Mass Liability and Punitive Damages Overkill

Alan Schulkin

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_law_journal/vol30/iss6/5
Notes and Comments

Mass Liability and Punitive Damages Overkill

By Alan Schulkin*

Introduction

Punitive damages\(^1\) have long been recognized as a means of punishing malicious,\(^2\) reckless,\(^3\) or grossly negligent\(^4\) wrongdoing and of deterring such future actions. Modern products liability and mass disaster litigation threaten, however, to turn punitive damages from a useful tool into a system for overkill, working against society's best interests by discouraging product development and destroying worthwhile enterprises.\(^5\) This Note will examine the danger of overusing punitive damages and will propose a system that would preserve their legitimate punitive and deterrent functions while protecting defendants from uncalled-for devastation.

The Danger

The possibility of massive liability has become clear since courts began to award damages in products liability cases.\(^6\) Before then, puni-

\(^1\) Punitive damages are also known as exemplary damages. Used correctly, “punitive” would refer to their retributive function and “exemplary” to their deterrent function: making an example. This Note uses the term punitive to cover both functions. For an excellent general discussion of punitive damages, see Morris, \textit{Punitive Damages in Tort Cases}, 44 Harv. L. Rev. 1173 (1931).


\(^3\) See 22 Am. Jur. 2d Damages § 251 (1965).

\(^4\) Id.

\(^5\) “A recent problem which has arisen to haunt the courts concerns the ‘mass disaster’ litigation, in which the defendant, for example by putting a drug on the market, has caused injury to a very large number of consumers. How often is such a defendant to be punished?” Prosser, \textit{supra} note 2, § 2, at 13.

\(^6\) “In a products liability context [the specter] 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, \textit{Products Liability} § 33.01(7), at 302
tive damages were usually given in cases of the classic intentional torts\(^7\) where the tortfeasor demonstrated outrageous conduct against an individual. In these cases, one jury would have one plaintiff and one or a few defendants before it and could decide from its common experience what amount would be adequate to punish the defendant or defendants and to deter similar action by these parties and others in the future.

This relative simplicity no longer exists. Consider an inventor/entrepreneur who, seeing the problem of rat infestation in ghettos, invents an odor-free, easy-to-use, all-electric rat trap. He incorporates and proceeds to manufacture and market the device. Sales are brisk, and in one area a local newspaper finds the trap has led to a substantial reduction in the area's rodent population.

Then chilling reports begin coming in. Three buyers have suffered serious electrical burns while installing the trap in damp basements. More reports come in. And then suits are filed: two in California state courts, three in federal district courts for Illinois, Washington, and Missouri, and another in a Pennsylvania state court. Besides asking for considerable compensatory awards, all plaintiffs seek high amounts of punitive damages, alleging that the traps had intentionally been produced with inadequate insulation in order to save ten percent on pro-

---

\(^7\) For cases awarding punitive damages for intentional torts, see Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672 (1919) (libel); Lawrence v. Hagerman, 56 Ill. 68 (1870) (malicious prosecution); Dunham v. Tenth St. Garage & Sales Co., 94 S.W.2d 1096 (Mo. Ct. App. 1936) (fraud); Pickle v. Page, 252 N.Y. 474, 169 N.E. 650 (1930) (kidnapping); Hairston v. Atlantic Greyhound Corp., 220 N.C. 642, 18 S.E.2d 166 (1942) (assault); Cross v. Campbell, 173 Or. 477, 146 P.2d 83 (1944) (conversion).
duction costs. Alone, the compensatory damages sought could set the company's growth back years; two or three punitive damage awards could bankrupt it.

A products liability case can breed tens, hundreds or even thousands of different plaintiffs situated throughout the United States, who may bring suits against the producer in a wide variety of state or federal courts over a long period of time. A good example is the litigation surrounding the drug MER/29 which was intended to control cholesterol levels. It caused cataracts as a side effect, and was withdrawn from the market two years after introduction. Over 1,500 suits were filed in almost every state and in many different courts, both state and federal, within most states, and hundreds of claims were disposed of one way or another short of suit. Because no one trial would dispose of all the claims, the defendant would be left open to liability for punitive damages uncontrolled by any one factfinder's determination. If ten juries feel the proper amount with which to punish the defendant is fifty thousand dollars, the defendant would be faced with a bill for half a million dollars, which could cripple his production capacity and force him into bankruptcy. Perhaps the product is one that has been or could be of great benefit to society. While a well-calibrated punitive award might make the producer perfect the product, an excessive judgment could force a halt to production and deprive society of an important new drug, an effective household product, a cheap mode of


9. See text accompanying notes 31-36 supra.

10. In FRUMER & FRIEDMAN, supra note 6, § 33.01(7), at 310-11, the authors quote the trial judge in Ostopowitz v. Wm. S. Merrell Co., No. 5879-1963 (N.Y. Sup. Ct., Westchester County Jan. 11, 1967), who reduced the punitive damage verdict which he thought was excessive because the jury believed it would be the final arbiter of the defendant's punishment: "'If every other jury before whom one of these cases is tried believes the same thing, the defendant can be destroyed by having their assets parcelled out, in grotesquely disproportionate amounts, among a number of individuals who have already been fully compensated for their injuries. Perhaps this would not be unconstitutional. It would be worse than that. It would be unjust.'" But see Owen, supra note 6, at 1324-25 ("'[T]he threat of bankrupting a manufacturer with punitive damages awards in mass disaster litigation appears to be more theoretical than real.'").

transportation, or a better rat trap.

Judge Friendly recognized the dangers of uncontrolled punitive damages in *Roginsky v. Richardson-Merrell, Inc.*, one of a series of cases dealing with MER/29. He expressed dismay that noncompensatory civil liability for an act could far exceed the applicable criminal penalties. Various fact patterns demonstrate the possibility for this kind of punitive overkill. Almost any products liability case based on a design rather than a manufacturing defect presupposes many potential plaintiffs, whether it involves a defectively designed fuel tank, or a caustic drain cleaner. A mass disaster, such as a mid-air collision, or an oil spill, is another obvious example.

The need to place some control on these situations seems apparent, but a balance must be struck so that the injury will be avoided, and the development of a beneficial product or service will not be discouraged. The answer is to restrict the total award to the largest amount that any one court believes to be proper, and not allow that to be multiplied by other “proper” awards.

**A Proposed Solution**

The mechanics of a system to control multiple awards of punitive damages need not be elaborate. The jury in the first case to come to trial anywhere in the country, uninformed of other actions pending, would give whatever punitive award it felt proper according to the standards set forth in that jurisdiction. That figure would be subject to the traditional controls of the trial court judge in that jurisdiction—

---

14. 378 F.2d 832 (2d Cir. 1967).
15. See cases cited note 11 supra; Rheingold, supra note 8.
16. 378 F.2d at 839.
17. See text accompanying notes 40-46 infra.
21. See, e.g., Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974); Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973).
reduction for lack of relation to the compensatory award,\textsuperscript{22} for an amount evidencing prejudice,\textsuperscript{23} or for absence of evidence that the defendant acted maliciously or recklessly. When another case based on the same wrongdoing, against the same defendant, comes to trial, the second jury would make the same independent determination, as prescribed in that particular jurisdiction. That trial court judge would also apply his or her discretion to modify the award if necessary. Then, and only then, he or she would consider the prior punitive damage award against that defendant for that tort, evidenced by copies of prior judgments supplied by defendant's counsel, and determine whether the prior awards, in toto, are more or less than the judge and jury would award. If the prior total is more, or the same, no punitive award would be given. If the award the judge and jury would grant is greater than the sum of prior awards, the difference would be granted. Reductions to offset prior awards would be conditioned on the prior judgments becoming final. If a judgment which was used as an offset is reversed on appeal, the award to the later plaintiff for that amount would be rehabilitated. In that way, no matter how many cases come to trial, the defendant's punitive damage liability would not exceed the amount thought proper by the most severe jury, and the defendant would not fortuitously escape punishment.\textsuperscript{24}

This system could be enacted by Congress under the broad powers\textsuperscript{25} granted it by the Constitution to regulate interstate commerce,\textsuperscript{26} or, more ponderously, by the legislatures of the fifty states.

The worth of this proposal, however, can only be analyzed properly in light of other possible solutions to the problem. Some alternatives that have been suggested follow.


\textsuperscript{23} See 22 Am. Jur. 2d Damages § 266 (1965). Courts have the same power to reduce excessive punitive damages awards as they do to reduce excessive compensatory damages awards. See Booth v. Peoples Finance and Thrift Co., 124 Cal. App. 131, 12 P.2d 50 (1932).

\textsuperscript{24} Professor Owen suggests the need to consider prior awards in awarding punitive damages. His idea, however, of allowing awards only to the first few plaintiffs, except to the extent that the award covers the cost of litigation, increases the chances of inadequate punishment by ignoring the determination of a later, harsher jury, and by giving less flexibility than the system this Note proposes. See Owen, supra note 6, at 1325.


\textsuperscript{26} U.S. Const. art. I, § 8, cl. 3 (commerce clause).
Other Approaches

Abolition of Punitive Damages

An obvious solution some writers have urged is to abolish punitive damages entirely, or make them inapplicable to products liability actions. This step would, of course, eliminate the problem of multiple awards. Although elimination of punitive damages in some contexts may well seem justified, punitive damages do serve important social functions, especially in the area of products liability.

When a tort is totally unrelated to commerce, punitive damages may be less necessary. When one driver, for instance, behaves recklessly and injures another, he will be subjected to liability for compensatory damages. These damages represent an absolute economic loss to the tortfeasor. The tortfeasor has realized no gain from the incident; indeed, he probably suffered personal injuries and property damage himself. The damages will be an out-of-pocket loss, and this alone will probably serve as adequate impetus for him to be careful in the future.

On the other hand, when torts are commerce-related, compensatory damages may act as no deterrent at all. For instance, if a rat trap manufacturer designs a trap in a way that would be cheaper but less safe than otherwise, he is making a conscious trade-off. He hopes that the compensatory damages resulting from injuries caused by the defects will be less than the profits he saves on the design. In such a situation, the manufacturer may make a net profit despite widespread injury and be tempted to repeat his conduct in a subsequent design, or to retain rather than remedy the initial defect. Without the specter of punitive damages to remind the manufacturer of the potential net loss, society could be seriously harmed.

---


29. See Owen, supra note 6, at 1325.


"Plaintiffs' attorneys had asked for a punitive award of $100 million, the amount they estimated Ford had saved by retaining the allegedly defective design on Pintos and other
Consolidation

Another alternative is consolidation of actions. All plaintiffs' claims would be combined into one action against the defendant. The judge and the jury would have the entire action in front of them and the jury could deliver a single, fair verdict. This system has two crippling flaws. First, actions may only be consolidated within a single court system. Although there are provisions to consolidate all federal court actions, this may only be done by joint action of judges in separate districts. A single district court judge may not affect an action pending in another district because, although the United States courts comprise one jurisdiction in terms of their accountability to a single Congress and Supreme Court, each district is a separate jurisdiction as small-car models from the time they were introduced until the federally mandated standards took effect on 1977 cars.

"[Juror] Greene . . . recalls bringing up the $125 million figure himself. He reasoned that if Ford had saved $100 million by not installing safe tanks, an award matching that wouldn't really be punitive. So he added $25 million . . . ." Id. One may argue that if a manufacturer can predict what the most severe jury would award, it could simply work that amount, along with potential compensatory liability, into the premarketing cost/benefit analysis it makes, and thus not be deterred from marketing an unsafe product. Admittedly, this analysis may occur, but the same would be true under any system that has any measure of predictability. If, however, the jury bases its award on evidence of management's cost/benefit calculations, as the Grimshaw jury did, the defendant will always be a step behind, and the result would be an escalating spiral much to the defendant's detriment.

31. See Morris, Punitive Damages in Tort Cases, 44 HARV. L. REV. 1173, 1195 (1931). Professor Morris suggested suspending consideration of punitive damages until all compensatory claims are litigated. The inapplicability of this idea to actions brought in many different jurisdictions is considered in Note, Punitive Damages in Products Liability Cases, 16 SANTA CLARA L. REV. 895, 920 (1976). Professor Morris' premises are criticized in Owen, supra note 6, at 1324-25.

32. "[W]e are of the view that a cause of action pending in one jurisdiction cannot be consolidated with a cause of action pending in another jurisdiction." Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267, 273 (3d Cir. 1962). In this case, two suits were brought in different federal district courts, both involving the same shipment of damaged machinery. The court ordered one trial judge to vacate an order of consolidation, as being an act in excess of his jurisdiction. See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 12.12, 12.13 (2d ed. 1977); see also Appalachian Power Co. v. Region Properties, Inc., 364 F. Supp. 1273, 1277 (W.D. Va. 1973): "[T]his court has no authority to consolidate an action of which it has jurisdiction with one of which it does not."

33. If the actions have been brought in the same district court, Federal Rule 42(a) can be invoked: "Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." FED. R. CIV. P. 42(a). When actions are brought in separate districts, the rule must be used in conjunction with the transfer of venue statute, 28 U.S.C. § 1404 (1976), or consolidation may be had under the comprehensive statute on multidistrict litigation, 28 U.S.C. § 1407 (1976). Even in federal court, however, not all cases could be consolidated, because claims arising out of a single design defect may be brought over a long period of time.
to its power over persons, property and causes. Furthermore, there is no power in the court of one state to consolidate a case with one brought in another state, or in federal court. Likewise, a federal court may not consolidate a pending case with one pending in state court.

In the rat-trap hypothetical, the Illinois, Washington, and Missouri cases could be consolidated, but this would leave three distinct actions: one in California, one in Pennsylvania, and the consolidated federal case. Any mass disaster case or products liability case is almost certain to involve complaints filed in federal courts in various districts and also in various state systems. Such actions may also be brought over a long period of time. An improperly designed fuel tank in a make of automobile could cause similar tortious injuries years apart because of a car’s long life. For these reasons, consolidation is merely a band-aid, not a cure. It is a solution only in limited situations.

Dollar Limits

A third suggestion has been to set, statutorily or judicially, a dollar limit for the size of a punitive damage award made in any single trial. This method could be grossly unfair to either society or the defendant. The idea of limitation is based on the assumption that there will be many awards that will aggregate the penalty. Unless the limit is made so small as to be virtually insignificant, aggregating many awards for that amount is not likely to forestall the overkill sought to be avoided. On the other hand, if relatively few claims are brought, the limit may be well below that adequate to make the defendant feel the punishment. An award of twenty thousand dollars may effectively deter a

---

35. See, e.g., Rheingold, supra note 8, at 121.
36. When the applicable statute of limitations begins to run depends on the theory of the case. If based on contract—a warranty action—U.C.C. § 2-725(2) would control, with a four-year limit running from the date of sale. The general rule on tort actions, however, is that the period begins to run only when the force wrongfully put in motion produces injury. 63 Am. Jur. 2d Products Liability § 221 (1972). In California that period is one year. See G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975). Because the period begins to run when the injury occurs, statutes of limitations will not prevent actions on design defects from being brought over long periods of time.
37. Judge Friendly recommended limiting all punitive awards to a certain, small sum ($5-10,000) where mass litigation was threatened. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967). However, in that case New York law was applied and since Judge Friendly saw no indication that New York would take this step, he overturned the award on other grounds.

A bill (AB 600) was introduced to the California State Assembly in February of 1979 which would, among other things, limit punitive damages in products liability cases to 10 percent of the defendant's financial worth, or $1 million, whichever is less. See The Recorder, Feb. 28, 1979, at 12, col. 8.
small manufacturer from skimping on the insulation of electric rat traps in the future, but it would have a negligible effect on a major automaker. This alternative fails because it does not provide individual treatment, which is the heart of the tradition of punitive damages.

Double Jeopardy

The application of the doctrine of double jeopardy is another suggested means of avoiding subsequent punitive damage awards: the defendant may not constitutionally be punished for the same act twice. Such was the contention of counsel for Richardson-Merrell, Inc., in the MER/29 cases. The defendant "argued that imposition of punitive damages by a civil jury was so similar to a criminal fine that reasonable procedural safeguards including a burden of proof beyond a reasonable doubt and the benefits of double jeopardy provisions should be required." This argument has been rejected by every court that has heard it, for good reason; double jeopardy applies only to two criminal prosecutions by the sovereign. Neither a completed criminal action, nor the potentiality of criminal prosecution, will bar receipt of punitive damages. By the same reasoning, the granting of punitive damages to one plaintiff will not bar the later granting of punitive damages to another plaintiff for the same act of the defendant. Historically, civil

38. California's AB 600, see note 37 supra, would prevent adequate punishment of the largest corporations, with punitive damages awards in no case being greater than $1 million. For example, in the year the jury in Grimshaw v. Ford Motor Co., No. 197761-199397 (Cal. Super. Ct., Orange County Feb. 14, 1978), reported in 22 JURY VERDICTS WEEKLY, No. 14, at 26 (1978), assessed Ford Motor Co. with $125 million in punitive damages, that amount roughly equaled one month of Ford profits. The Wall Street Journal, Feb. 14, 1978, at 1, col. 4. Against this level of earnings, a $1 million award could hardly be expected to have much deterrent force.


40. Rheingold, supra note 8, at 135.

41. "It is a basic principle that the doctrine of double jeopardy, in either its constitutional or its common-law sense, has a strict application to criminal proceedings only, and does not apply to civil actions . . ." 22 C.J.S. Criminal Law § 240 (1961). See also One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 236 (1972); Helvering v. Mitchell, 303 U.S. 391 (1938).

42. See Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948); Bundy v. Maginess, 76 Cal. 352, 18 P. 668 (1888).


44. The MER/29 cases are an example of where a second court has allowed punitive damages to stand where another court had already awarded them to another plaintiff. See Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (affirming trial court's reduced punitive damage award of $250,000); Ostopowitz v. Wm. S. Merrell Co., No. 5879-1963 (N.Y. Sup. Ct., Westchester County Jan. 11, 1967) cited in FRUMER &
actions have not been included under the umbrella of double jeopardy, and to date few courts have held otherwise.

Jury Discretion

One possibility for preventing excessive punitive damages is simply to let the jury decide how much it should contribute to the defendant's total punishment in the course of all litigation after informing it of any prior punitive damage awards and any other pending actions. The jury might then do any subtraction it wishes after it has concluded that the defendant is liable. This course, however, is impossible to administer, is perhaps prejudicial, and in form subverts the purpose of punitive damages. First, the jury would be forced to predict the outcome of subsequent actions in order to fairly apportion an assumed "total" award to a particular plaintiff; it must foresee all suits which will result in the future from the wrongdoing in question, as well as consider those being adjudicated and those already adjudicated.

Second, informing the jury could prejudice it by encouraging it to "jump on the bandwagon," or to show provincial bias. It may be

FRIEDMAN, supra note 6, § 33.01(7), at 304 (granting punitive damages of $100,000 reduced from jury's verdict of $850,000).


47. Attempting such prediction is criticized at text accompanying notes 71-78 infra.

48. Judge Friendly commended the trial judge in Roginsky for attempting to get the jury to take a broad view of the litigation by "instructing the jury that it 'may consider the potentially wide effect of the actions of the corporation and, on the other hand . . . the potential number of actions similar to this one to which that wide effect may render the defendant subject.'" Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839-40 (2d Cir. 1967). But Judge Friendly rejected the efficacy of this approach, saying that "it is hard to see what even the most intelligent jury would do with this, being inherently unable to know what punitive damages, if any, other juries in other states may award other plaintiffs in actions yet untried." Id.
swayed to make a punitive award when it otherwise might not have by the knowledge that another jury has found the defendant's conduct worthy of punishment.\textsuperscript{49} Or the prospect of depriving a local plaintiff may lead the jury to ignore a prior award in another state.

In \textit{Roginsky v. Richardson-Merrell, Inc.},\textsuperscript{50} the court said:

\begin{quote}
[W]e think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare . . . and still more unrealistic to expect that the jury would follow such an instruction or that, if they didn't, the judge would reduce the award below what had become the going rate.\textsuperscript{51}
\end{quote}

Such concerns should be irrelevant to the jury's determination.

Third, asking the jury to decide how much of defendant's punishable conduct was directed against the plaintiff confuses the concepts of punitive and compensatory damages. An example of this confusion is found in \textit{Hoffman v. Sterling Drug, Inc.},\textsuperscript{52} in which the court insisted the plaintiff could not recover punitive damages representing the impact of a defective drug “on the whole of society.”\textsuperscript{53} Rather, the court held, the punitive damage figure “must be a reasonable sum in relation to the defendant's conduct vis-à-vis the plaintiff.”\textsuperscript{54}

This view is mistaken. Punitive damages do not “relate” to compensation of a particular plaintiff. Rather, they are concerned only with the conduct of the defendant and are awarded because the deterrent effect provides a general benefit to society.\textsuperscript{55} Dangerous conduct should be subject to punitive damages even if no injury or an insignificant injury occurs. States that require a reasonable relation between compensatory and punitive damages\textsuperscript{56} misapprehend the function of punitive damages.\textsuperscript{57} Any benefit to the particular plaintiff is inciden-

\textsuperscript{49} Professor Morris suggests informing the jury of a prior award as a minimum guard against punitive overkill, but adds that such an admonition is just as likely to place the defendant in a worse light in the jury's eyes. Morris, \textit{Punitive Damages in Tort Cases}, 44 \textit{Harv. L. Rev.} 1173, 1195 n.40 (1931). \textit{See also} Note, \textit{Punitive Damages in Products Liability Cases}, 16 \textit{Santa Clara L. Rev.} 895, 919-21 (1976).

\textsuperscript{50} 378 F.2d 832 (2d Cir. 1967).

\textsuperscript{51} \textit{Id.} at 840. That final comment about the local judge's hesitance would not be valid under the proposed system because the judge would have no option. He would merely be making a subtraction with figures known to all parties. If the subtraction is left to the jury, the amount it used as a setoff would remain a mystery.

\textsuperscript{52} 374 F. Supp. 850 (M.D. Pa. 1974).

\textsuperscript{53} \textit{Id.} at 856.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{See, e.g.}, Garland Coal and Mining Co. v. Few, 267 F.2d 785, 790 (10th Cir. 1959); \textit{J.C. Penney Co.} v. O'Daniell, 263 F.2d 849, 851 (10th Cir. 1959); Morris v. Board of Educ., 401 F. Supp. 188, 215 n.39 (D. Del. 1975).


\textsuperscript{57} \textit{See Comment, Required Ratio of Actual to Exemplary Damage}, 25 \textit{Baylor L. Rev.}
When juries begin carving punitive awards into percentages that represent the defendant's misdeed against a particular plaintiff, the award loses its punitive character and takes on that of compensation.

**Evaluation of the Proposed System**

**Plaintiffs' Rights**

One objection to a system for limiting punitive damages is that such a system would violate the rights of plaintiffs. However, there is no "right" to punitive damages. Courts and writers agree that the awarding of punitive damages lies completely in the discretion of the trier of fact, and regardless of the circumstances, legislatures may restrict awards of punitive damages. Furthermore, there is no vested right to collect such damages until they are actually awarded.

Essentially, punitive damages are a windfall to the plaintiff, being exacted for the benefit of society, not for reasons of individual compensation. The weakness of a plaintiff's claim to punitive damages is further evidenced by the unwillingness of the courts to reverse a punitive award.

---


59. See text accompanying notes 50-51 supra.


61. See, e.g., Prosser, supra note 2, § 2, at 13; C. McCormick, Law of Damages § 84 (1935).

62. "The plaintiff is without legal right to [punitive damages], as that right attaches to actual damages suffered . . . . Such damages may be even forbidden, or affirmatively withheld, by legislative enactment, so far as impinging rights of property are concerned. In short, such damages, until a vested property right attaches to them through a judgment rendered in a party's favor, are not properly within the protection of Constitutions." Louisville & Nashville R.R. v. Street, 164 Ala. 155, 157, 51 So. 306, 307 (1910) (citations omitted). See also Smith v. Hill, 12 Ill. 2d 588, 147 N.E.2d 321 (1958); 22 AM. JUR. 2D Damages § 238 (1965).


64. Probably the best use to which punitive damages could be put is a common fund used to help correct the defendant's misdeed to society as a whole, as with "fluid recoveries" in class action suits. Consideration of that possibility is beyond the scope of this Note.
ative damage award, at the plaintiff's behest, for inadequacy. For the above reasons, limiting the chances of later plaintiffs to recover punitive damages does not deprive them of a personal or property right, and does not undercut the fairness of the proposed system.

Specific Benefits

Jury Function Retained

The proposed system has many characteristics that make it preferable both to the chaos that now exists and to the other reforms suggested. One benefit is that the determination of what a just punishment should be is left in the hands of the jury. Though much has been said to denigrate the wisdom of using juries in civil trials, the old justifications still apply, and recent studies have reaffirmed the jury's competence. The law has always left the power to grant punitive damages

65. See Louisville & Nashville R.R. v. Street, 164 Ala. 155, 51 So. 306 (1910); 1 G. PARMELE, DAMAGE VERDICTS 14 (1927); 22 AM. JUR. 2D Damages § 266 (1965).

66. It could be argued that without the "jackpot" of punitive damages to make a case financially attractive to a lawyer, later plaintiffs will lose the opportunity to recover even compensatory damages because they will never get into court. This argument, however, is just as true in any negligence action where the victim's damages are small. The answer is not to let punitive damages remain wildly out of hand, but to adopt the English custom of awarding attorney's fees in successful actions. See, e.g., McLaughlin, The Recovery of Attorney's Fees: A New Method of Financing Legal Services, 40 FORDHAM L. REV. 761 (1972); Taylor, It's Time to Allow Recovery of Attorney's Fees to the Prevailing Party in Any Civil Case, 2 ORANGE COUNTY B.J. 645 (1975).


68. The first justification is delivery of a verdict reflecting a common sense of justice. Note the instructions of post-Revolutionary War Judge Dudley of New Hampshire: "A clear head and an honest heart are wuth [sic] more than all the law of all the lawyers. . . . It's our business to do justice between the parties; not by any quirks of the law out of Coke or Blackstone—books that I never read and never will—but by common sense and common honesty between man and men. . . . Give us an honest verdict that common sense men needn't be ashamed on." F. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 40 n.118 (1969). Other justifications are the jury's advantage over a judge in reflecting current community values; the jury's function as a buffer between the state and the people; the benefit of size and diversity in making factfinding decisions; and the jury's function of spreading responsibility. See comments of Lord Brougham in M. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 223-24 (1894). See also L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 157-82 (1973).

to the jury, probably because the punishment should relate to the 
prevailing ethics of the community. 70 Otherwise, the decision will be held 
up to public contempt, and will be more likely to spur resistance to the 
law than a change in conduct. The jury is able to individualize treatment. 
It looks only to the facts before it and can judge what is proper 
for the given circumstances.

No Need to Predict

This proposal would leave the determination of adequate punish-
ment within the province of the jury, 71 as controlled by the trial judge, 
and there would be no need for juries, judges, or legislators to predict 
how many actions will be brought for any given wrongdoing. Judge 
Friendly correctly points out that such prediction is impossible. 72 Setting 
a maximum figure requires legislators to know how many actions are 
going to be tried in any given fact situation. Even the kind of 
wrongs that might occur involving outrageous conduct is completely 
unknown. Also, under the present system, individual judges must try 
to predict whether there will be additional cases, and how many, and 
how much may be awarded in them. 73 The task would be an exercise 
in futility.

Attempts at prediction threaten to let a defendant avoid adequate 
punishment. For example, two judges in the MER/29 cases reduced 
punitive damage awards because of the possibility of multiple liability. 
The California judge in Toole v. Richardson-Merrell Inc. 74 cut the puni-
tive damages verdict of $500,000 to $250,000 because many untried 
cases were pending; 75 the New York judge in Ostopowitz v. Wm. S. 
Merrell Co. 76 reduced the $850,000 punitive damages award to

897, 901 (1972) (citing the University of Chicago Jury Project); Comment, Criminal Safe-

70. "The need for the popular and nonprofessional perspective which the jury brings to 
the courtroom is particularly acute where punitive damages are involved, because it is upon 
contemporary community standards that conduct is judged as wanton, grossly negligent, 
outrageous, or malicious—and thus a proper basis for punitive damages. The jury is also 
said to be particularly suited for setting the penalty for such conduct: 'The amount 
awarded is limited by the common conscience which is called into play by the jury system.' " 
Comment, Criminal Safeguards and the Punitive Damages Defendant, 34 U. Chi. L. Rev. 
408, 420-21 (1967).

71. See text accompanying notes 47-58 supra.


73. See Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 
(1967); Ostopowitz v. Wm. S. Merrell Co., No. 5879-1963 (N.Y. Sup. Ct., Westchester 
County Jan. 11, 1967), cited in Frumer & Friedman, supra note 6, § 33.01(7), at 304.

74. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

75. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 834 n.3 (2d Cir. 1967).

& Friedman, supra note 6, § 33.01(7), at 304.
$100,000 because the jury would not know of other cases pending.\textsuperscript{77} Consequently, only two punitive awards survived the appellate courts for a total ($350,000) that might reasonably be considered inadequate for the seriousness of the wrongdoings involved.\textsuperscript{78}

There is no way of knowing how many actions will arise in any products liability or mass disaster tort until the last injury is suffered and the last statute of limitations has passed. Only then can any reasonable prediction be made of punitive damage liability, but by then it is too late to protect either the defendant or the interests of society.

\textit{Adequate Punishment Provided}

Although the advocated system's chief purpose is to protect defendants from unwarranted liability, it also acts to insure that each defendant will be sufficiently punished, which a flat-sum limit, whether imposed by a legislature or an individual judge, could not do.\textsuperscript{79} Under the suggested system, one trial would produce adequate punishment. Subsequent actions would increase that punishment only if the isolated jury felt more severe punishment was due, but credit would be given for the first award. The defendant would not be prejudiced if the first jury it faces is relatively severe. Conversely, it would not be fortuitously benefited if the first jury is unusually lenient. The award thought proper by the harshest jury to consider the question will ultimately be the amount of the defendant's total punitive liability.

\textit{Diligent Plaintiff Rewarded}

One element that might seem to be a flaw—that the earlier plaintiffs receive more benefit—is actually an asset. The plaintiff who is the most diligent in prosecuting an action will be the most rewarded. If two plaintiffs are fated to receive jury verdicts for punitive damages of $50,000 each, that plaintiff who pushes his case to judgment first will receive the full amount, the second nothing.

The benefit of being early extends past the race for the first judgment. Every plaintiff who is earlier than the next will be in a more favorable position throughout the course of the litigation as a whole.

\textsuperscript{77} See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 n.9. See generally Rheingold, \textit{supra} note 8, at 136-37.

\textsuperscript{78} Two separate juries felt so—the \textit{Toole} jury which awarded $500,000 and the \textit{Ostopowitz} jury which awarded $850,000—and neither trial judge indicated that the awards should be reduced as evidencing passion or prejudice. If those judges could have applied the proposed system, they would not have had to predict the outcome of future or pending actions. \textit{Toole} would have received $500,000 in punitive damages while \textit{Ostopowitz} would have received $350,000, and Richardson-Merrell, with assets estimated at $150-200 million, see \textit{Rheingold, supra} note 8, at 135, would have been more adequately punished.

\textsuperscript{79} See text accompanying notes 37-38 \textit{supra}.
Promptness will continue to be preferred. One writer has encouraged such a preference in the products liability context because of the enormous diligence, imagination, and financial outlay required of initial plaintiffs to uncover and to prove the flagrant misconduct of a product manufacturer. In fact, subsequent plaintiffs will often ride to favorable verdicts and settlements on the coattails of the firstcomers. The initial plaintiffs in appropriate cases should receive punitive damages awards that reward their efforts.\textsuperscript{80}

The preference will discourage delays by plaintiffs’ counsel intended to let other litigants blaze trails, uncover information, and give a better opportunity to gauge the settlement value of a claim. Such delays clog the court system,\textsuperscript{81} and the resulting prompt resolution of disputes outweighs any effect this procedure might have in encouraging litigation.

**Flexibility**

The proposed system does not interfere with the traditional discretionary powers of trial judges to identify an award as excessive and order a remittitur. It reinforces and augments that tradition. The judge may still remit for reasons of passion and prejudice,\textsuperscript{82} but must now also remit to offset a prior award.

The offset for a prior award is not based on a verdict, but on a judgment. The second judge will only look at the actual judgment in the first action—that is, the combination of jury determination and judicial modification—not the jury verdict. Likewise, if there is a new judgment on appeal or on new trial in the first action, the offset amount considered in the second action becomes the more recent punitive damages award in the first action. This result follows because the initial judgment is eradicated upon the granting of a motion for a new trial, or upon judgment on appeal.\textsuperscript{83} Although in some situations this procedure could introduce an element of randomness as to which plaintiffs actually receive awards, such randomness is irrelevant to the purpose of punitive damages.

In action 1 the plaintiff might receive a punitive damage judgment of $50,000. In action 2, if the jury awards the plaintiff $50,000 in punitive damages the “second” plaintiff will of course receive none of that. Subsequent to judgment in action 2, the judgment in action 1 may be reversed. So the punitive damages in action 2 would be rehabilitated and the plaintiff could receive the entire $50,000. In this manner, ade-

\textsuperscript{80} Owen, supra note 6, at 1325.
\textsuperscript{81} See Tauro, *Court Delay and the Trial Bar—One Judge’s Opinion*, in *Selected Readings: Court Congestion and Delay* 52 (G. Winters ed. 1971). Contra, Zeisel, *Court Delay Caused by the Bar?*, in id. at 57.
\textsuperscript{82} Remittitur is recognized to be in the realm of the trial judge’s discretion. 22 Am. Jur. 2d *Damages* § 266 (1965); 25 C.J.S. *Damages* § 126(1) (1966).
quate punishment of the defendant for society's benefit is assured, the court has a solid basis for avoiding overkill, and the court has not been forced to predict the outcome of future actions.

Settlements

Settlements can be worked into the system as offset amounts only if embodied in consent judgments. If a defendant settles with plaintiff $\text{I}$ for $100,000 without breaking down that amount into individual elements, there is no way of knowing what portion of that sum represents potential punitive damage liability. If a settlement specifies its elements, for example by stating that $\text{50,000}$ represents compensatory liability and $\text{50,000}$ represents punitive damage liability, that specification alone is not helpful because of the opportunity for fraud by the defendant. Under present tax law it is irrelevant to the first plaintiff whether his money is called "punitive" or "compensatory," as neither type of award is includable as gross income to a personal injury plaintiff.\textsuperscript{84} Therefore, a defendant could request or require an inflated punitive designation to shield itself from punitive damage liability in future actions, and the plaintiff would be glad to acquiesce at a price.\textsuperscript{85}

If, however, the settlement is embodied in a consent judgment, a judge will pass on the settlement and determine whether the percentage designated as punitive damage liability is a reasonable one. The judge could refuse to enter judgment on a settlement that does not give a fair detailing. Because of the adequate controls, the element of such a settlement designated as punitive could be used in subsequent actions as an offset.\textsuperscript{85}

Conclusion

The proposed system would be most effective if enacted by Congress because of the uniform application that would result. However, each state that takes the initiative of adopting the system on its own

\begin{flushright}
84. Under the reasoning of Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955), which held includible in gross income punitive damages for fraud and the punitive two-thirds of an antitrust treble damages recovery, all punitive damages appeared to be includible as gross income. A recent Revenue Ruling, however, states that "any damages, whether compensatory or punitive received on account of personal injuries or sickness are excludable from gross income." Rev. Rul. 75-45, 1975-1 C.B. 47.

85. If Rev. Rul. 75-45, see note 84 supra, is ever overturned, a settlement alone could provide an offset amount. The plaintiff would want his settlement denominated as compensatory damages, which for personal injuries are tax exempt. See I.R.C. § 104(a)(2). The defendant, on the other hand, would want a portion identified as punitive damages so that it could be offset against a future punitive damage award. Since both sides would negotiate out of self-interest, fraud by the defendant could be avoided without judicial intervention.
\end{flushright}
would be taking a useful step toward limiting multiple punitive damages.

With adequate punishment assured, manufacturers, airlines, riparian industries, and other potential mass tortfeasors will be encouraged to mend their ways while not eliminating the social good they perform. As one writer stated: "Business firms are in the business of making money; to the extent that they cannot make money through defective products or intentional unavoidance of injury, they will with alacrity join the forces of the law in reducing the long history of industrial and public carnage extant in America."86

86. Igoe, Punitive Damages: An Analytical Perspective, 14 TRIAL, Nov. 1978, at 48, 49.