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FOREWORD: THE USE AND CONTROL OF PUNITIVE DAMAGES

DAVID G. OWEN†

I.

Punitive damages are on the march. Almost overnight, they seemed to spring from nowhere onto center stage in private litigation of virtually every type.¹ In the very recent past, punitive damages have spread into more and more corners of civil litigation, such as admiralty,² insurer bad faith,³ business torts of various types,⁴ drunk driving,⁵ and professional malpractice,⁶ to name only a few.

Perhaps the area of tort litigation most pervasively affected by the spread of punitive damages is products liability.⁷ Punitive

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1. See, e.g., Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 133 (1982) (“[punitive damages] are now dramatically awarded in cases in which liability of any sort would have been almost out of the question merely fifteen years ago”). See generally *Symposium: Punitive Damages*, 56 S. CAL. L. REV. 1 (1982) (analysis of fairness and efficiency of punitive damages) [hereinafter cited as *Symposium*].

2. See, e.g., *Dyer v. Merry Shipping Co.*, 650 F.2d 622 (5th Cir. 1981) (punitive damages may be recovered under general maritime law for willful and wanton creation or maintenance of unseaworthy conditions).

3. See, e.g., *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978) (punitive damages may be awarded where insurer acts with oppression in denying its insured a reasonable settlement).

4. See, e.g., *Miley v. Oppenheimer & Co.*, 637 F.2d 318 (5th Cir. 1981) (stockbroker “churned” client’s account).

5. See, e.g., *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (“conscious disregard of the probable dangerous consequences” of drunk driving may constitute “malice” and warrant punitive damages).

6. *Nelson v. Gaunt*, 125 Cal. App. 3d 623, 178 Cal. Rptr. 167 (1981) (doctor knowingly administered illegal medical procedure).

7. Among the considerable writing on this aspect of the topic, I am most familiar with Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982) [hereinafter cited as *Problems*]; and Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976) [hereinafter cited as *Punitive Damages*]. A helpful, more recent article is Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37 (1983); see also Meyers & Barrus, *Punitive Damages in Products Liability Cases: A Survey*, 51 INS. COUNS. J.

damages verdicts for large amounts have been rendered or upheld in the very recent past in a variety of products liability contexts: \$6 million in one Dalkon Shield case,⁸ \$500,000 in another;⁹ \$2.75 million in an oral contraceptive failure to warn case;¹⁰ \$8 million in one Mustang II fuel tank case,¹¹ \$100 million in another;¹² and \$25 million for a defective pilot's seat in a small airplane.¹³ Nor will the asbestos industry, especially Johns-Manville, be seeing the end of punitive damages verdicts any time soon.¹⁴ And lawyers representing the chemical and pharmaceutical industries in the mid-1980's must be seriously concerned over the prospect that punitive damages will spread broadly into the fields of toxic chemical and drug litigation. Punitive damages are thus in the forefront of modern tort litigation, and the bench and bar have a vital need for elucidation of this crucial topic.

II.

The three articles in this Symposium serve this need well. Gary Haugen and Howard Tarkow's article, *Punitive Damages in Minnesota: The Common Law and Developments Under Section 549.20 of the Minnesota Statutes*,¹⁵ provides an excellent roadmap for the lawyer trying to structure his case under the statutory and common law of Minnesota. The article by Judge Donald Alsop and David Herr, *Punitive Damages in Minnesota Products Liability Cases: A Judicial Perspective*,¹⁶ presents a particularly insightful outline of the case management problems posed by punitive damages at the various procedural steps in the litigation of such a case. Finally, in *The Discovery and Proof of a Punitive Damages Claim: Strategy Decisions and*

212 (1984) (survey of recoverability of punitive damages in products liability cases by jurisdiction).

8. *Palmer v. A.H. Robins Co.*, — Colo. —, 684 P.2d 187 (1984).

9. *Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984).

10. *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038 (1984).

11. *Ford Motor Co. v. Stubblefield*, — Ga. App. —, 319 S.E.2d 470 (1984).

12. The trial court remitted the verdict to \$20 million. See Walsh, *Filing of Punitive Damages Claim Is Focus of Increasing Controversy*, Wall St. J., Nov. 12, 1984, at 27, col. 4.

13. *Guarneri v. Harper*, Civ. No. 80-3285 (D.N.J. June 8, 1984) (verdict against Cessna Aircraft Co.), cited in 4 VERDICTS & SETTLEMENTS 417 (Sept. 1984).

14. See, e.g., *Hansen v. Johns-Manville Prod. Corp.*, 734 F.2d 1036 (5th Cir. 1984); *Fischer v. Johns-Manville Corps.*, 193 N.J. Super. 113, 472 A.2d 577 (App. Div. 1984).

15. Haugen & Tarkow, *Punitive Damages in Minnesota: The Common Law and Developments Under Section 549.20 of the Minnesota Statutes*, 11 WM. MITCHELL L. REV. 353 (1985).

16. Alsop & Herr, *Punitive Damages in Minnesota Products Liability Cases: A Judicial Perspective*, 11 WM. MITCHELL L. REV. 319 (1985).

Pretrial Tactics When Representing the Plaintiff,¹⁷ Dale Larson and Robert Wattson forcefully present the plaintiff's case favoring such damages, and examine a number of important strategic issues unique to punitive damages claims.

The Haugen and Tarkow article first examines the two principal functions of punitive damages at common law—punishment and deterrence. The relevance of the defendant's financial condition is considered in this context, as are the effect in such an action of the death of the defendant, or of the plaintiff, and the *Eisert*¹⁸ decision's rejection of punitive damages in strict products liability property damage actions. The remainder of the article examines five key issues under the statute: (1) jurisdictional issues, including the preclusion of punitive damages claims in contracts actions, further discussion of the strict liability property loss exception of *Eisert*, and the legislative resolution of the wrongful death issue; (2) the "clear and convincing evidence" standard of proof, and its effect of increasing judicial control; (3) the "willful indifference to the rights or safety of others" statutory standard for punitive damages liability; (4) the statutory factors for determining the amount of such damages; and (5) the liability for punitive damages of principals generally, and municipalities in particular, for the misconduct of their agents.

The Alsop and Herr article works from the premise that punitive damages claims raise "a significant risk of an excessive or otherwise errant verdict," thereby requiring greater judicial control throughout the management of the case.¹⁹ The authors point out that strict judicial control has been mandated by both the Minnesota Legislature and the Minnesota Supreme Court, and that the manner in which a judge will exercise that control will often be guided in large part by the court's early "impression" of the strength of the punitive damages claim. The authors next examine special problems raised by the punitive claim during the early stages of the case, including questions involving motions to dismiss, summary judgment, class action certification, consolidation, impleader and joinder of third parties, and the implications for settlement—and bad faith claims—if the defendant is insured. Discovery problems concerning the defendant's wealth are next

17. Larson & Wattson, *The Discovery and Proof of a Punitive Damages Claim: Strategy Decisions and Pretrial Tactics When Representing the Plaintiff*, 11 WM. MITCHELL L. REV. 395 (1985).

18. *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226 (Minn. 1982).

19. Alsop & Herr, *supra* note 16, at 320.

discussed, after which the authors consider final pretrial issues such as motions in limine, limiting experts, and bifurcation. Among the trial issues examined are the reference to punitive damages in opening statements and final argument, various evidentiary considerations, and cautionary instructions. Finally, the authors discuss verdict forms, the risk of inconsistent verdicts, the importance of a clear and specific jury charge, the standard of proof, and the use of remittitur. The authors conclude the article by returning once again to their theme—that the courts must manage cases involving punitive damages claims with strict control.

The Larson and Wattson article looks at punitive damages from the plaintiff's perspective, and highlights many of the various strategic choices that arise when a punitive damages claim is in the case. The authors begin by arguing the importance of punitive damages in restraining corporate malfeasance, and consider some practical problems in that regard. They then focus on a variety of strategic considerations, such as the difficult question of whether a plaintiff should assert a punitive claim at all, and risk the possibility of reversal or remittitur, or instead should make the culpability case in negligence and push for an inflated "compensatory" award which the court may be more reluctant to reduce. The authors next consider several thorny implications on settlement strategy if the defendant carries liability insurance, and in this context examine the conflict problem between the insurer and insured, and the resulting risk of bad faith failure to settle claims. Then they examine certain discovery problems involving claims of work product privilege, the importance of discovering records of product testing, documentary evidence of internal corporate criticism, and records pertaining to similar accidents. The authors conclude with some suggestions for dealing with pretrial motions by defendants, dealing with such matters as protective orders, bifurcation, remedial measure evidence exclusion, and partial summary judgment.

III.

Ever since punitive damages emerged from the primordial ooze,²⁰ courts and commentators have had an ambivalent, love-

20. For the historical development of punitive damages, see Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982); *Punitive Damages*, *supra* note 7, at 1262-64.

hate relationship with this peculiar remedy.²¹ Being in their nature "quasi-criminal," awardable to the plaintiff in a civil case, but for the purpose of punishing the defendant, they are truly neither fish nor fowl.²² As such, they do present a significant risk of confusing the trial of all the issues in the case, as the Alsop-Herr article points out. Yet, as Messrs. Haugen and Larson indicate, such damages have long been sanctioned by the courts of Minnesota and most other states, and in 1978 received at least passive legislative approval. Their entrenched and growing role in private litigation derives very simply from the fact that sometimes the civil law needs more than compensatory damages to serve as an adequate response to harmful behavior which is highly disrespectful of other persons' rights.

I tend to agree with Messrs. Larson and Wattson's assumption that punitive damages probably do not in fact deter gross misconduct very much at all. Our perspectives are quite different, however, on the Ford Pinto litigation²³ to which he refers. While I agree that the automotive industry has probably not been much deterred by the Pinto litigation, I believe that the failure of deterrence here arises principally out of the difficulty of comprehending the nature of the proscribed misconduct.²⁴ The problem disappears, of course, if one facilely concludes that the product was in fact, and obviously, dangerously "defective," as does Mr. Larson in referring to G.M.'s "X" cars, and inferentially to the Ford Pinto. I do not know if anyone has calculated the financial losses to Ford from selling the Pinto—in terms of litigation costs (and payouts) on compensatory claims alone, and most of all on the damage to public confidence in the company, and the resulting damage to market share. My hunch is that such losses have exceeded a billion dollars, perhaps substantially.

Corporate managers at Ford and General Motors are all too well aware today of the close to catastrophic²⁵ costs of massive litigation resulting from the sale to the public of hundreds of

21. See *Punitive Damages*, *supra* note 7, at 1263 n.22, 1267. See generally *Symposium*, *supra* note 1.

22. Yet punitive damages may give rise to both fish and fowl, for a plaintiff's lawyer may go after such damages like a shark, and the defendant's lawyer may then turn chicken.

23. See generally *Problems*, *supra* note 7.

24. See *id.* at 20-28, 36-38.

25. The result may be completely catastrophic for the company, as most notably (but not exclusively) in the case of the Johns-Manville asbestos litigation.

thousands (or even millions) of products that are found to be defective. One might plausibly assume that these risks alone would give such managers about as much incentive (short, perhaps, of criminal sanctions) as the law can provide. It seems naive to me, to say the least, to conclude that any rational enterprise would sell over a million products known to contain a dangerous defect that threatened life. If I am wrong, and if a major corporation such as General Motors were proven in fact to have sold the public more than a million cars knowing they contained dangerously defective brakes,²⁶ then surely punitive damages in large amounts would be entirely appropriate. Not having seen the evidence, I simply cannot believe that General Motors is run by such simple fools, unaware of the devastating effects such a choice would have upon the company—and their own careers—totally apart from punitive damages. I therefore think that punitive damages, for most manufacturers and in most contexts, are an ineffective, superfluous deterrent.

This is not to say, however, that punitive damages serve no useful purpose in products liability or other litigation. First, I believe that there probably is some modest deterrent effect on some persons when they hear of a large punitive damages assessment against another person in a similar situation. More significantly, I believe that the actual and symbolic punishment²⁷ and law enforcement²⁸ effects of such awards are valid social objectives in a civilized society. That is, both the victim and the law-abiding members of society may fairly demand that a person proven²⁹ to have deliberately stolen³⁰ another person's rights—to bodily safety, mental equanimity, or financial security—be made to suffer, in order to restore the balance in the social compact broken by the theft. Moreover, a very important compensatory function that only the Alsop-Herr article mentions, and it derisively, is the payment of the plaintiff's attorney's fees. Whatever the merit (vel

26. These are in fact the allegations in the administrative civil penalty action now in progress against General Motors in connection with its "X" cars. See *GM Witness Says NHTSA Consumer Complaints Shed No Light On Cause of Spin-Out Incidents*, 12 PROD. SAFETY & LIAB. REP. (BNA) 857 (Nov. 2, 1984).

27. See generally Ellis, *supra* note 20, at 4-8 (analyzing punishment as implying a notion of desert); *Punitive Damages*, *supra* note 7, at 1279-82.

28. See generally Ellis, *supra* note 20, at 10; *Punitive Damages*, *supra* note 7, at 1287-95.

29. It is important that plaintiffs be required to prove their punitive damages claims by clear and convincing evidence because of the quasi-criminal nature of this form of civil fine. See Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 119 (1982).

30. This notion is explained in Owen, *supra* note 29, at 109-11.

non) in typical litigation of the "American rule," requiring each party to bear his own expenses of prosecuting or defending litigation, surely the victim of a "theft" should be entitled to recover all the costs of maintaining a restitution action against the thief.³¹ And so I believe that punitive damages, although perhaps a poor deterrent, serve other important social goals.³²

IV.

But the determination of whether the defendant's conduct was culpable enough to warrant punitive damages, that is, whether it showed a "flagrant"³³ or "willful indifference to the rights or safety of others," is often a formidable task in an individual case. Perhaps even more difficult is the determination of an appropriate amount for such damages, once liability is appropriately assessed. As a result, there is a compelling need for close judicial control over all aspects of such claims—as outlined in the Alsop-Herr article, as mandated by the Minnesota Supreme Court,³⁴ as reflected

31. See *id.*; *Punitive Damages*, *supra* note 7, at 1295-99. While punitive damages awards only occasionally approximate the costs of a plaintiff's lawyer and expenses of litigation, such damages do nevertheless serve this function, even if only roughly so. Ideally, such costs—perhaps with some form of a premium—should be legislatively prescribed upon clear and convincing proof that the tort was committed with willful indifference to the plaintiff's rights.

32. It is important to realize that the goals of punitive damages are not open-ended, but that they instead have logical stopping places, even where a defendant's conduct has been proven wrongful in the extreme. Thus, once a plaintiff's non-recoverable damages have been fully met, the compensatory goal of punitive damages itself is achieved in full. The punitive damages goals of punishment and deterrence may be partially or even fully met in certain cases by the costs of paying compensatory damages (and related litigation costs), particularly if the defendant must defend against many claims arising out of the same misconduct.

Finally, at least from a tort perspective, the compensatory damages objective of providing injured plaintiffs with compensation that is deserved should take precedence over the punitive damages goals, if the two conflict. In the mass tort context, for example, if the defendant's bankruptcy is truly threatened (or actually caused) by the litigation, a court should pause before allowing the jury to assess punitive damages, at least in a large amount.

Where strict liability for compensatory damages imposes adequate punishment, as it does in this type of case [asbestos litigation], we decline to cleave to a judge-made remedy of punitive damages that would both fail in its own purpose and obstruct the broader objectives of the underlying cause of action which the plaintiff has chosen to pursue.

Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 530 (5th Cir. 1984), *question certified to the Mississippi Supreme Court*, 750 F.2d 1314, 1328-29 (5th Cir. 1985) (en banc).

33. "'Flagrant' implies an objective standard apart from the actor and indicates that, typically, only extreme departures from the norm, from accepted and acceptable safety practices and engineering choices, will subject the manufacturer to punishment." *Problems*, *supra* note 7, at 24 (footnotes omitted).

34. *Eisert*, 314 N.W.2d at 229.

in (and very probably the central goal behind) Minnesota's 1978 punitive damages statute,³⁵ and as urged by many commentators³⁶ and courts in other jurisdictions.³⁷

Perhaps the single most important aspect of a punitive damages case demanding strict judicial control involves the review—by trial and appellate courts—of the amount of such awards. In the absence of quite specific statutory rules of measurement for such awards,³⁸ there is always a substantial risk that a jury outraged enough to return such a verdict at all will assess an excessive award. The legislative guidelines on measurement³⁹ should help both the jury and the judge at trial, in properly measuring such damages, and the reviewing courts on appeal. But it is the courts in the final analysis, and not the juries, which must determine how much punishment is too much,⁴⁰ and when it is not deserved at all.⁴¹

V.

The common law of punitive damages in Minnesota has developed over the years fairly typically compared to other states. The courts of this state, however, have shown a more sophisticated appreciation both for the importance of such damages in proper con-

35. MINN. STAT. § 549.20 (1982).

36. See generally Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L. REV. 351, 401-02 (1983); Seltzer, *supra* note 7, at 89; *Problems, supra* note 7, at 50-59; *Symposium, supra* note 1. Various control procedures may be constitutionally required. See Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

37. See, e.g., *Acosta v. Honda Motor Co.*, 717 F.2d 828, 839 (3d Cir. 1983) (Becker, J.); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 461 (1980) (Abrahamson, J.); *Moore v. Remington Arms Co.*, 100 Ill. App. 3d 1102, 427 N.E.2d 608, 617 (1981) (Londrigan, J.).

38. Such damages could be limited to some multiple of compensatory damages; or they could be subject to some absolute maximum cap, or perhaps to a minimum floor; or they could be subject to some combination of these and other measurement requirements. Further statutory refinement along these lines, defining the boundaries for determining the proper amounts of punitive damages awards, could do much to cure many problems of administration.

39. See MINN. STAT. § 549.20, subd. 3 (1982). I believe these were derived in part from the guidelines proposed in *Punitive Damages, supra* note 7, at 1319.

40. And so to order remittitur accordingly, or a new trial conditioned thereon. See *Problems, supra* note 7, at 58.

41. And so, before or at the trial, to grant judgment on the merits for the defendant on the punitive damages claim; on appeal, to reverse the punitive damages verdict, and the compensatory verdict as well if the contaminating influence of the evidence, argument, and instructions on the punitive claim permeated the entire case. See *Problems, supra* note 7, at 56-58.

texts⁴² and for the need to define carefully the limits of such damages through strong judicial control.⁴³ The punitive damages statute enacted in 1978 provides a helpful structure which should facilitate the principled adjudication of punitive damages claims. Each of the articles in this Symposium should help enlighten the bench and bar of Minnesota on many of the issues peculiar to the litigation of these claims, should focus a variety of issues for debate, and should so enhance the further maturity of punitive damages jurisprudence.

42. See *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied sub nom. Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980) (punitive damages appropriate in products liability action).

43. See *Eisert*, 314 N.W.2d at 229 (punitive damages inappropriate in strict liability in tort property loss action). The *Eisert* court's refusal to allow punitive damages on the facts of that case may well reflect the court's fair perception that the case as presented was more in the nature of a contractual breach of warranty case—in which such damages would be inappropriate—than a “true” tort suit for property damage. From this perspective, the case was correctly decided, for all the good reasons that courts have adamantly refused such damages in contract actions. It is widely agreed that punitive damages are simply out of place in ordinary commercial frustration cases. See generally RESTATEMENT OF CONTRACTS § 342 (1932); 5 A. CORBIN, CONTRACTS § 1077 (1964).

