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TORTS—DAMAGES—MISSOURI ALLOWS PUNITIVE DAMAGES IN PRODUCTS LIABILITY ACTION. *Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. App. 1978). Plaintiff sustained personal injuries from a collision occurring when a used automobile she was test-driving continued to accelerate after she removed her foot from the accelerator. Plaintiff asserted that the immediate cause of the accident was the breakage of the fast-idle cam, which in turn jammed the throttle.¹ During the preceding four-year period, the manufacturer had received twenty-nine reports of similar occurrences involving the same model automobile.² Plaintiff brought actions against the dealer, alleging strict liability, and against the manufacturer on alternative theories of strict liability and negligent failure to warn. The jury found for both defendants on the strict liability claims, but found against the manufacturer on the negligence theory, awarding \$100,000 in compensatory and \$460,000 in punitive damages. The Missouri Court of Appeals affirmed and *held*: (1) punitive damages are recoverable in products liability cases; and (2) the jury properly could have found a conscious disregard of a real danger sufficient for an award of punitive damages based on defendant's inaction in the face of the reports of similar occurrences.³

Allowing punitive damages in civil suits has generated considerable controversy among courts⁴ and commentators.⁵ The objections stem

of all *fatal* motor vehicle accidents, and in 11 percent of *injury* accidents. (Dept. of Cal. Highway Patrol (1976) Ann. Rep. of Fatal and Injury Motor Vehicle Traffic Accidents, p. 68)." *Coulter v. Superior Court*, 21 Cal. 3d 144, 154, 577 P.2d 669, 675, 145 Cal. Rptr. 534, 540 (1978) (emphasis in original).

1. *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 658 (Mo. App. 1978). Inspection of the carburetor after the accident indicated that the cam was broken. *Id.* Witnesses testified that when the accelerator was pushed to the floor, the broken cam rotated into a position that jammed open the fast-idle lever. A mechanical engineer testified that the design of the carburetor was inadequate because the cam was too small to withstand loads placed on it and because there was no stop to prevent rotation. A chemical engineer testified that the cam was made from a material too weak for its purposes. *Id.*

2. *Id.* at 663. A letter from Ford's Director of Auto Safety to the United States Department of Transportation, pursuant to the Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1976), was admitted into evidence to show defendant's knowledge. The letter contained the names of 29 other Ford owners who, from December 24, 1968, to June 27, 1973, reported throttle jammings on cars equipped with the same model carburetor. *Id.*

3. 567 S.W.2d 655 (Mo. App. 1978).

4. Compare *Fay v. Parker*, 53 N.H. 342, 382 (1873) (the idea of punitive damages as a civil remedy is a "monstrous heresy") with *Luther v. Shaw*, 157 Wis. 234, 238-39, 147 N.W. 18, 20

from the award's similarity to criminal penalties. Critics argue that punitive awards destroy the symmetry of the civil-criminal distinction,⁶ impose "criminal fines" without constitutionally required safeguards,⁷ and provide a windfall⁸ to plaintiffs.⁹ Despite these arguments, all but four states now allow punitive damages in some civil actions.¹⁰

Courts have been slow, however, to extend punitive awards to products liability actions, as demonstrated by the paucity of reported cases.¹¹ In *Roginsky v. Richardson-Merrell, Inc.*¹² Judge Friendly, writ-

(1914) ("punitive damages may be given in a civil action, although the defendant may have been punished criminally for the same act").

Missouri at one time rejected punitive awards as an undesirable invasion of criminal sanctions into civil jurisprudence. *McKeon v. Citizens' Ry.*, 42 Mo. 79 (1867). Since 1873, however, with the decision in *Klingman v. Holmes*, 54 Mo. 304 (1873), Missouri has allowed punitive damages in various tort actions, including negligence. See, e.g., *Sharp v. Robberson*, 495 S.W.2d 394 (Mo. 1973) (indifference to or conscious disregard for safety of others); *Hoene v. Associated Dry Goods Corp.*, 487 S.W.2d 479 (Mo. 1972) (malicious prosecution); *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970) (nuisance); *Tietjens v. General Motors Corp.*, 418 S.W.2d 75 (Mo. 1967) (fraud); *Carnes v. Thompson*, 48 S.W.2d 903 (Mo. 1932) (assault); *Helming v. Adams*, 509 S.W.2d 159 (Mo. App. 1974) (false imprisonment).

5. E.g., Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975); Duffy, *Punitive Damages: A Doctrine Which Should be Abolished*, in DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST PUNITIVE DAMAGES 4 (D. Hirsch & J. Poulos eds. 1969); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931). See also Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976).

6. *Fay v. Parker*, 53 N.H. 342, 382 (1873). *Contra*, Owen, *supra* note 5, at 1278.

7. Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967). *But see* *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975); *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

8. *Walker v. Sheldon*, 10 N.Y.2d 401, 409, 179 N.E.2d 497, 501, 233 N.Y.S.2d 478, 494 (1961) (Van Voorhis, J., dissenting).

9. Hodgen & Veitch, *Punitive Damages—Reassessed*, 21 INT'L & COMP. L.Q. 119 (1972).

10. See *Moore v. Blanchard*, 216 La. 253, 43 So. 2d 599 (1949); *Vincent v. Morgan's La. & T.R. & S.S. Co.*, 140 La. 1022, 74 So. 541 (1917); *Boott Mills v. Boston & Me. R.R.*, 218 Mass. 582, 106 N.E. 680 (1914); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N.E. 1 (1891); *Boyer v. Barr*, 8 Neb. 68 (1878); *Anderson v. Dalton*, 40 Wash. 2d 894, 246 P.2d 853 (1952); *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 P. 1072 (1891).

For a discussion of the development in Missouri, see note 4 *supra*; Comment, *Punitive Damages in Missouri*, 42 Mo. L. REV. 593 (1977). See generally Morris, *supra* note 5.

11. See *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973); *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975); *Drake v. Wham-O Mfg. Co.*, 373 F. Supp. 608 (E.D. Wis. 1974); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968); *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); *E.R. Squibb & Sons, Inc. v. Stuckney*, 274 So. 2d 898 (Fla. Dist. Ct. App. 1973), *cert. denied*, 416 U.S. 961 (1974); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970). See generally Owen, *supra* note 5, at 1326 n.333, 1328 n.334; Annot., 29 A.L.R.3d 1021 (1970).

ing for the Second Circuit, pointed to the potentially large number of plaintiffs in products liability actions¹³ and questioned whether "claims for punitive damages in such a multiplicity of actions throughout the nation can be administered so as to avoid overkill."¹⁴

In *Rinker*, however, the court found these objections insufficient to distinguish products liability actions from other torts, given the award's purposes of punishing aggravated misconduct and deterring similar actions,¹⁵ and asserted that adequate judicial controls already exist to protect defendants from excessive awards.¹⁶ The court also found that the punitive award was proper on the facts of the case. Missouri law requires a showing of legal malice before punitive damages may be awarded in civil cases.¹⁷ Plaintiff sought punitive damages under a jury instruction that requires "complete indifference to or a conscious disre-

12. 378 F.2d 832 (2d Cir. 1967).

13. Judge Friendly raised several policy objections to the award of punitive damages in products liability cases. First, because of the courts' inability to control the size of awards, excessive punishment might be meted out to manufacturers of other safe and beneficial products. These punitive awards, multiplied by the large number of suits that may arise from a single defective product, may bankrupt a corporation for a single misdeed. Second, multiple compensatory damage awards and criminal sanctions would serve as sufficient deterrents. Third, because the majority of products liability defendants are corporations, unfairness is inherent in severely punishing stockholders for management decisions. *Id.* at 839-41.

14. *Id.* at 839.

15. 567 S.W.2d at 668.

16. *Id.* at 669. Many states, including Missouri, require that punitive damages bear a reasonable relation to the injury or compensatory damages. See *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719, 724 (Mo. 1966). See also *Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850 (M.D. Pa. 1974) (remand on damages). Other legislative limitations include awards only to the extent of counsel fees and disbursements, *Doroszka v. Lavine*, 111 Conn. 575, 150 A. 692 (1930), limitations to an amount that will fully compensate plaintiff for injuries, *Oppenhuizen v. Wennersten*, 2 Mich. App. 288, 139 N.W.2d 765 (1966); *Vratsenes v. New Hampshire Auto, Inc.*, 112 N.H. 71, 289 A.2d 66 (1972), and the complicity rule, *Roginsky v. Richardson-Merrell Inc.*, 378 F.2d 832 (2d Cir. 1967). Judicial controls include granting new trials on the issue of damages, *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974), and offering plaintiff the option of remittitur or a new trial, *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). See generally *Owen*, *supra* note 5 at 1315-23.

17. Legal malice requires either (1) intent to do a wrongful act with knowledge of the wrongfulness, *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *Schmidt v. Central Hardware Co.*, 516 S.W.2d 556 (Mo. App. 1974), or (2) action displaying such disregard for others that conscious wrongdoing may be implied, *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *Gerharter v. Mitchellhill Seed Co.*, 157 S.W.2d 577 (Mo. App. 1941).

gard for the safety of others.”¹⁸ Accordingly, the court noted that the jury reasonably could have found that the automobile’s defect constituted a threat to public safety, and that “[t]he jury had the right to weigh Ford’s inactivity against the hazard presented and could well conclude that Ford consciously or knowingly elected to disregard what it well knew to be a genuine potential for danger.”¹⁹

Rinker is significant not only because it is the first Missouri appellate decision to uphold punitive damages in a products liability action,²⁰ but also because it sets a lower threshold of culpable conduct at which a court may award punitive damages. An examination of previous products liability cases upholding awards of punitive damages indicates that the *Rinker* standard allows these awards for somewhat less culpable behavior.²¹ One commentator has suggested that manufacturers’ culpable conduct falls into five categories:²² (1) fraud (concealment of known defects), (2) knowing violation of safety standards, (3) inadequate testing or quality control, (4) failure to warn,²³ and (5)

18. 567 S.W.2d at 667. Missouri Approved Jury Instruction 10.02 reads:

Damages—Exemplary—Conscious Disregard for Others

If you find the issues in favor of plaintiff, and if you believe the conduct of defendant as submitted in Instruction Number — (*here insert the number of plaintiff’s verdict directing instruction*) showed complete indifference to or conscious disregard for the safety of others, then in addition to any damages to which you may find plaintiff entitled under Instruction Number — (*here insert number of plaintiff’s damage instruction*) you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter him and others from like conduct.

MISSOURI SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, MISSOURI APPROVED JURY INSTRUCTIONS § 10.02 (2d ed. Supp. 1978).

19. 567 S.W.2d at 668.

20. *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155 (8th Cir. 1978) (recognizing the issue as one of first impression in Missouri).

21. See notes 11-12 *supra*, note 25 *infra*.

22. Owen, *supra* note 5, at 1329.

23. Owen, *supra* note 5, at 1345, notes that a large proportion of products liability cases are decided on this theory. See Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976), where the authors demonstrate that cases that should be decided on the ground of defective design and manufacture are frequently decided on a negligent-failure-to-warn theory, because it is the easier ground to prove. They argue that when a warning cannot reduce the risk of harm and would only result in nonmarketability of the product, “then the true issue before the court is the acceptability of the design.” *Id.* at 501.

In cases involving failures to adequately warn of known defects, however, defendants were able to escape punitive damages when they provided a warning, even though the warning was not sufficient to reduce the risk of harm in the particular instance. See *Johnson v. Husky Indus., Inc.*, 536 F.2d 645 (6th Cir. 1976); *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089 (5th Cir. 1973).

postmarketing failure to remedy known dangers.²⁴ Each of the cases upholding awards of punitive damages contained several of these misdeeds.²⁵ In *Rinker*, however, there was no finding that the defendant knew or should have known of the defect at the time of manufacture; the only evidence supporting the award of punitive damages was defendant's inaction in light of a known postmarketing defect.²⁶

If other states follow Missouri's lead, it is likely that courts will more readily award punitive damages in products liability actions, which will present difficult line-drawing problems between negligent behavior that

24. Owen, *supra* note 5, at 1361. The remedy will depend upon the nature of the defect and will take the form of either a warning or a recall with a change in design for future manufacture of the product.

25. In *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir.), *cert. denied*, 424 U.S. 913 (1975), there was arguably fraudulent conduct, knowingly inadequate design, inadequate testing, failure to warn both before and after marketing, and a failure to remedy after marketing. *Id.* at 106. In *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973), the court held that the issue of punitive damages should have been submitted to the jury because the jury might have found that the manufacturer inadequately tested its drug for a new use, neglected to test despite reports of a connection between its product and permanent eye damage, misrepresented its knowledge of harmful side-effects, and failed to warn in a manner calculated to reach physicians. *Id.* at 147. In *Sabich v. Outboard Marine Corp.*, 60 Cal. App. 3d 591 (opinion deleted from official reporter), 131 Cal. Rptr. 703 (1976), although the award of punitive damages based on fraud was reversed on other grounds, the jury awarded both punitive and compensatory damages to a plaintiff injured by defendant-manufacturer's snow vehicle. Evidence showed that inadequate testing failed to disclose the true nature of a hazard of which defendant should have known, a misrepresentation of its capabilities, and an inadequate warning of the danger. 60 Cal. App. 3d 591 (opinion deleted from official reporter), 131 Cal. Rptr. 703 (1976). Similarly, in *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974), though the jury award of punitive damages was again denied on other grounds, the trial court awarded punitive damages because the manufacturer knew before marketing of a defect rendering its airplane dangerous, but failed to warn users. *Id.* at 466, 113 Cal. Rptr. at 426. In *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), the court found evidence of inadequate testing, possible falsification of test results to the FDA, manufacture and distribution despite indications of harmful side-effects, and continued marketing without warning to users even after acquiring firm evidence of a connection between the product and serious eye injury. *Id.* at 695-702, 60 Cal. Rptr. at 404-08. In *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), there was inadequate design and testing, failure to warn and failure to remedy after notice of postmarketing injuries. *Id.* at 124-32, 253 N.E.2d at 643-46.

26. Conceivably, *Rinker* falls into the category of defective design cases decided erroneously on a negligent-failure-to-warn theory. See Twerski, *supra* note 23, at 534-35. If so, then the culpable behavior actually consists of negligent manufacture, most likely resulting from inadequate testing and a failure to warn or to remedy the defect upon becoming aware of it. However, in light of the fact that the jury refused to impose liability based on strict liability in tort, and seemed to have trouble finding the product "defective," 567 S.W.2d at 659-60, it is equally plausible that the jury perceived a need to punish and deter inaction in the face of a known postmarketing defect, and thus did extend the scope of a manufacturer's liability for punitive damages.

affords only compensatory awards and behavior that warrants punitive damages.

PROCEDURE—SERVICE OF PROCESS—PROPOSED AMENDMENT TO RULE 4(C) CRITICIZED. Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (1979). The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Advisory Committee) has proposed a major amendment to the federal rules governing who may serve process in federal courts.¹ Rule 4(c) of the Federal Rules of Civil Procedure presently requires that a United States marshal, his deputy, or a special court appointee serve process.² The proposed amendment would extend rule 4(c) by also permitting service at the plaintiff's election "by a person authorized to serve process by any statute or rule of the state in which the district court is held or in which service is made."³

Through the amendment the Advisory Committee seeks to eliminate a "troublesome ambiguity"⁴ within rule 4. While the current rule 4(c) requires service of process by a United States marshal, rules 4(d)(7)⁵

1. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REVISED PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 1 (Feb. 1979) [hereinafter cited as DRAFT PROPOSAL].

2. FED. R. CIV. P. 4(c) provides:

By Whom Served. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

3. DRAFT PROPOSAL, *supra* note 1, at 1. Amended rule 4(c) would read:

By Whom Served. Service of process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely. At the election of the plaintiff service of process may be made by a person authorized to serve process by any statute or rule of the state in which the district court is held or in which service is made.

4. *Id.* at 2. See *Fair & Co. v. Cia. Intercontinental de Nav. de Cuba, S.A.*, 243 F.2d 342 (2d Cir. 1957); *Giffin v. Ensign*, 234 F.2d 307 (3d Cir. 1956); *Bonan v. Leach*, 22 F.R.D. 117 (E.D. Ill. 1957); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1083, at 334 (1969 & Supp. 1978).

5. FED. R. CIV. P. 4(d)(7) provides:

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like