to the defendant and to others that knowing disregard for consumer safety will not be tolerated.

Regardless of how the judge reviewing the award on appeal resolves the excessiveness issue here, a strong possibility exists that *Smith v. MegaFood* will be among the last cases in which any judge will have to struggle with the excessiveness issue in a product liability case. Indicators suggest that advocates of tort reform will be successful in persuading Congress to cap punitive damages in product liability cases in state and federal courts.[113] If the cap becomes law, the amount of punitive damages no longer will be an issue requiring appellate review.

VII. CONCLUSION

Smith v. MegaFood aptly illustrates the variety of issues that may arise in a case involving a large punitive damage award assessed against a U.S. corporation in a product liability case. Controversy over the proper resolution of those issues continues to rage. Concern for the future of U.S. business has prompted

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113. 23 Prod. Safety & Liab. Rep. (BNA) 526 (1995) (citing The Common Sense Product Liability and Legal Reform Act, H.R. 956, 104th Cong., 2d Sess. (1995); The Fairness in Product Liability Act, S. 565, 104th Cong., 2d Sess. (1995)). Both H.R. 956 and S. 565 provide for limits on the size of punitive damage awards. H.R. 956 caps punitive damage awards so that a plaintiff may recover no more than the greater of $250,000 or three times the amount awarded as economic damages. S. 565 applies only in product liability actions and limits plaintiffs to the greater of $250,000 or twice compensatory damages. The fate of each act, upon presentation to the Conference Committee and submission to President Clinton for signature, remains to be seen.

significant changes in the law of punitive damages in many jurisdictions and attempts to control the remedy through federal legislation. In spite of the efforts of tort reformers and business interests, however, it is unlikely that the award of punitive damages in product liability will ever be eliminated completely. As the Supreme Court of New Jersey noted in a product liability case, the doctrine of punitive damages survives because "it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice."[114]

114. Fischer v. Johns-Manville Corp., 512 A.2d 466, 472 (N.J. Sup. Ct. 1986). *See also* RESTATEMENT (SECOND) OF TORTS § 908(1) (1965).