A Reprise of Compensatory and General Damages with A Focus on Punitive Damage Awards in Products Liability Cases

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Abstract

Compensatory damages, also called special damages, are designed to compensate a plaintiff for personal injury, property damage, or economic loss after the trier of fact has determined that a product is defective. General or noneconomic damages may include damages for pain and suffering or for emotional distress. This article also considers issues relating to the award of punitive or exemplary damages, which are assessed above and beyond compensatory damages and which are designed to punish a party for especially egregious or reprehensible conduct.

This article is one of a series of seventeen research articles on topics related to products liability by the authors and colleagues at Seton Hall University and elsewhere over the past twenty years. (See Appendix A).

Key Words: Products Liability; Compensatory Damages; Economic Damages; Punitive Damages; Damage Caps; Negligence; Strict Liability in Tort

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1. Introduction

Only after the court has determined that a defendant is liable to the plaintiff—that is, the trier of fact (either judge or jury) has found that a product is *defective*—will a jury then determine the damages to which a plaintiff may be entitled to recover. There are three types of defects that are covered under products liability law: *manufacturing* defects, *design* defects, and *marketing* defects which specifically relate to the sufficiency of warnings or labels that accompany a product. (Hunter, Shannon & Amoroso, 2012, p. 1). This article chiefly considers issues relating to the award of punitive damages in products liability cases that have resulted after a finding of liability against a defendant. Punitive damages are awarded above and beyond compensatory damages which are normally assessed to compensate a plaintiff for personal injury, property damage, or provable economic loss. Before delving into the area of punitive damages, the article briefly reviews the various types of damages that may be awarded in products liability cases so as to provide the reader with a full picture of the implications of placing defective products on the market.

The article contains a review of some of the major cases in the area of products liability, as well as a discussion of important law review and social science articles, in order to continue the policy debate relating to the imposition of punitive damages in products liability cases.

1.1 The Basis of Liability

Under the common law, there were three theories of liability in products liability cases: negligence (a tort action), warranty (a contract concept), and fraud (a hybrid or combination of both contract and tort). However, all of these theories would provide significant proof problems and continued dangers for consumers of dangerous products.

Most jurisdictions today have abandoned a negligence theory as the sole basis for a products liability claim and hold manufacturers and suppliers of products strictly liable in tort for the injuries caused by their defective products.

Strict liability or "liability without fault" as in a traditional negligence cause of action was established as a matter of public policy because of a recognition of the inherent dangers involved in placing defective products into the stream of commerce and the intention to hold product manufacturers responsible for these defective products. (Greenman v. Yuba Power Products, 1963; Restatement (Second) of the Law of Torts Section 402A, 1965). As the court in *Greenman* (1963, p. 701) noted: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."

Several rationales have been offered for the imposition of strict liability in products cases. First, the manufacturer is in a much better position to avoid a risk of loss than is the consumer or buyer. Second, more often than not, negligence and warranty actions carry with them significant proof problems and thus, the imposition of strict liability represents the only way an injured plaintiff could recover for his or her injuries; and, third, the threat of liability without fault (fault being the traditional negligence standard) acts as an incentive for manufacturers to make sure that their products are safe and reach the consumer without a defect in design, manufacturing, or marketing. As Heiner (1990, p. 1344) noted: "Strict liability is usually the most attractive alternative for the consumer to pursue because it avoids bars to recovery existing in warranty and negligence remedies. It circumvents the contract requirements of privity, notice and disclaimer, as well as the tort requirement of proof of negligence."

Section 402A of the Law of Torts (1965) essentially embraced the *Greenman* standard. In general terms, Section 402A provides that in order for a manufacturer to be found strictly liable, the plaintiff must prove that the product was defective; that the defect was caused by the manufacturer or supplier; and that the defect caused the plaintiff's injuries. (Kerr v. Corning Glass, 1969). In the absence of any hard and fast rules, whether strict liability is imposed instead of proceeding under an ordinary negligence standard may depend on the type of defect that caused plaintiff's injuries. Strict liability is often the preferred theory in cases involving a manufacturing defect, while negligence will be applied in cases involving design defects or marketing (failure to warn) cases.

2. Compensatory Damages

The Comment to Restatement (Second) Section 903 of the Law of Torts (1977) notes that compensatory damages are "designed to place the plaintiff in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed." In calculating compensatory damages—often characterized as *special damages*—a jury will take into account a plaintiff's financial or economic losses, such as any medical expenses, lost wages, salary, or earnings, and any damage to tangible personal property which has a recognized or provable market value. Galligan et al. (2007, p. 909) note that "Special damages typically encompass measurable economic losses that are direct, reasonable, and expectable items of loss from an injury." For example, awarding damages for any wages the plaintiff may have lost caused by an injury due to a defect in a product would certainly return the plaintiff to his or her previous position of receiving the wages that he or she would have earned if the product had not been defective. (E.g., O'Connell, 1987, p. 319).

Interestingly, the standard employed in a products liability case is similar to the formula for awarding "contract damages,"

> "Special damages must fall within the rule of *Hadley v. Baxendale* (1854), . . . that is, they must reasonably be supposed to have been contemplated or foreseeable by the parties when making the contract as the probable result of a breach. If special circumstances cause an unusual injury, special damages cannot be recovered unless the circumstances were known or should have been known to the party at fault at the time the contract was made." (California Jury Instruction 351, 2003, citing Sabraw v. Kaplan, 1962, p. 227).

In cases where a defect in a product has caused *physical harm*, either in the form of bodily injury or damage to the tangible personal property of a plaintiff, the tort system will provide a plaintiff with the "greatest range of damage remedies." (Geistfeld, 2006, p. 199). The plaintiff will be able to choose between a suit in negligence (Powers, 1991) or in strict liability (e.g., Goldberg & Zipursky, 2016; Calabrasi & Hirshoff, 1972 (favoring strict liability); Posner, 1972 (favoring negligence)). In such cases, the plaintiff will be able to recover compensatory or general damages for bodily injury, pain and suffering, any property damages, and any economic losses caused by the defect. (Hales v. Green Colonial, Inc., 1974). In *Hales*, a defective heater caused a fire in a commercial building. The fire destroyed both the building and its contents and disrupted the business operations of the plaintiff for eight months. The court granted recovery for the profits that were lost during this period because they had resulted directly from the destruction of the business and were foreseeable and not speculative.

It should be noted, however, that there are still a minority of jurisdictions that deny compensation for economic loss (such as a loss in profits) even if that loss flows from the physical harm to person or property. The plaintiff will be required to bring a warranty action to recover such losses—although such a suit may be problematic considering the possibility of warranty disclaimers relating to producer goods (as opposed to consumer goods) and where the loss is commercial. (UCC Sections 2-316, 2-719; cf. Star Furniture Co. v. Pulaski Furniture Co., 1982; Southland Farms, Inc. v. Ciba-Geigy Corporation, 1991). Further, while courts may recognize a tort action for harm to property (Salt River Project Agr. Imp. and Power District v. Westinghouse Elec. Corp., 1984), a court may permit commercial parties with equal bargaining power to disclaim or limit liability under certain circumstances. (Fischer & Powers, 1988, p. 382). This principle would be especially relevant where the there is no evidence of either substantive or procedural unconscionability in the creation of the disclaimer provision. (See Lindemann v. Eli Lilly & Co., 1987; generally Hunter et. al, pp. 114-120).

However, "A court can refuse to enforce oppressive warranty terms against a buyer on unconscionability grounds." (Kaprelian, 1985, p. 534). Whether or not a warranty disclaimer or limitation will be upheld may depend on the attributes or personal characteristics of the actors. For example, in *Wille v. Southwestern Bell Telephone Co.* (1976), a limitation of liability clause in a contract entered into by an experienced businessman was held *not* to be unconscionable.

2.1 Economic Damages

However, most courts will apply a different rule where a plaintiff suffers *only an economic or financial loss* consisting of "damage to the product itself" [as where the "product injures only itself"] and other financial harm, such as repair costs to the defective product (most often in manufacturing defect cases), a decrease in the value of a product, or reduced profits or earnings—and "no physical injury to person or other property" has occurred. (Phillips et al., 2002, p. 508). It should be noted that in these cases, a clear majority of courts follow the precedent established in *Morrow v. New Moon Homes, Inc.* (1976) and will deny recovery in tort for pure economic loss. As the Supreme Court of New Jersey noted in *Spring Motors Distributors, Inc. v. Ford Motor Co.* (1985), "the weight of authority supports the proposition that economic expectations that are protected by the U.C.C. [warranty provisions] are not entitled to supplemental protection by negligence principles." (Citing Clark v. International Harvester Co., 1978, p. 581).

As noted by Professor Geistfeld (2016), this principle is further grounded in "the approach charted by the U.S. Supreme Court" found in *East River Steamship Corp. v. Transamerica Delavel Inc.* (1986), which "barred tort recovery for all stand-alone economic harms to ensure that contract law does not 'drown in a sea of tort.'" (East River (1986, p. 866). Professor Geistfeld continues:

> "As the Court explained, 'damage to a product itself has certain attributes of a products-liability claim. But the injury suffered—the failure of the product to function properly—is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.'

> This contracting rationale has been regularly invoked by other courts, yielding a 'high degree of agreement' that the resultant 'economic loss rule' bars tort recovery for pure economic loss to maintain the boundary between contract and tort law." (Geistfeld, 2016, pp. 393-394).

As the Eleventh Circuit Court of Appeals later noted in *Watkins v. Ford Motor Company* (1999), "Such recovery is better left to the warranty law of contracts and other provisions of the U.C.C." (Cf. Heiner, 1990). This distinction may not loom as critical, however, since a majority of courts will also permit commercial parties to sue in strict liability as opposed to negligence where disclaimers are not generally recognized. (Mann & Roberts, 2000; Seeley v. White Motors, 1965, pp. 148-149, 247).

2.2 Noneconomic Damages: Damages for Pain and Suffering

Noneconomic damages are commonly known as *general damages* and may include compensation for pain and suffering or in some cases for emotional harm. (Hunter & Amoroso, 2011). Professor Ellen Pryor (2006, p. 563) notes that courts in fact use many different terms when they refer to general damages:

> "Tort law has many terms for suffering, including general damages, noneconomic damages, pain and suffering, mental anguish, impairment, loss of the enjoyment of life, and loss of companionship and society. All of these terms signify forms of human suffering: from pain; from injury and shock; from loss of ability, mobility, or livelihood; from the loss of a loved on; from the recognition that life will never be the same."

Unlike compensatory damages, which are designed to "restore the injured person to his previous position," damages for pain and suffering are instead recoverable as general damages in order to "give to the injured person some pecuniary return for what he has suffered or is likely to suffer." (Restatement (Second) of Torts Section 903 comment a, 1997). Such damages, in fact, "are about one-half of all damage payments." (Rubin & Shepherd, 237, p. 223)

In *Kwasny v. United States* (1987, p. 197), Judge Richard Posner of the Seventh Circuit provides an important rationale for the imposition of damages for pain and suffering:

> "We disagree with those students of tort law who believe that pain and suffering are not real costs and should not be allowable items of damages in a tort suit. No one likes pain and suffering and most people would pay a good deal of money to be free from them. If they were not recoverable in damages, the cost of negligence would be less to the tortfeasor and thefore would be more negligence, more accidents, more pain and suffering, and hence higher social costs."

Noneconomic damages are much more difficult to prove or assess than are compensatory damages. In *Fein v. Permanente Medical Group* (1985, pp. 680-681), the California Supreme Court discussed some of the difficulties which are inherent in cases where damages for pain and suffering are being sought:

> "Thoughtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting… the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers."

General damages might include compensation for fright, grief, sadness, depression, anxiety, indignity, or the loss of life's pleasure—often referred to as a loss of consortium—between parents and children and other parties or loss of sexual intimacy between spouses. (See Hibpshman v. Prudhoe Bay Supply Co., 1987 (parental consortium); Fernandez v. Walgreen Hastings Co., 1998 (grandmother-granddaughter consortium); Barrett, 2008).

It must be recognized, however, that damages for emotional harm in the absence of any physical harm or a physical consequence, impact, or manifestation or where the "predominant or sole basis for recovery is for emotional distress" have continued to vex courts and commentators alike. (Klein, 2002). Traditionally, courts refused to permit recovery for mental distress unaccompanied by physical harm. For example, in *Ball v. Joy Techs., Inc.* (1991), the Fourth Circuit Court of Appeals held that mere exposure to toxic chemicals without proof of any physical harm did not establish the necessary physical injury to entitle them to recover for any emotional distress. In addition, the court denied damages for the costs of medical surveillance absent proof of any physical injury.

However, there are several or exceptions to these general principles. For example, in *Gentry v. Stokley-Van Camp* (1982)—admittedly an unusual case—the plaintiff's recovery of $2,000 for emotional distress was upheld on appeal where he had discovered a condom in a can of defendant's pork and beans that he was eating on a lunch break. The plaintiff ran from the cafeteria to the bathroom where he vomited. He alleged a "loss of appetite, a revulsion for pork and beans, mental anguish, and difficulty in eating and retaining food since the incident." In this case, the court determined that the plaintiff would not be required to offer medical proof of an independent physical injury and that his "nausea and vomiting" were caused by "something as repulsive as a condom in a can of pork and beans." The court stated that the jury could certainly infer that "the plaintiff suffered a physical injury as a result of the eating of the contaminated beans" that had manifested itself in the systems the plaintiff Gentry had suffered.

As a further complication, perhaps as an attempt to finesse the distinction between physical and emotional harm, many courts began to blur the distinction between physical and emotional/mental injury and have construed the term "physical injury" to in fact include depression, nervousness, weight gain, and nightmares as the equivalent to physical injury (Gnirk v, Ford Motor Co., 1983; Silverman, 1985), recognizing that there is "no fine line distinguishing physical harm from emotional injury." (Cf. D'Ambra v. United States, 1973, p. 1184; Berman v. Allan, 1979). The Restatement (Second) of Torts, Section 436A comment c (1965) bolsters this view and states:

> "On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character."

In cases where a plaintiff brings a claim for emotional distress based on a fear that a disease *might* somehow manifest itself in the future, the plaintiff will be required to prove that the emotional distress is *reasonable*, based on the chance that "the disease will manifest." (Klein, 2002, p. 978; Sullivan v. Combustion Eng'g, 1991; Williamson v. Waldman, 1997; Hunter, 2004). Professors Henderson and Twerski (2002, p. 822) stated that "a number of courts recognized a cause of action on behalf of asymptomatic plaintiffs for mental distress arising from the fear that they would develop cancer in the future." The plaintiff would have the burden of proof to show that the fear must be a "serious one" (Devlin v. Johns-Manville Corp. (1985) and must prove these future damages by a preponderance of the evidence, [and] he can do so only by adducing expert opinion." (Gideon v. Johns-Manville Sales Corp., 1985; cf. Daubert v. Dow Pharmaceuticals, 1993 (relating to the nature of expert proof)).

Finally, there is yet another twist. For example, in *Sternhagen v. Kozel* (1918), the plaintiff alleged that "she suffered a severe fright and through such fright received a severe mental and physical shock." The *Sternhagen* court responded:

> "Without determining whether one could recover for fright alone, such fright not accompanying physical injury either as its results or cause we are of the opinion that: When physical injury accompanies a fright as its effect, the injured party may recover for the fright, for the physical injury, and for any mental injury accompanying such fright and physical injury, exactly as one can recover where the fright is the result of a physical injury."

If the court in *Sternhagen* seemed less than clear, can you imagine the difficulty a member of a normal jury would have in trying to decipher the subtle distinction between physical and emotional distress and which of these was either the cause or effect of the other?

2.3 Calculating the Damages

Professor Geistfeld (2006) notes that in attempting to resolve the inherent difficulties in trying to distinguish between pure emotional distress and physical harm, courts have also been unable to devise a consistent methodology for calculating the damage award itself. Consider these historical examples. Diamond (1993, p. 297) reported that jurors have found "the guidance that is given to them on how to compute damages to be minimal." Greene (1989, p. 230) noted that determining the amount of damages for pain and suffering amounted to no more than a "guesstimation"; and Vidmar (1993, pp. 254-255) noted that juries often used "different methods of calculating the awards" and that "the general damage portion of awards was positively related to severity of plaintiff's injury. That is, the more serious the injury the higher the mean and the median levels of general damages."

A decade later, Professor Pryor (2003) noted that juries will receive far more guidance about provable special damages for medical expenses and lost earnings than the "vague standards" they receive when determining noneconomic damages. Pryor further stated: "For impairment, mental anguish, and pain and suffering, juries inevitably are given vaguer standards such as to 'fairly and reasonably compensate' the plaintiff, or to use 'good discretion' or 'enlightened conscience.'" (Pryor, 2003, p. 660, citing Childs v. United States, 1996). More recently, Campbell et al. (2016) suggests that numerous studies indicate that the "amount of a juror's damage decision is strongly affected by the number suggested by the plaintiff's attorney, *independent of the strength of the actual evidence* (a psychological effect known as 'anchoring'). (Cf. Sapadin, 2013).

Thus, in the end, while recognizing that "there is no exact yardstick by which pain and suffering can be measured … the only standard for evaluation is such amount as twelve reasonable persons estimate to be fair compensation when that amount appears to be in harmony with the evidence and arrived at without passion or prejudice." (Tucker v. Lower, 1967, p. 327).

Once again, the state of California in its *Jury Instructions* (2005, Section 14.13) underscores the vagueness employed in stating any guidelines for determining damages for pain and suffering and places the burden of assessment on the jury:

> "No definite standard [or method of calculation] is prescribed by law by which to fix a reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. [Furthermore, the argument of counsel as to the amount of damages is not evidence is not evidence of reasonable compensation.] In making an award for pain and suffering you should exercise your authority with calm and reasonable judgment and the damages you fix must be just and reasonable in the light of the evidence."

2.4 Capping Damages

Because of the innate imprecision in attempting to formulate a rule of general construction for measuring noneconomic damages, such damages have often been the subject of what has become to be known as "tort reform." (Zollers et al., 2009; Cook, 2013). Christensen (2016, p. 261) lays out the general aspects of tort reform as "passing laws to deter outrageous jury verdicts and windfall recoveries to undeserving parties. In essence, tort reform is a political agenda developed in response to perceived problems with the current tort system."

As many as twenty-five states have enacted legislation to limit noneconomic damages for pain and suffering awards or to place a cap on such damage awards (Rustad, 2006; Friedson, 2017) —in many cases to $250,000 or $350,000—although the constitutionality of such statutes has been brought into question. For example, in *Franklin v. Mazda Motor Corp.* (1989), the District Court in Maryland upheld Maryland's cap of $350,000 on noneconomic damages, holding that the cap did not violate state or federal constitutional rights to trial by jury or the due process requirements of notice and hearing. In *Murphy v. Edmonds* (1992), Maryland's Supreme Court reached the same result.

However, in *Brannigan v. Usitalo* (1981), the New Hampshire Supreme Court struck down as unconstitutional New Hampshire's $875,000 cap on noneconomic damages in personal injury actions on grounds that the statute violated the equal protection clause of New Hampshire's state constitution. Later, in *Morris v. Savoy* (1991), the Supreme Court of Ohio ruled that a $200,000 cap on noneconomic damages violated the equal protection clause of the Ohio constitution under a rational basis or reasonableness test. And in *Sophie v. Fibreboard Corp.* (1989, p. 711), the Supreme Court of Washington found that the a statute that placed a limit on the noneconomic damages recoverable in a personal injury or wrongful death action "interfered with the jury's traditional function to determine damages… and violates article 1, section 21 of the Washington Constitution, which protects as inviolable the right to a jury…."

It might be interesting to note that a Florida statute providing for a cap of $1 million in total noneconomic damages was determined to be constitutional since it provided for *exceptions,* as where the noneconomic damages sustained by the injured party were "particularly severe" and the trial court determined that the negligence of the defendant caused a "catastrophic injury" to the patient. (Florida Statute Section 766.118, 2011).

The question certainly remains an open one, but the Florida legislature seems to have provided a proper compromise and balanced position on the issue upon which both proponents and opponents of tort reform and caps on damage awards might concur.

3. Punitive Damages

Only *after* the plaintiff has established a right to compensatory and or general damages can the plaintiff then attempt to collect punitive or exemplary damages by proving that the defendant had acted with fraud, malice, or wanton or "conscious" disregard of the plaintiff's rights or that the defendant acted with the "probability of injury to members of the consuming public." (Grimshaw v. Ford Motor Co., 1981, p. 813 (*The Ford Pinto Case*)). (Taliadoros, 2016; Griffith, 2016).

As Dupree (2010, p. 421) noted:

> "Few areas of the law are as plagued by problems of uncertainty and unfairness as punitive damages. They are all too often awarded in amounts that bear little relation to the alleged injury, and for conduct that was not clearly unlawful-let alone so extreme and outrageous as to warrant an additional sanction on top of a compensatory damages award. In many cases, punitive damages amount to a lottery ticket that can lead to a multimillion dollar windfall for a fortunate plaintiff."

Arguments have been advanced supporting the award of punitive damages which include:

"(a) The tort victim is not fully compensated by compensatory damages, because he usually is unable to recover his attorney's fees and some of his other costs;

(b) punitive damages provide supplemental compensation where the defendant's conduct is egregious;

(c) punitive damages induce 'private attorneys general' to provide the valuable service of suing wrongdoers and deterring highly undesirable conduct;

(d) punitive damages help provide a safer society by deterring the creation of unsafe products and conduct." (Galligan et al., 2007, p. 972, citing Rustad, 2005).

Others disagree and would limit or completely eliminate punitive damage awards in products liability cases. In support of that position, they cite the following arguments:

"(a) There is no empirical data confirming that punitive damages do in fact deter others;

(b) punitive damages result in a 'windfall' to the plaintiff which should be shared by the public generally;

(c) it is unfair to permit the jury to impose a crippling remedy on a business or enterprise, particularly without rational guidelines;

(d) the threat of punitive damages stifles industry creativity and reduces the number of new products available to the public." (Galligan et al., 2007, p. 972; cf, Olson & Boutrous, 1989).

There is also some discussion about the amount or quantum of proof required in such cases where a plaintiff is seeking punitive damages. Although the United States Supreme Court has rejected the proposition that punitive damages are constitutionally required to be proven by a "weight of evidence greater than that of a preponderance" (Pacific Mutual Life Insurance Co. v. Haslip, 1991; Markel, 2009, p. 251), in at least one jurisdiction—Maryland—the court noted:

> "A growing majority of states requires that a plaintiff prove the defendant's malicious conduct by clear and convincing evidence before punitive damages can be considered. Many states have adopted the clear and convincing standard by statute. Others states have adopted the standard by judicial decisions."
>
> "… We hold that this heightened standard is appropriate in the assessment of punitive damages because of their penal nature and potential for debilitating harm." (Owens-Illinois, Inc. v. Zenobia, 1992, pp. 656-657).

The Restatement (Second) of Torts Section 908 (1977) provides a standard for awarding punitive damages. As Galligan et al. (2007, p. 974) has noted, the Restatement requires conduct "that is outrageous, because of the defendant's evil motive or … reckless indifference to the rights of others" indicating at least a greater amount of proof than that required in a standard negligence case. Colorado stands as the only jurisdiction that requires a plaintiff to prove punitive damages "beyond a reasonable doubt."

Interestingly, the issue of punitive damages has sparked both a public policy and constitutional debate on a national level. The United States Supreme Court has clearly stated that awarding punitive damages is aimed at "deterrence and retribution" and can only be justified where conduct of the defendant was "reprehensible." (State Farm Mutual Automobile Insurance Co. v. Campbell, 2003. p. 416). The following section considers this issue.

3.1 A Brief Constitutional Analysis

In the past twenty years, federal courts have begun to consider the constitutionality of state court punitive damage awards. Three cases are regularly cited for this proposition: *BMW of North America, Inc., v. Gore* (1996) ($4,000 in compensatory damages; $4 million in punitive damages—later reduced (through *remittitur*) by the Alabama Supreme Court to $2 million); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 2003 ($1 million in compensatory damages; $145 million in punitive damages); and *Exxon Shipping Co. v. Baker* (2008) (*Exxon Valdez*) (District Court awarded $507.5 million in compensatory damages and $5 billion in punitive damages). (Cf., Klutinoty, 2010; Fontugne, 2015).

The most important of these cases as precedential value is arguably *BMW of North America, Inc. v. Gore* (1996). (Van Horn, 2003; Hines & Hines, 2015). In *Gore*, a case involving alleged fraud on the part of an auto manufacturer by concealing the repainting of newly minted autos damaged by acid rain exposure, the United States Supreme Court enunciated for the first time a set of guideposts as requisites in determining whether a punitive damage award satisfied the requirements of *due process* under the Fourteenth Amendment to the United States Constitution. These guideposts include:

- "the degree of reprehensibility of the [defendant's misconduct];
- the disparity between the [actual] or potential harm suffered by [the plaintiff] and his punitive damages award; and
- the difference between [the punitive damages awarded by the jury] and the civil penalties authorized or imposed in comparable cases."

Later in *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), the United States Supreme Court held that the due process clause of the Fourteenth Amendment of the United States Constitution will in most cases limit punitive damage awards to less than ten times ("single digits") the size of the compensatory damages awarded and that punitive damage awards of four times the compensatory damage award is "*close to the line of constitutional impropriety."* (Cf. Zalma, 2013). As noted by Espy (2004, p. 848), the Court restated its concern that "while States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." Espy (2004, p. 848) notes that the *Campbell* Court further bolstered the formulation in *Gore* that "grossly excessive or arbitrary punishments" on a tortfeasor would be prohibited by the due process clause of the Fourteenth Amendment and voiced a concern regarding the jury's wide degree of discretion in assessing punitive damages. (Cf. Kemp, 2013).

Justice Kennedy, in writing for the United States Supreme Court in *Campbell* (2003, pp. 14-18), amplified upon the core elements found in *Gore* that related to the requirement of *reprehensibility* of a defendant's conduct, and thereby establishing parameters on punitive damage awards. Justice Kennedy stated the following:

> "To determine a defendant's reprehensibility–the most important indicium of a punitive damages award's reasonableness–a court must consider whether: the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident. (Citing Gore, 1996, pp. 576-577). It should be presumed that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence.
>
> Justice Kennedy continued:
>
> "With regard to the second *Gore* guidepost, the Court has been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award; but, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. Single-digit multipliers are more likely to comport with due process, while still achieving the State's deterrence and retribution goals, than are awards with 145-to-1 ratios, as in this case. Because there are no rigid benchmarks, ratios greater than those that this Court has previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages, but when compensatory damages are substantial, then an even lesser ratio can reach the outermost limit of the due process guarantee.

> Here, there is a presumption against an award with a 145-to-1 ratio; the $1 million compensatory award for a year and a half of emotional distress was substantial; and the distress caused by outrage and humiliation the Campbells suffered is likely a component of both the compensatory and punitive damages awards. The Utah Supreme Court sought to justify the massive award based on premises bearing no relation to the award's reasonableness or proportionality to the harm."

3.2 Is There an Abuse of Punitive Damage Awards?

New York Times writer Andrew Pollack (1999) may have framed the policy debate concerning the awarding on punitive damages best in his article, "$4.9 Billion Jury Verdict in GM Fuel Tank Case." The decision of the jury sparked curiosity, and a call for further tort reform to reign in such egregious jury verdicts. Yet, an objective analysis of the facts might yield a different result. Is the debate about punitive damages "much ado about nothing"?

A series of studies cited by Professor Geistfeld (2006, p. 217) indicated, however, that "punitive damages were awarded in approximately 5 percent of the trial cases won by plaintiffs, with the same rate applying to product cases." Galligan et al. (2007) reported on the results of a 2001 survey of state court cases and noted that plaintiffs in tort cases received punitive damages in only 6 percent of the successful cases and only in 5 percent of products liability cases; and the median award for punitive damages was only $23,000 in trial courts and $15,000 in bench trials. (Civil Justice Survey, 2001). In another survey cited by Galligan et al. (2007), Rustad (1992, p. 40) noted that a study of punitive damages in products liability litigation found that judges reversed or remitted over half of all punitive damages awards rendered in products liability actions for the period 1965-1990. Finally, Professors Landes and Posner (1987) reported that punitive damages, as a matter of fact, were rarely awarded in products liability cases at all.

4. Some Concluding Thoughts

Although the thrust of the discussion in Part 3 of the article has centered on punitive or exemplary damages, the comments of author (and attorney) John Grisham on damage caps may be equally apt. Concerning damage caps of $1 million in civil cases, Grisham (2016, p. 128) wrote:

> "This is because the wise people who make the laws in our state legislature decided ten years ago that their judgment was far superior to that of the actual jurors who hear the evidence and evaluate the damages."

It appears that punitive damage awards are indeed quite rare in products liability cases. However, if properly administered under the precise guidelines enunciated in *Gore*, and further expanded upon in *Campbell* concerning the requirement of reprehensibility, and "as long as courts take seriously their obligation to balance the ratio of punitive to compensatory damages and the reprehensibility of the defendant's underlying conduct in determining how much is too much" (Fischer, 2004), the availability of punitive damages to an injured plaintiff can serve as an important deterrent to conduct which may result in the production, manufacture, design, or marketing of unsafe or defective products.

It will be interesting to see what the Court's opinion in *Campbell* will have on several recent cases such as the $1.04 billion award against Johnson & Johnson in an alleged defect in an artificial hip (July 4, 2017) or a $10.5 million award against DuPont relating to a chemical used to make Teflon that allegedly contaminated a water supply (January 5, 2017).

The principles enunciated in the United States relating to damages in products liability cases will no doubt also be important guideposts in international business as nations throughout the world seek to develop consistent rules in their own products liability regimes.

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APPENDIX A

PUBLICATIONS RELATING TO PRODUCTS LIABILITY

JOURNAL ARTICLES:

Law and Psychology in Products Liability
Richard J. Hunter, Jr.
Law-Psychology Bulletin
Vol. 6, No. 2, pp. 5-6 (Fall 1995).

The Issue of Punitive Damages in Products Liability
(With Robert Shapiro, Seton Hall University)
Business Law Review
Vol. 29, pp. 77-89 (1996).

HIV: Fear of AIDS or Medical Malpractice
Richard J. Hunter, Jr.
North Dakota Law Review
Vol. 80, No. 3, pp. 385-403 (2004).

To Paraphrase W.S.: "Sugar by Any Other Name Might Surely ***Not*** Be As Sweet": Merisant v. McNeil
(With Mark Blodgett, Suffolk University and Hector R. Lozada, Seton Hall University)
Business Law Review
Vol. 42, pp. 31-45 (Spring 2009).

Understanding and Negotiating the Products Liability Pitfalls of Outsourcing to China: Systemic Failures or Isolated Product Defects?
(With Hector Lozada, Seton Hall University and Aaron Gordon, MBA Candidate, Stillman School of Business, Seton Hall University
International Bulletin of Business Administration
Issue 6, pp. 28-39 (Fall 2009).

A Managerial Guide to Avoiding the Products Liability Trap in Dealing with the People's Republic of China
(With Hector R. Lozada, Seton Hall University and Aaron Gordon, MBA, Seton Hall University)
The Mustang Journal of Law and Legal Studies
Vol. I, pp. 28-45 (2010).

Damages for Pain and Suffering and Emotional Distress in Products Liability Cases Involving Strict Liability and Negligence
(With Henry J. Amoroso, Seton Hall University)
Faulkner Law Review
Vol. 3, Issue 2, pp. 277-302 (Spring 2012).

The Hand That Truly Rocks the Cradle: A Reprise of Infant Crib Safety Lawsuits and Regulation from 2007-2012
(With Melissa A. Montuori, MBA Candidate, Seton Hall University)
Loyola Consumer Law Review
Vol. 25, No. 2/3, pp. 229-247 (2013).

Should a Legal Analysis of the Adequacy of Warning Labels Consider Issues Relating to Use of Products by Non-English Speakers?
(With Kelly Dallavalle, MBA Candidate and Hector R. Lozada, Seton Hall University)
Atlantic Law Journal
Vol. 16, pp. 80-93 (August 2014).

A Statutory Override of an "As Is" Sale: A Historical Appraisal and Analysis of the UCC, Magnuson-Moss, and State Lemon Laws
Richard J. Hunter, Jr.
University of Massachusetts Law Review
Vol. 11, pp. 44-62 (2016).

ON-LINE JOURNAL ARTICLES:

A Managerial Guide to Products Liability: Part I- A Primer on the Law in the United States
(With Henry J. Amoroso and John H. Shannon, Seton Hall University)
International Journal of Learning and Development
Vol. 2, No. 3, pp. 34-56 (2012).

A Managerial Guide to Products Liability: A Primer on the Law in the United States: Part II- A Focus on the Theories of Recovery
(With Henry J. Amoroso and John H. Shannon, Seton Hall University)
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Vol. 2, No. 3, pp. 99-122 (2012).

A Managerial Guide to Products Liability: A Primer on the Law in the United States: Part III: The Scope of Liability in Products Liability Cases
(With Henry J. Amoroso and John H. Shannon, Seton Hall University)
International Journal of Learning and Development
Vol. 2, No. 4, pp. 1-16 (2012).

Counterfeit Products within China—A New Twist to an Old Problem: "Imitation Apple Retailers"
(With Lindsay Puliti, MBA Candidate, Seton Hall University)
International Journal of Academic Research in Business and Social Science
Vol. 2, Issue, pp. 400-418 (September 2012).

Products Liability in the Pharmaceutical Industry
(With Jason Dooney, MBA Candidate, Seton Hall University)
International Journal of Advances in Social Sciences and Humanities
Vol. 2, Issue 7, pp. 12-20 (July 2014).

Making Whipped Cream or Getting High: Product Misuse or a Failure to Warn?
(With Sandy Solano, Seton Hall University MBA, Controller Leland Gas Technologies)
Journal of Social Science Research
Vol. 8, No. 3, pp. 1672-1682 (July 2015).

Compensation for Bystander Injuries in Strict Products Liability: Why It Is Important to Afford Bystanders with More Protection than Consumers or Users of Products
(With John H. Shannon & Henry J. Amoroso, Seton Hall University)
Advances in Social Sciences Research Journal
Vol. 3, No. 10, pp. 1-11 (October 2016).