CURRENT TRENDS IN THE AMERICAN LAW OF PUNITIVE DAMAGES

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Introduction

Over the past fifteen years few legal questions have generated as much emotional reaction as those relating to the propriety of awarding punitive damages and the method (or lack of method) used in determining the amount of punitive damages to be awarded in particular cases. To many members of the general public, the awarding of punitive damages in tort is the most graphic foundation of the belief that something has gone wrong with the American legal system, that the operation of the American tort system over the past few decades has led to the stifling of technological innovation and to the loss of America's international competitiveness. Perhaps the most sensational of the cases giving rise to this public perception is *Grimshaw v. Ford Motor Co.*¹ in which the jury awarded one of the plaintiffs \$2,841,000 in compensatory damages and \$125,000,000 in punitive damages. As a condition for denying Ford's motion for a new trial, the trial court required Grimshaw to accept a reduction in the award of punitive damages to \$3,500,000, and the trial court's disposition of the case was affirmed on appeal. More recently, in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*,² a case that shall be discussed at greater length later in this article, the Supreme Court of the United States upheld against certain types of constitutional attack a judgment entered on a jury verdict awarding compensatory damages of \$51,146 and \$6,000,000 in punitive damages. With sums like these in question, it is no wonder that the question of the awarding of punitive damages in tort cases has captured the attention of many non-lawyers. This article will discuss the major developments in the law concerning punitive damages over the last few years.

I. The Legal Background

Although punitive damages are ostensibly prohibited in a few states³ and

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1. 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981). (The judgment entered on the jury's award of compensatory damages was \$2,516,000; the reduction reflects payments to the claimant made by others.)

2. 492 U.S. 257, 109 S.Ct. 2909 (1989).

3. 1 J. Ghiardi and J. Kircher. Punitive Damages §§ 4.07-12 (1985) list five states in which punitive damages are restricted to only a few types of cases (Indiana) or prohibited unless specifically authorized by statute (Louisiana, a "civil-law" jurisdiction and Massachusetts) or presumably prohibited totally (Nebraska and Washington). In 1986, New Hampshire ostensibly joined this list by enacting legislation that prohibited punitive damages unless specifically authorized by statute. N.H. Rev.Stat. Ann. 507:16 (Supp. 1989). New Hampshire had, however, by judicial decision, previously limited punitive damages to the "aggravated" damages recoverable in England and in Michigan. For this reason, it has been declared that the statute has effected no change in New Hampshire law. Alfano, *RSA 507:16 and the Law of Punitive Damages*, 28 N.H. Bar J. 117 (1986). Since 1987, Georgia does not permit punitive damages if the plaintiff's only injury is to his "peace, happiness, or feelings". Ga. Code Ann. § 51-12-6 (Supp. 1990).

limited to serving only a compensatory purpose in a few others,⁴ the general rule in the United States is that, when the evidence shows that a defendant's conduct has been "malicious," "wanton," "oppressive," or "outrageous," the jury may in its discretion assess punitive (or "exemplary") damages against the defendant as something in the nature of a punishment for his morally reprehensible conduct and as a deterrent to the repetition of such conduct. As a practical matter, this means that, when the defendant's conduct is intentional or reckless, he may also be liable for punitive damages, although some courts impose the additional requirement, particularly in cases involving defamation,⁵ of some showing of actual malice in the form of ill will or intent to injure. In some states, it has been held that punitive damages may be awarded for "gross negligence,"⁶ but in those jurisdictions the gross negligence required in order to justify an award of punitive damages requires a finding that comes very close to approximating the same sort of findings that will justify a conclusion that the defendant behaved recklessly.⁷

The jury is largely unrestrained in assessing punitive damages. In some jurisdictions the jury can even take into account the plaintiff's legal costs in bringing the action.⁸ In most jurisdictions evidence of the defendant's net

4. In a few states punitive damages, although allowed, are largely restricted to damages that are compensatory in nature. In Connecticut, for example, punitive damages may not exceed the plaintiff's litigation costs. *Collens v. New Canaan Water Co.*, 155 Conn. 477, 488, 234 A.2d 825, 831 (1967), reaffirmed in *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co.*, 193 Conn. 208, 235, 477 A.2d 988, 1003 (1984), and in Michigan punitive damages are awarded to compensate the plaintiff for the humiliation he has suffered. *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922), reaffirmed in *Willett v. Ford Motor Co.*, 400 Mich. 65, 253 N.W.2d 111 (1977). In Michigan punitive damages resemble the English concept of "aggravated damages". See Lord Devlin's speech in *Rookes v. Bernard*, [1964] A.C. 1129, 1229, 2 W.L.R. 269, 331, 1 All E.R. 367, 412. It is claimed that despite the statutory prohibition of punitive damages, unless specifically authorized by statute, New Hampshire still permits the awarding of punitive damages in the form of aggravated damages. See Alfano, *supra* note 3, at 121.
5. For citations to cases, see 1 J. Ghiardi and J. Kircher, *supra* note 3, at §§ 13.15, 19.19. These examples involve actions for defamation and misrepresentation. Since *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), a showing of malice in this sense has not been enough to support an award of punitive damages. Actual knowledge of falsity or reckless disregard of truth or falsity on the part of the defendant must also be shown. In *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) in a surprising and confusing decision, the Court put in doubt whether the constitutional strictures of *Sullivan* and *Gertz* applied in defamation actions brought by private persons (against possibly only non-media defendants) about statements that did not concern matters of public interest.
6. See, e.g., *Inland Container Corp. v. March*, 529 S.W.2d 43 (Tenn. 1975), and *Jordan v. Sauve*, 219 Va. 448, 247 S.E.2d 739 (1978).
7. In the *Inland Container Corp.* case, *supra* note 6, proof that the defendant acted in a "conspicuously sloppy manner and to the detriment of this small landowner" was not enough to warrant an award of punitive damages. 529 S.W.2d at 44. In the *Jordan* case, *supra* note 6, the court held that the negligence sufficient to support an award of punitive damages must "evince a conscious disregard of the plaintiff's rights". 219 Va. at 454, 247 S.E.2d at 742.
8. This is of course more likely to be the case in a jurisdiction like Connecticut where punitive damages are awarded for compensatory purposes, see note 4, *supra*, but the plaintiff's attorneys' fees are sometimes taken into account in awarding punitive damages even when these damages are considered as a type of punishment. In *St. Luke Evangelical Lutheran Church, Inc. v. Smith*, 318 Md. 337, 568 A.2d 35 (1990), the court said it was joining some nine other states in permitting the plaintiff's attorney's fees to be considered by the jury in its assessment of punitive damages.

worth is admissible as a tool for assessing the appropriate amount of punitive damages.⁹ Finally in some jurisdictions punitive damages can be assessed against a defendant only if he has been found liable for more than nominal damages,¹⁰ but, in the majority of states, there does not appear to be any such requirement. Large amounts of punitive damages have been assessed even when only nominal compensatory damages have been awarded.¹¹ In some states, one finds judicial declarations that punitive damages must be "reasonable" taking into account the actual damages, but we are not told what kind of a relationship to actual damages is reasonable.¹² As seen in the *Browning-Ferris* case, *supra*, in most states there is no requirement that punitive damages bear any set proportional relationship to the compensatory damages that have been assessed. It is this regime that is being challenged by the modern critics of punitive damages.¹³

Much of the recent literature has concerned the imposition of punitive damages in products liability litigation. The *Grimshaw* case itself involved a passenger in a Ford Pinto that burst into flames when it was hit in the rear by another vehicle where there was evidence that Ford was aware of a design defect in the Pinto that could have been remedied for perhaps as little as \$15 per car. At about the same time in *Dorsey v. Honda Motor Co.*¹⁴ an award of five million dollars in punitive damages was reinstated by the appellate court. The compensatory damages in that case were \$750,000. It is cases like this that are alleged to have helped contribute to the United States' competitive decline.

Empirical evidence in support of statements about the effect of tort litigation on the competitiveness of the American economy is hard to find. The difficulty of examining the vast number of cases and of supplementing the material found in the bare court records with information as to how much in punitive damages a defendant actually paid has discouraged the exhaustive empirical studies that would be necessary to document or refute these

9. For citation to cases, see 1 J. Ghiardi and J. Kircher, *supra* note 3, at § 5.36.
10. *Id.* at § 5.37 and 1989 Cumulative Supplement. Some of the statutory "reforms" cited later in this article, see note 22 ff, limit punitive damages to some proportionate relationship to compensatory damages. There are some statutes, however, that impose a requirement of an award of compensatory damages without specifying any necessary relationship between the compensatory damages and the punitive damages. See e.g. Utah Code Ann. § 78-18-1(1)(a) (Supp. 1990) and N.J. Stat. Ann. § 2A-58C-5(a) (1987) (applies only to products liability cases).
11. For example, in *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied* 396 U.S. 1049 (1970), a defamation case, a judgment entered on a jury verdict of \$1 in compensatory damages and punitive damages of \$25,000 against one defendant and \$50,000 against another was upheld on appeal.
12. See e.g. *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 719, 60 Cal.Rptr. 398, 419 (1967) (some "reasonable relationship to actual damages"); *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 150, 70 S.W.2d 397, 409 (1934) ("must be reasonably proportioned to the actual damages found").
13. The controversy over the propriety of punitive damages has generated considerable academic literature. A valuable recent source is *Symposium: Punitive Damages*, 40 *Ala.L.Rev.* 687-1261 (1989). Often-cited earlier works discussing punitive damages in products-liability litigation include two articles by Professor Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 *U.Chi.L.Rev.* 1 (1982), and *Punitive Damages in Products Liability Litigation*, 74 *Mich.L.Rev.* 1257 (1976).
14. 655 F.2d 650 (5th Cir. 1981).

impressions, at least with regard to how awards of punitive damages have affected the American economy. A study conducted by the Institute for Civil Justice of the RAND Corporation, which made an analysis in depth of jury verdicts in Cook County, Illinois and San Francisco, California from 1960-1984, and of jury verdicts in other California jurisdictions from 1980-1984, has concluded that "the incidence of punitive damage awards (measured by proportion of cases in which such awards are made) and the amount of money (measured in constant 1984 dollars) awarded for punitive purposes have increased substantially over the years."¹⁵ The report also noted that corporate defendants are more likely than individuals or public agencies to be "the target of such awards." The report noted, however, that punitive damage awards are often significantly reduced and that only about one-half of the dollars awarded are ultimately paid to the plaintiff. The report continued:

But our work has produced some surprises as well. In all the jurisdictions studied, personal injury cases, which have received the lion's share of attention in the current debate, were much less likely to result in punitive damage awards than cases involving contract disputes and intentional tort suits, which usually involve violations of civil rights. And the ratio of punitive damage awards to compensatory awards in personal injury cases was rarely more than 2:1, a far smaller ratio than in contract and intentional tort cases. Although the analysis provides some relatively weak signals that the incidence and amounts of punitive damage awards in personal injury cases have increased recently, the actual numbers of such awards remain very small through 1984.¹⁶

The RAND Report did provide the first empirical evidence of what it and others have called the "tortification of contract law." The report noted that in San Francisco and elsewhere in California "about one third of the punitive damage awards imposed in contract cases stemmed from allegations of 'bad faith' on the part of a corporate defendant."¹⁷ Indeed, in 1984 bad faith claims accounted for one quarter of all punitive damage awards in California and ten percent of all such awards in Cook County. In dollar amounts during that same period, punitive damages in business/contract cases accounted for almost one-half of all dollars awarded as punitive damages in California.¹⁸

In this regard it should be noted, however, that, in several recent cases, the Supreme Court of California has overruled prior authority and materially restricted the tort remedies available in these "business/bad faith contract cases." For example, in *Moradi-Shalal v. Fireman's Fund Ins. Cos.*,¹⁹ the Supreme Court of California overruled its earlier decision in *Royal Globe Ins. Co. v. Superior Court*²⁰ and held that violation of the provisions of the

15. M. Peterson, S. Sarma and M. Shanley, *Punitive Damages, Empirical Findings* iii (RAND Corp., The Institute for Civil Justice, 1987) (hereafter "RAND Report"). The quotations are from the executive summary at the beginning of the report.

16. *Id.* at iii-iv.

17. *Id.* at iv.

18. *Id.* at vi.

19. 46 Cal.3d 287, 250 Cal.Rptr. 116, 758 P.2d 58 (1988).

20. 23 Cal.3d 880, 153 Cal.Rptr. 842, 592 P.2d 329 (1979).

California Insurance Code proscribing certain unfair insurance practices did not create a private cause of action on the part of those who were victims of those practices. More recently, in *Foley v. Interactive Data Corp.*,²¹ the Supreme Court of California held that an employee has no cause of action for tortious discharge in contravention of public policy and furthermore that there was no cause of action in tort for breach of an implied covenant of good faith and fair dealing in employment contracts. Both of these decisions will materially reduce the number of cases in which punitive damages are imposed in California. The RAND Report concluded that "[p]unitive damages continued to be rarely assessed in personal injury cases, and [were] most frequently assessed against defendants who were found to have intentionally harmed plaintiffs. In most of these cases the damages were modest."²²

The conclusions of the RAND Report are buttressed by the working paper recently released by the American Bar Foundation.²³ The Bar Foundation paper discussed the results obtained by studying punitive damage awards in forty-seven counties in eleven states for the period 1981-85 and punitive damage awards in two counties (Dallas County, Texas and Jackson County, Missouri) over the period 1970-88. Its conclusions were that, in the counties examined, there is no evidence to support the propositions that punitive damages are routinely awarded, that they are awarded in large amounts, that the frequency and size of punitive damage awards have been rapidly escalating, and that these three alleged phenomena are national in scope. The Bar Foundation points out that the alarmist contention that there has been such an escalation is based on references to average awards. As the paper notes, when the number of awards considered in a sample is small and one award is very large, reliance on averages is statistically unsound.²⁴ Suppose in some jurisdiction there have been six awards of punitive damages in products liability cases of roughly \$10,000 to \$15,000 in some particular year and some ten years later there are also six such awards of punitive damage awards that, except for one award of \$6,000,000, range in size from \$10,000 to \$25,000. If one looks to the average award, there is an astronomical increase but, if one looks to median awards, the increase is not out of line with what one would expect, given inflation.

Whether the RAND Report and the American Bar Foundation study are correct in suggesting that the explosion in punitive damage awards is not as great as is publicly imagined, the fact remains that significant numbers of important participants in the legal process actually believe that this is the case. It is the beliefs and fears of these participants that have driven and are driving the attempts to "do something" about the situation. Their principal concerns may be summarized as follows. First there is the obvious concern with the problem of the amount of punitive damages that are awarded which finds expression in the reaction to *causes célèbres* discussed above as well

21. 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373 (1988).

22. RAND Report at ix.

23. Daniels and Martin, *Myth and Reality in Punitive Damages*, ABF Working Paper #8911 (1990), which is described on the cover as a "working draft" of an article to be published in the October 1990 *Minnesota Law Review* (Vol. 75, No. 1).

24. *Id.* at 40-44 (75 *Minn. L.Rev.* at 39-43).

as the *Browning-Ferris* case that was decided by the United States Supreme Court. There is, secondly, concern about the ease with which the plaintiff can qualify for an award of punitive damages. The traditional rule has been that eligibility for punitive damages, like all other issues in a civil case, must be proved by a "preponderance of the evidence."²⁵ Many people have contended that this standard is too lenient.

The awarding of punitive damages in some products liability and other types of cases presents a third set of problems. What if the plaintiff's action is one of a number of claims arising out of essentially the same tortious conduct – for example, an airplane crashes with 400 passengers aboard, or a defectively designed drug injures thousands of people, or a particular manufacturer's product, such as asbestos, injures hundreds of thousands of people who have been exposed to it? Is a jury required to take into account, as a mitigating factor in assessing punitive damages, the fact that the defendant has been or is likely to be assessed punitive damages in these other actions? The argument for requiring a jury to mitigate damages on this basis is premised in large part on the notion that, although the defendant should be obliged to compensate all those whom he has injured, he should not be subjected to multiple punishment for essentially a single instance of wrongful conduct.²⁶ The contrary argument asserts that the jury is not obliged to take into account other awards of punitive damages presumably because each legal action is unique and rests on its own particular facts.²⁷ Moreover, who is to say how much punishment or deterrence is enough?

Even if evidence of prior awards is relevant – and most courts would certainly allow the introduction of such evidence – the problem remains that, given the traditional form of trial in which the defendant contests both liability

25. For a typical statement of the common-law doctrine, see 1 J. Ghiardi and J. Kircher, *supra* note 3, at § 9-12.
26. One of the first important forums in which this argument was raised was in Friendly, J.'s opinion in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-42 (2d Cir. 1967).
27. *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967), concerned the same drug that was involved in the *Roginsky* case, *supra* note 26. Although aware of Friendly, J.'s discussion in *Roginsky*, the *Toole* court affirmed an award of punitive damages; the defendant's attack on punitive damages as violating its constitutional rights to due process and its claims of double jeopardy were rejected. Friendly, J.'s views in *Roginsky* were specifically rejected in a number of cases, including *Martin v. Johns-Manville Corp.*, 322 Pa. Super. 348, 361-70, 469 A.2d 655, 661-66 (1983) (one judge dissented on the issue of whether any punitive damages should be awarded in mass products liability cases brought for exposure to asbestos), and *Tetuan v. A.H. Robbins Co.*, 241 Kan. 441, 485-91, 738 P.2d 1210, 1241-44 (1987). In *Tetuan*, a Dalkon Shield case, the court upheld a \$7,500,000 punitive damage award (on top of an award of \$1,700,000 in compensatory damages) despite the fact that the defendant had been assessed punitive damages in ten other cases in amounts totalling \$17,327,005 of which the defendant had paid \$11,000,000 before filing a voluntary petition for bankruptcy. The largest of these prior awards was apparently \$6,200,000; the smallest \$5. In *Tetuan*, the plaintiff had to undergo a complete removal of her fallopian tubes and ovaries owing to the defendant's defective IUD. Her medical expenses were \$6,000 and her earning capacity was apparently unaffected. The court noted that while the same product was involved in all these cases, the manufacturing and marketing of the product over the years involved a multitude of acts. The defendant was not being repeatedly punished for a "single act".

and the amount of damages that should be awarded in the same trial, it would be an extremely foolhardy defendant who, in the process of contesting liability, would wish to bring to the attention of the jury the fact that it had been assessed punitive damages for substantially the same type of conduct in previous cases.

The contention that there must be some limit to the number of times a defendant may be assessed punitive damages for basically the same type of conduct is based not only on considerations of fairness towards the defendant but also on the more practical consideration that it would be unfair to litigants whose cases were adjudicated subsequently and were denied recovery of compensatory damages because a defendant's resources had already been exhausted in paying punitive damages to litigants whose cases had been adjudicated earlier. In cases such as those involving asbestos or the Dalkon Shield, in which many of the defendants were forced into bankruptcy, this is a serious problem.

In the remainder of this article, we shall examine how legislatures and, to a lesser degree, courts have reacted to these objections to the present regime governing the award of punitive damages.

II. The Legislative Reaction

It comes as no surprise that punitive damage awards have been caught up in the "tort reform" movement in America of the last few years and that, in response, a number of states have, by statute, made significant changes in the law concerning punitive damages. At least seven states, including California, have provided that punitive damages cannot be awarded unless they are supported by "clear and convincing" evidence.²⁸ New Hampshire, which only provided what under English law are called aggravated damages, has now enacted a statute expressly outlawing punitive damages unless specifically provided by statute.²⁹ Several states now also specifically prohibit the awarding of punitive damages for injuries caused by drugs that have been approved by the Federal Drug Administration, unless the manufacturer knowingly misrepresented information supplied to the agency or willfully withheld pertinent information from the public.³⁰ Finally, to meet the problem caused by the imposition of multiple awards of punitive damages for essentially the same type of conduct, several states have specifically authorized the trial judge to reduce punitive damage awards in the light of previous awards

28. Alaska Stat. § 09.17.020 (1989); West's Ann.Cal.Civ.Code § 3294(a) (Supp.1990); Minn.Stat. Ann. § 549.20 (West 1988); Mont. Code Ann. § 27-1-221(5) (1989); Ohio Rev. Code Ann. § 2307.80(A) (Anderson) (Supp.1989) (applies only to products liability cases); Ore.Rev.Stat. § 30.925(1) (1988); Utah Code Ann. § 78-18-1(a) (Supp.1990).
29. See the discussion in note 3, *supra*. As noted there it has been argued that the New Hampshire statute (N.H.Rev. Stat. Ann. 507:16 (Supp.1988)) has made no change in New Hampshire law.
30. N.J.Stat. Ann. § 2A:58C-5(c) (1987); Ohio Rev. Code Ann. § 2307.80(C) (Anderson) (Supp.1989); Ore.Rev.Stat. § 30.927 (1988); Utah Code Ann. § 78-18-2 (Supp.1990).

that might have been made against the same defendant for substantially the same conduct.³¹

A more radical and perhaps more significant statutory reform is the procedure adopted in a growing number of states, now totalling at least seven, allowing some type of bifurcated proceeding to determine liability for punitive damages.³² In New Jersey and Ohio, this bifurcated procedure is available only in products liability litigation. Under these procedures, in Missouri, Montana, Utah, and Georgia the jury or other trier of fact, during the liability stage of the proceedings, only decides whether the defendant is liable for punitive damages. The actual punitive damages are assessed during a second proceeding conducted before the same trier of fact. In New Jersey, however, both liability for punitive damages as well as the amount of punitive damages are determined in the second proceeding before the same jury. In Nevada and Ohio, the amount of punitive damages is found by the court after the trier of fact has found liability.

A number of states have tried to meet the problem of "excessive" awards of punitive damages by placing statutory limits or caps on the amount of punitive damages. For example, Virginia imposes an absolute cap on punitive damages of \$350,000.³³ Texas imposes a limit of \$200,000 or four times actual damages, whichever is greater unless some exceptional circumstances can be shown.³⁴ In Oklahoma, punitive damages cannot exceed the compensatory damages except in certain relatively aggravated circumstances.³⁵ Georgia imposes a limit of \$250,000 unless the action is one involving products liability or it is found that the defendant has acted or failed to act with a specific intent to cause harm.³⁶ Products liability cases in Georgia are covered by a different regime which we shall have occasion to discuss later in this article.³⁷ Kansas imposes a limit of the lesser of the defendant's highest gross annual income in the five years preceeding the defendant's act or \$5,000,000 or, in some cases, one-and-a-half times the amount of profit which the defendant has gained or expects to gain as a result of its misconduct.³⁸ Colorado limits punitive damages to the amount of compensatory damages, but the judge has discretion to triple the award in certain "aggravated"

31. Vernon's Ann.Mo.Stat. § 510.263(4) (Supp.1989); Mont.Code Ann. § 27-1-221(7)(c) (1989). Alabama has enacted a broader provision requiring the trial Judge, upon motion of either party, to conduct hearings and receive additional evidence concerning the amount of punitive damages and then independently, without any presumption the jury's award of punitive damages is correct, "re-assess the nature, extent, and economic impact" of the award and reduce or increase the award, as appropriate, in the light of all the evidence. Ala. Code § 6-11-23(b) (Supp.1990).
32. Ga. Code Ann. § 51-12-5.1(d) (Supp.1990); Vernon's Ann.Mo.Stat. § 510.263(1) (Supp.1989); Mont. Code Ann. § 27-1-221(7)(a) (1989); Nev.Rev.Stat. § 42.005(3) (Supp.1989); N.J.Stat.Ann. § 2A:58C-5(b) (1987); Ohio Rev. Code Ann. § 2307.80(B) (Anderson) (Supp.1989); Utah Code Ann. § 78-18-1(2) (Supp.1990).
33. Va. Code Ann. § 8.01-38.1 (Supp.1989).
34. Vernon's Tex.Cir.Prac.&Rem. Code Ann. §§ 41.007, 41.008 (Supp.1990). These circumstances include damage arising from intentional torts.
35. Okl.Stat.Ann.tit. 23 § 9 (1987). Such circumstances include "wanton or reckless disregard for the rights of another" established by clear and convincing evidence.
36. Ga. Code Ann. §§ 51-12-5.1(e), (f), and (g) (Supp.1990).
37. See text at note 72, *infra*.
38. Kan.Stat.Ann. § 60-3701(e) and (f) (Supp.1989).

circumstances.³⁹ In Nevada, punitive damages are limited to three times the compensatory damages awarded up to a maximum of \$300,000 in punitive damages, but this limitation does not apply to product liability, bad faith insurer, discriminatory housing, hazardous material, and defamation actions.⁴⁰ Finally, Florida limits punitive damages to three times compensatory damages and expressly authorizes the trial court to reduce the damages by remittitur unless the claimant can show by "clear and convincing evidence" that the amount awarded "is not excessive in light of the facts and circumstances" of the case.⁴¹

In what is perhaps the most radical innovation that has thus far been attempted, a number of states have adopted statutes requiring a portion of the punitive damage awards to be paid to state funds rather than to the plaintiff. In Colorado the state fund receives one-third of the award;⁴² in Florida 60%;⁴³ and in Georgia, under a scheme now under constitutional attack, 75% of the amounts awarded in products liability cases is to be paid to the state treasury.⁴⁴ Illinois provides that the trial court in its discretion may apportion the award "among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Rehabilitation Services".⁴⁵ In Iowa, if the plaintiff's conduct is specifically directed to the claimant, the claimant gets the entire amount; otherwise, after payment of costs and fees, an amount not to exceed 25% is paid to the claimant with the remainder awarded to a state fund.⁴⁶ In Missouri 50%, after deduction of attorney's fees and expenses, is awarded to the state.⁴⁷

Most of the statutory schemes described above have been adopted during a period in which the American common law of punitive damages has been subjected to a variety of constitutional attacks. These constitutional attacks will be examined in the next section. Furthermore, as anyone with even a smattering of knowledge about the American legal system can appreciate, the legislative "reforms" of the common law regime governing punitive damages described above are themselves, as we shall see, now being subjected to constitutional attack.

III. Punitive Damages and the Constitution: The Judicial Response

A. *The Constitution and the Traditional American Common Law of Punitive Damages*

After years of avoiding having to answer constitutional questions concerning

39. Colo.Rev.Stat. § 13-21-102(3) (1987).

40. Nev.Rev.Stat. § 42.005(1)(a) and (b), § 42.005(2) (Supp.1989).

41. Fla.Stat. Ann. § 768.73(1)(a) and (b) (Supp.1990). Originally enacted to expire on July 1, 1990, this provision and the related provisions mentioned elsewhere in this article have been extended indefinitely. 1988 Laws of Florida, c.88-335.

42. Colo.Rev.Stat. § 13-21-102(4) (1987).

43. Fla.Stat. Ann. § 768.73(2) (Supp.1990).

44. Ga. Code Ann. § 51-12-5.1(e)(2) (Supp.1990). For description of the constitutional attack on this provision, see text at note 85, *infra*.

45. Ill-S.H.A. ch.110, § 2-1207 (Supp.1989).

46. Iowa Code Ann. § 668A.1.

47. Vernon's Ann.Mo.Stat. § 537.675(2) (Supp.1989).

the common law of punitive damages,⁴⁸ the Supreme Court of the United States in June of 1989, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,⁴⁹ finally ruled on whether a punitive damage award could be challenged under the "excessive fines" clause of the eighth amendment to the Constitution of the United States. In *Browning-Ferris*, the action was brought in a U.S. federal district court on both federal antitrust and state law grounds. The gist of the complaint was that, through predatory pricing, the defendants were attempting to monopolize the commercial trash collection business at large industrial and construction sites in the Burlington, Vermont area. Under federal antitrust law, a successful claimant would be entitled to treble damages and attorneys' fees. Under the state law claim, the claimant was entitled only to compensatory damages but, if the requisite degree of fault were shown, could also recover punitive damages. The jury brought in a verdict for something over \$50,000 in compensatory damages on both the federal and state law claims and \$6,000,000 in punitive damages on the state law claim. The trial court gave the plaintiff the option either of receiving three times its compensatory damages plus over \$200,000 in attorneys' fees and costs on the anti-trust claim or, in the alternative, having judgment entered for the compensatory damages and punitive damages awarded on the state-law claim. Not surprisingly, the plaintiff chose the latter approach. The judgment was affirmed by the United States Court of Appeals for the Second Circuit. Review was sought in the United States Supreme Court which granted *certiorari* to review the propriety of the award of punitive damages.

In an opinion written by Justice Blackmun, seven members of the Court concluded that the excessive fines clause which was taken from the English Bill of Rights of 1689 was, both in 1689 as well as in 1791 when the eighth amendment was adopted, considered to refer only to criminal proceedings. While the Court was not prepared to hold that the clause applied only to criminal cases, it concluded that "[w]hatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."⁵⁰ The petitioners had in addition argued that the English Bill of Rights and the eighth amendment also incorporated an older tradition dating from Magna Carta that imposed limits on the Crown's ability to impose "amercements" on litigants.⁵¹ The Court concluded that, as used at common law, the term

48. The Court continued to duck the question in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988). The Court had previously avoided ruling on the issue in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 246-47 (1984).

49. 492 U.S. 257, 109 S.Ct. 2909 (1989).

50. 492 U.S. at 263-64, 109 S.Ct. at 2914.

51. 492 U.S. at 268-73, 109 S.Ct. at 2916-19. The Court also held - unanimously on this point - that the verdict should not be overturned as excessive as a matter of federal common law. Since the claim arose under state law, although the case was tried in federal court, the Court was reluctant to hold that the court of appeals erred in upholding the district court's exercise of its discretion in accepting the jury's award of punitive damages. 492 U.S. at 277-80, 109 S.Ct. at 2921-23. On this point, the two dissenters agreed with the majority. 492 U.S. at 283, 109 S.Ct. at 2924.

"amercements" only included sums paid to the Crown and not sums paid to private litigants. It was on this point that the dissenters, Justice O'Connor, joined by Justice Stevens, focused their principal disagreement with the Court. The dissenters believed that amercements had included civil damages that were awarded as punishment rather than compensation.⁵²

In rejecting the challenge to the imposition of punitive damages based on the eighth amendment, the Court left open the question of whether an award of punitive damages that is thought to be excessive could be challenged under the due process clause of the fourteenth amendment. The Court noted that there was some authority for the proposition that the due process clause imposed some limitation on "the size of a civil damages award made pursuant to a statutory scheme",⁵³ but the Court had never addressed that question in the context of a common law claim in which there was no express statutory limit on damages. Concluding that the petitioners had not adequately raised that issue below, the Court refused to consider it.

It is hard to know how the Court would rule on the question of whether the due process clause (discussed more fully below) imposes some limitation on the amount of punitive damages that might be assessed against a litigant in an action involving only private parties. More to the point, even if the Court were prepared to accept that at some level the imposition of punitive damages offended due process, determining what that level is would be another matter. In *Browning-Ferris* the jury found that the defendants had inflicted \$51,146 worth of damages upon the plaintiff. The punitive damage award was thus 120 times greater than the compensatory damages. At the same time, the evidence was sufficient to show that the defendants "willfully and deliberately attempted to drive Kelco out of the market."⁵⁴ The jury had been instructed that in determining the amount of punitive damages it could take into account the "the character of the defendants, their financial standing, and the nature of their acts."⁵⁵ There was evidence that the defendants' total revenues during the year previous to the trial of the action were 1.3 billion dollars or \$25,000,000 a week. On this record, the United States Court of Appeals had concluded that, even if the eighth amendment were applicable to a civil case such as the one before it, the damages were not "so disproportionate as to be cruel, unusual, or constitutionally excessive."⁵⁶ This conclusion may support a finding of due process as well.

52. 492 U.S. at 282, 286-99, 109 S.Ct. at 2924, 2926-33.

53. 492 U.S. at 276, 109 S.Ct. at 2921, citing *St. Louis, I.M. & S.Ry. v. Williams*, 251 U.S. 63 (1919), in which the Court upheld against a due process objection a statutory scheme under which passengers who were overcharged could bring an action for a statutory penalty of not less than fifty nor more than three hundred dollars. The Court noted that the validity of the penalty could not be determined solely by its relation to the overcharge which might, in a given case, be rather small. In that case the overcharge was sixty-six cents. The passenger had obtained judgment for the overcharge plus a \$75 penalty plus \$25 in costs and attorneys' fees.

54. 492 U.S. at 262, 109 S.Ct. at 2913. The Court here quotes from the opinion of the court of appeals.

55. *Id.*, at 261, 109 S. Ct. at 2913, quoting the language used by the district court as preserved in the record.

56. *Id.*, quoting from the opinion of the court of appeals.

It was thought that the Court might answer some of the questions it has thus far left unanswered in *Pacific Mutual Life Ins. Co. v. Haslip*,⁵⁷ a case in which it granted *certiorari* on April 2, 1990. The case was argued on October 3, 1990 and was decided on March 4, 1991, while this article was in the course of publication. In *Haslip*, one of the plaintiffs received damages, in an insurance fraud case, of \$1,040,000. It is not apparent from the opinion of the Alabama Supreme Court⁵⁸ what portion of these damages were out-of-pocket expenses or damages for mental distress or simply punitive damages. In refusing to overturn the award, the Supreme Court of the United States assumed that the punitive damages amounted to \$840,000. The *Haslip* case will be discussed briefly in a postscript. The Court's decision leaves many questions still unanswered. Because of the sparseness of the record the case did not seem the best vehicle by which to dispose of the question of whether and how the due process clause applies to the awarding and calculation of punitive damages.⁵⁹ The award was attacked not only because of its size but also on the ground that Alabama law was vague because it did not contain criteria by which juries could be guided in assessing the amount of punitive damages.⁶⁰ In one of the other cases on which *certiorari* has been sought the further issue is presented that state law (Mississippi) was also unclear as to what sorts of tortious conduct can give rise to punitive damages.⁶¹

The Court in *Haslip* was not directly confronted with the questions that are presented when the defendant's objection is not so much that the damages awarded in that particular case are constitutionally objectionable but that, because the offending conduct has given rise to a number of actions by different plaintiffs arising out of essentially the same basic conduct, the cumulative awards eventually reach constitutionally objectionable proportions. To the suggestion made in 1967 by Friendly, J., of the United States Court of Appeals for the Second Circuit in *Roginsky v. Richardson-Merrell, Inc.*,⁶² that, even apart from constitutional considerations, there must be some limit to the number of times a defendant may be answerable in punitive damages for essentially the same basic conduct, a California District Court

57. 110 S.Ct. 1780 (1990).

58. 553 So.2d 537 (Ala. 1989).

59. As of September 1990 there were at least ten other cases involving the constitutionality of punitive damages awaiting disposition on petitions of *certiorari* to the Court. By October 1, 1990, the Court had disposed of two of these cases by dismissing one and denying *certiorari* in the other. By January 16, 1991, *certiorari* had been sought in four other cases. [See postscript for subsequent details.]

60. The verdict was also challenged on the ground that the evidence, which showed clear fraud on the part of one of the individual defendants, was insufficient to show that the person was acting as the agent of the corporate defendant.

61. This at least was one of the issues raised in the court of appeals in *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355, 1363 (5th Cir. 1989), rehearing *en banc* denied, 894 F.2d 1414 (5th Cir. 1990) *cert. pending*.

62. 378 F.2d 832, 838-42 (2d Cir. 1967). The case was brought in the federal courts on the basis of diversity of citizenship. Friendly, J., opined that a possible solution was drastically limiting the punitive damages awarded in each of the series of cases arising out of essentially the same basic conduct rather than allowing the first several claimants to receive large awards of punitive damages and the remaining plaintiffs nothing. *Id.* at 839-40.

of Appeal in *Toole v. Richardson-Merrell, Inc.*⁶³ responded that each legal action is unique and rests on its particular facts. As we have noted, even accepting that most courts would allow the defendant to introduce evidence of the amount of punitive damages that have been assessed against him in previous, similar actions, unless there is a bifurcated trial in which the question of liability is decided separately from the question of punitive damages, no rational defendant who is contesting liability would introduce evidence of prior awards of punitive damages that have been entered against it.

Although Friendly, J.'s views have been expressly rejected in a number of other subsequent cases,⁶⁴ they have nevertheless been incorporated in similar suggestions that have been made in other subsequent cases.⁶⁵ But, instead of being premised primarily on the notion that there are common law limits to the number of times punitive damages may be assessed for essentially the same conduct, the suggestion that there must be some such limits is, in these later cases, being increasingly premised on the constitutional ground of "due process of law." The due process objections focus on two sorts of concerns that have already been mentioned. First, there are the considerations of fairness towards the defendant that are raised by subjecting a defendant to repeated judicial awards of punitive damages for essentially the same wrongful conduct. Second, there are considerations of fairness with regard to future plaintiffs who might even be unable to recover compensatory damages if a defendant's resources have already been exhausted in paying punitive damages to litigants whose cases had been adjudicated earlier. Now that we know that even large companies can be forced into the bankruptcy courts by litigation arising out of products liability, the fear of exhausting a defendant's resources before all compensatory damages have been paid is not an idle one.

Responding to these arguments, Sarokin, J., sitting in the United States District Court in New Jersey, in a decision that he subsequently vacated, held "that a manufacturer or other mass tortfeasor cannot be subjected to repeated punitive damage awards for the same conduct."⁶⁶ He called for a legislative solution of the problem. In the cases before him, he ordered that, "with respect to those defendants who are able to present competent proof that liability for punitive damages has already been imposed upon them for the conduct alleged to be the basis of a punitive damage claim in this action, the court

63. 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967). The district court of appeal is the intermediate appellate court in California.

64. For other cases besides *Toole* rejecting Friendly, J.'s suggestion, see note 27, *supra*.

65. See e.g., *In re School Asbestos Litigation*, 789 F.2d 996, 1003-05 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

66. *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053, 1065 (D.N.J. 1989), *vacated*, 718 F.Supp. 1233 (D.N.J. 1989), on the ground, *inter alia*, that the court could not grant a fair and effective remedy since it could not control what other courts would do with regard to other plaintiffs.

will dismiss the plaintiff's claim for such punitive damages."⁶⁷ Sarokin, J. was dealing with some asbestos cases. Shortly afterwards, another judge (Fisher, J.) in the same district refused to take that approach in another asbestos case.⁶⁸ Fisher, J. noted that none of the defendants had been able to show that the assessment of punitive damages against them, thus far, had made it likely that they would be unable to respond to the damage claims of subsequent litigants. In a more recent case in the same federal district but not involving asbestos, a third judge held that the awarding of punitive damages in a mass tort case is not unconstitutional.⁶⁹ As already noted, Sarokin, J. subsequently vacated his order. He did so, however, without prejudice to the right of any defendant against whom multiple damage awards might be awarded to raise due process objections.⁷⁰

For the moment this is where the matter stands in mass tort situations. To the extent that the states provide for a bifurcated trial in which the issue of punitive damages is decided subsequent to the question of liability, some of the problems noted by Sarokin, J. and others may be avoided or at least lessened. Under a bifurcated trial procedure, the plaintiff may introduce evidence of previous awards without jeopardizing its defence on the question of liability. At the same time, there is no guarantee that a jury that has been advised of the previous awards of punitive damages made against the defendant will be sufficiently sympathetic to refrain from making a substantial award in the case before it.⁷¹

B. *The Courts, the Constitution, and the Tort "Reform" Statutes*

The legislative response to the so-called tort crisis in the United States has itself engendered a great deal of litigation. Most of the litigation, however,

67. 705 F.Supp. at 1065.

68. *Leonen v. Johns Manville Corp.*, 717 F.Supp. 272 (D.N.J. 1989). Fisher, J., was not prepared to say, however, that there was no limit that might be placed on the amount of punitive damages that might be awarded against such a manufacturer. *Id.* at 283.

69. *Germanio v. Goodyear Tire & Rubber Co.*, 732 F.Supp. 1297, 1305-06 (D.N.J. 1990). The issue was also raised in *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281-82 (2d Cir. 1990), an asbestos case, but the court held that the record was inadequate to permit resolution of the issue. It also expressed some doubt that all asbestos cases against the same defendant could be lumped together as involving essentially the same conduct.

70. 718 F.Supp. at 1236

71. The *Leonen* case, *supra*, and, most probably also, *Juzwin* were being tried under New Jersey law that provides for a bifurcated trial, but that did not prevent the defendants from raising the issue or lead either Fisher, J., or Sarokin, J., to discount, on that ground, the defendants' fears.

has concerned caps on compensatory damages⁷² - particularly on awards for non-economic loss such as pain and suffering which limitations often only apply to medical malpractice cases - and the constitutionality of statutes of repose which, for example, terminate a defendant's liability a certain number of years after a product has been manufactured or sold regardless of when the damage suffered by the plaintiff is incurred.⁷³ There have thus far been few occasions upon which the major features of legislative intervention specifically aimed at regulating the common law regime of punitive damages have been challenged. Although in many states the wrongful death statutes have been construed so as not to permit awards of punitive damages, there have been so many cases upholding restrictions that have been imposed on the ability of plaintiffs to recover even compensatory damages in wrongful death cases,⁷⁴ that it is taken for granted that the legislature may prohibit

72. Compare *Etheridge v. Medical Ctr. Hosps.*, 237 Va. 87, 376 S.E.2d 525 (1989) (upholding a \$750,000 limit on total recovery in medical malpractice actions - since raised to \$1,000,000 for more recent injuries); *Fein v. Permanente Med. Group*, 38 Cal.3d 137, 211 Cal.Rptr. 368, 695 P.2d 665, appeal dismissed, 474 U.S. 892 (1985) (upholding a \$250,000 limit on recovery for non-economic loss in medical malpractice actions); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977) (upholding a \$500,000 limit, \$100,000 from a health care provider and the balance from a state fund, on total recovery in medical malpractice actions - since raised to \$1,000,000 with \$200,000 coming from the health care provider and the balance from the fund), with *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711 (1989) (striking down statute limiting non-economic damage in all personal injuries to 0.43 times "the average annual wage" times "the life expectancy" which "shall be not less than fifteen years" as a violation of state constitution's guarantee of the right to a jury trial); *Lucas v. United States*, 757 S.W.2d 687 (Tex.1988) (striking down a \$500,000 limit on total recovery with exception for cost of hospital and other custodial care); *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987) (striking down \$450,000 limit on non-economic loss in all personal injury actions). In both the *Lucas* and *Smith* cases the statutes were struck down under provisions of the respective state constitutions guaranteeing citizens access to the courts. These sorts of provisions are common in state constitutions and are often referred to as "open court" provisions. After *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980), struck down a \$250,000 limitation on recovery of non-economic loss in medical malpractice cases, the legislature responded with a provision limiting non-economic damages in all personal injury actions to \$875,000. N.H.Rev. Stat. Ann. 508:4-D.
73. Compare *Jones v. Five Star Engineering, Inc.*, 717 S.W.2d 882 (Tenn. 1986) (requiring action to be filed within ten years of the product's first sale for use held constitutional); *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 418 N.E.2d 207 (1981) (requiring that action be filed within ten years after delivery to initial user held constitutional) with *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986) (requirement that action be filed within ten years of date of purchase or eleven years from date of manufacture, violates the state (and apparently also the federal) constitutional guarantee of equal protection); *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195 (R.I. 1984) (requirement that action be filed within ten years of first purchase for use or consumption, violates state constitution's guarantee of access to the courts). Statutes of this type can apply to more than products liability. A provision requiring most medical malpractice actions to be brought within two years of the alleged negligence was among the other provisions struck down in *Carson v. Maurer*, *supra* note 72. New Hampshire's common law doctrine is that the statute of limitations only begins to run after the date of discovery of the existence and cause of the injury or the date of the discovery of facts that would reasonably lead to such discovery. 120 N.H. at 936, 424 A.2d at 833.
74. See e.g., *Herbert v. Herbert*, 120 N.H. 369, 415 A.2d 679 (1980); *Hall v. Gillins*, 13 Ill.2d 26, 147 N.E.2d 352 (1958).

the awarding of punitive damages in such cases.⁷⁵ Since an action for wrongful death was unknown to the common law and is totally the creation of the legislature, the legislature may determine the scope of the remedy. Many of the automobile no-fault plans provide that one may not bring an action for non-economic damages unless one has met certain threshold requirements such as suffering "serious injury" or incurring medical expenses in excess of a certain dollar amount. Since punitive damages are generally considered non-economic damages, a person who cannot meet one of the thresholds will be unable to bring an action for punitive damages against the party who injured him. The argument that these provisions are a denial of due process and equal protection, insofar as they prohibit the awarding of punitive damages to someone who has not been seriously injured, has been rejected rather summarily⁷⁶ and apparently there is no case where it has been accepted.

As near as can be determined the first time that statutory restrictions on the awarding of punitive damages, such as those described above in s.II of this article, have been attacked as unconstitutional was a challenge to the Florida provisions described above⁷⁷ that reached the Florida Supreme Court in 1987.⁷⁸ As noted earlier, the Florida provisions, *inter alia*, limited punitive damages to three times the compensatory damages. The challenge was part of a broader attack on the tort reform process in Florida. Portions of that process including, in particular, a cap of \$450,000 on recovery for non-economic loss, were struck down. The provisions on punitive damages, however, were upheld against the claim of violating the separation of powers mandated by the Florida constitution with only the briefest discussion that lasted less than a page.⁷⁹ In a footnote the court set forth a portion of the opinion of the trial judge in which he said: "The legislature which has the authority to abolish punitive damages can surely set the standard for establishing such claims."⁸⁰

More recently, the entire 'New Jersey punitive damages regime', major portions of which were described above,⁸¹ was attacked in a federal court in New Jersey.⁸² The defendant claimed that the regime provided juries with no standards by which to assess punitive damages and was therefore "void for vagueness"; and that punitive damages in New Jersey were criminal in nature and, since the New Jersey scheme lacked adequate protections, thus offended due process. Both these claims were rejected as was a claim that the New Jersey regime was invalid under the excessive fines clause of the

75. In *McBride v. General Motors Corp.*, 737 F.Supp. 1563, 1576 (M.D. Ga. 1990), which as we shall see very shortly recently held unconstitutional some important portions of the Georgia statutory modification of the common law regime of punitive damages, the court declared that cases dealing with the measure of damages in wrongful death cases had no bearing on the case before it. Since there was no such cause of action at common law, as a *quid pro quo* for creating the action the legislature could limit the damages recoverable.

76. *Teasley v. Mathis*, 243 Ga. 561, 255 S.E.2d 57 (1979).

77. See note 41, *supra*, and accompanying text.

78. *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987).

79. *Id.* at 1092.

80. *Id.* at 1092, n.10.

81. See notes 30 and 32, *supra*, and accompanying text.

82. *Germanio v. Goodyear Tire & Rubber Co.*, 732 F.Supp. 1297 (D-N.J. 1990).

New Jersey constitution. The defendant made another claim of unconstitutionality, namely that the New Jersey scheme deprives the defendant of the "equal protection" guaranteed by the fourteenth amendment of the United States Constitution because it permitted the jury to consider "the financial condition of the tortfeasor" in assessing punitive damages. The court rejected this claim rather summarily.⁸³

All these decisions seem unexceptionable. There is, however, another recent case concerning the constitutionality of legislative tort reform as it relates to punitive damages that took a less sympathetic view of at least some features of these statutes. It may be helpful to examine this decision in greater detail as a harbinger of the types of objections that might be made to these statutes in the coming years. The case is *McBride v. General Motors Corp.*,⁸⁴ decided in a federal district court in Georgia.

In that case the court had occasion to rule on some portions of legislative tort reform in Georgia that concerned punitive damages. The plaintiffs in the case, who had been injured in automobile crashes, asserted that General Motors' automobiles were defective in that the seat belts provided for passengers riding in the rear seat did not have shoulder straps. The provisions that were challenged – and eventually ruled unconstitutional under both the Constitution of the United States and that of the state of Georgia – related to the award of punitive damages in products liability litigation. The legislation provided that, in actions arising out of product liability, there would be no limitation regarding the amount which might be awarded as punitive damages but that only "one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of actions which may arise from such act or omission."⁸⁵ The challenged legislation also provided that 75% of any amount awarded as punitive damages in such products liability litigation, less a proportionate part of the cost of litigation, including attorney's fees, "shall be paid into the treasury of the state" and that upon issuance of judgment the "state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages."⁸⁶

In *McBride*, the court (Elliott, J.) held that the statutory scheme was unconstitutional on its face because it discriminated between plaintiffs having claims for punitive damages arising out of product liability actions, in which only "the first plaintiff able to win the race to the courthouse and secure an award" would be entitled to an award of punitive damages, and plaintiffs

83. *Id.* at 1305. The court denied the plaintiff standing to contest the validity of the provision cited in note 30, *supra*, prohibiting the awarding of punitive damages for injuries caused by drugs approved by the Federal Drug Administration when there is no showing that the manufacturer knowingly misrepresented information supplied to the agency or willfully withheld pertinent information from the public. *Id.* at 1299.

84. 737 F.Supp 1563 (M.D. Ga. 1990).

85. Ga. Code Ann. § 51-12-5.1(e)(1) (Supp.1990). This and other Georgia provisions discussed in this portion of the article were cited *supra*, at notes 36 and 44.

86. *Id.* at § 51-12-5.1(e)(2) (Supp.1990).

in other tort cases.⁸⁷ The statutory scheme likewise discriminated between plaintiffs in products liability actions and plaintiffs in other types of tort actions because even successful plaintiffs in products liability actions could retain only 25% of a punitive damage award, whereas successful plaintiffs in other types of actions could retain 100% of any award for punitive damages. To the attempts of the state, which made an appearance in the case, to justify the legislation as part of a program of tort reform, the court noted that, in order to pass constitutional muster, at the very least the award rendered against a tortfeasor "must be a meaningful and substantial award, commensurate with the wrongdoing committed by a product manufacturer."⁸⁸ Since the award under the statute "could be as little as \$50",⁸⁹ the statute was not a rational response to the tort crisis. The court felt that a rational legislative response must afford a guarantee of damages of a substantial and meaningful amount to some extent proportional to the wrongdoing committed so as to "penalize, punish, or deter . . . the wrongdoing."⁹⁰ It was prepared to concede, however, that due process might place a limit on the number of times and the extent to which the defendant may be subject to punishment for a single course of conduct.

The court in *McBride* felt that, in addition to its other defects, the Georgia statute was fatally vague as to what was the "act or omission" which triggered the one award limitation.⁹¹ The court went out of its way, however, to state that it was not suggesting that a statute that placed a cap on punitive damage awards might not be constitutional "if the cap is sufficiently substantial to reasonably relate to a deterrence of the conduct complained of, and its provisions do not arbitrarily discriminate between tort claimants, and do not favor one class of business defendants over others."⁹² Finally, the court also declared that, apart from the fact that the state was given a share of the punitive damage award only in products liability litigation, the whole scheme of giving the state such an interest in awards of punitive damages in litigation between private claimants was constitutionally suspect.⁹³ It relied of course on *Browning-Ferris* for this conclusion, but that case appears to have considered the possible unconstitutionality of such schemes from the perspective of the defendant who is forced to pay, not from the perspective of a plaintiff who only receives a portion of the damages assessed. An appeal of *McBride* could have provided the United States Court of Appeals for the Eleventh Circuit and eventually the Supreme Court of the United States an opportunity to clarify many important constitutional issues concerning punitive damages and the attempts

87. 737 F.Supp. at 1569.

88. *Id.* at 1570.

89. *Id.*

90. *Id.*

91. *Id.* at 1571. The court ignored General Motors' stipulation that "the development of each separate car line constitutes a separate act or omission". Brief of General Motors at p.17. A copy of this brief is in the author's files.

92. 737 F.Supp. at 1580.

93. *Id.* at 1578. The court also ruled that the provisions in question were invalid for contravening certain technical provisions of the Georgia constitution, such as the body of the statute containing matter different from that expressed in the title. *Id.*

by state legislatures to regulate the awarding of such damages. Counsel advise, however, that the case has been settled.

IV. What Will the Future Bring?

By the time this article appears in print, the Supreme Court of the United States may have supplied some guidance with regard to how the due process clause applies to the awarding and assessment of punitive damages. At the risk of appearing terribly silly after the event, I would think it would be hard to lay down general criteria which would apply to all classes of cases. Insurance fraud and the bad faith refusal of insurance companies to settle claims have very little in common with actions for products liability and even less in common with actions for defamation and assault and battery. The Court could impose a constitutional requirement, by analogy to defamation, that punitive damages can only be imposed when there is clear and convincing evidence that the defendant intentionally exposed the plaintiff to an unreasonable risk of personal injury or was recklessly indifferent to that possibility. Beyond this, and particularly with regard to what might be considered the appropriate size of punitive damage awards, it is hard to think of any rules that could be sufficiently concrete and yet apply to this vast range of litigation. It is certainly difficult to have a categorical rule that punitive damages must bear some relationship to compensatory damages. As the United States Supreme Court itself has noted, in upholding a statutory penalty scheme, there are strong public policy grounds for allowing punitive damages far in excess of compensatory damages in many classes of cases.⁹⁴ All the Court could say on that occasion was that the penalty should not be "so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable."⁹⁵

Even if, contrary to my estimation, the Court were able to provide truly Solomonic wisdom with regard to the question of when punitive damages are appropriate and how they may be assessed, the Court will still some day have to confront the question of what, if any, constitutional claim a defendant might have when it is subjected to a series of substantial punitive damage awards in a mass tort situation. The issue is easiest to deal with in a mass disaster case such as an airplane crash or the collapse of a large structure in which many people are injured as a result of what most people would accept as a single tortious act.⁹⁶ In the more typical mass tort situation, namely that involving products liability actions, the defendant may have sold tens of thousands of the product over a long period of time during which its

94. *St. Louis, I.M. & S.Ry. v. Williams*, 251 U.S. 63, 66-67 (1919) .

95. *Id.* at 67. As described in note 53, *supra*, the statutory scheme resulted in the *Williams* case in a judgment of sixty-six cents in compensatory damages and a penalty of seventy-five dollars and costs of twenty-five dollars.

96. *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982). The case involved the collapse of two skywalks into the lobby of the Hyatt-Regency Hotel in Kansas City, Missouri. The court of appeals refused to permit the district court to certify the claims for compensatory and punitive damages as a class action and to enjoin other pending actions.

knowledge and opportunities for knowledge about its product have been constantly changing. Are these all a single instance of wrongful behavior? In the asbestos cases and some of the drug cases, many courts have indicated that this question should be answered in the affirmative.⁹⁷ The contrary conclusion that was reached in *McBride*⁹⁸ and a few other cases does not strike me as inherently implausible or even necessarily unsound.⁹⁹

Turning to the so-called tort reform statutes, the Court, as we have seen, has itself raised the issue whether the awarding of most of the punitive damage award to the state brings into play the excessive fines clause of the eighth amendment. Indeed, payment to a state fund may also raise questions under the double jeopardy clause which the Court has otherwise held does not apply to litigation between private parties but may encompass civil proceedings brought by the government that are in effect a civil sanction for conduct that has already been punished in a criminal proceeding.¹⁰⁰ There is, however, no warrant for the district court's conclusion in *McBride* that the mere fact of payment of part of an award of punitive damage to a governmental body - regardless of the amount - itself raises any question under the United States Constitution.

Insofar, however, as the tort reform statutes distinguish between types of claimants, as for example, the Georgia statute considered in the *McBride* case which distinguished between plaintiffs in products liability actions and plaintiffs in all other types of tort actions, these statutes immediately raise problems under the equal protection clause of the fourteenth amendment of the United States Constitution and under similar provisions in state constitutions. Indeed, tort "reform" statutes limiting the awards for non-economic loss in some types of actions, such as medical malpractice actions, but not in other types of actions have been attacked for precisely these reasons. The attacks have succeeded in some states but not in others.¹⁰¹ The attacks are usually based on both state constitutional grounds and federal constitutional grounds and it would appear, at first glance, that the Supreme Court of the United States will be unable to avoid deciding the issue. Given the extreme deference which the Court has shown over the last fifty years to state legislative initiatives regulating economic matters,¹⁰² I doubt that the Court would seek out any

97. See cases cited in notes 27, 62-63, 65, *supra*.

98. See note 75, *supra*, and accompanying text.

99. See *Tetuan v. A.H. Robbins*, 241 Kan. 441, 485-491, 738 P.2d 1210, 1241-44 (1987), discussed in note 27, *supra* and *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281-82 (2d Cir. 1990), *cert. dismissed* 111 S.Ct. 27, (1990).

100. *United States v. Halper*, 490 U.S. 435, (1989).

101. See cases cited in note 72, *supra*.

102. See e.g., *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955). In the tort area the Court has summarily rejected the argument that automobile guest statutes, which in some states require guest passengers to show gross negligence or sometimes even recklessness before the guest can recover against his host, offend the equal protection clause by singling out one class of tort claimant for special treatment. *Cannon v. Oviatt*, 520 P.2d 883 (Utah 1974), *appeal dismissed for want of a substantial federal question*, 419 U.S. 810 (1974). That is not to say that such statutes might not be found to violate a state constitution. See *Brown v. Merlo*, 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212 (1973).

such cases and I am personally very skeptical that the Court would actually hold that state legislative schemes that distinguish between different classes of plaintiffs are unconstitutional so long as there is even a remotely plausible justification for the difference. I thus very much doubt that the Supreme Court of the United States would agree with Elliott, J. in the *McBride* case, that the Georgia scheme considered there was invalid under the United States Constitution.

Nevertheless in the absence of any further decisions by the Supreme Court of the United States, the issues which we have discussed here are likely to remain fluid and in very vigorous contention over the foreseeable future. But, whatever the Supreme Court of the United States may do, the fact that a statutory scheme can survive attack under the United States Constitution does not mean that a state scheme, such as the one involved in *McBride*, might not be struck down as contrary to the state's own constitution.

Postscript

As noted in the text, in *Pacific Mutual Life Ins. Co. v. Haslip*,¹⁰³ the United States Supreme Court upheld an award of punitive damages of at least \$840,000 (out of a total award of \$1,040,000) against a challenge under the due process clause of the fourteenth amendment. Only Justice O'Connor dissented. The recently appointed Justice Souter did not sit. The opinion of the Court was written by Justice Blackmun and was joined in by four other justices. The Court held that the manner by which punitive damage awards are made was subject to challenge under the due process clause. In the case at bar, however, the procedure followed was not constitutionally infirm because the jury was advised that the purpose of punitive damages was not to compensate the plaintiff but to punish the defendant and to deter the defendant and others from future wrongdoing. Although the jury was given significant discretion in determining whether to award punitive damages and the amount of any such damages, the discretion was not unlimited. The discretion was confined to deterrence and retribution, and the jury was told that it must take into consideration the character and degree of the wrong. The Court noted that the discretion was no greater than that allowed in deciding questions such as "'the best interest of the child,' 'reasonable care,' 'due diligence,' or appropriate compensation for pain and suffering or mental anguish."¹⁰⁴ The Court also noted that trial courts in Alabama were obliged to scrutinize punitive damage awards to see if they were excessive. The Court further noted that the Alabama Supreme Court also exercised an appellate review of punitive damage awards in which it considers awards in comparable cases. The Court described, with seeming approval, the criteria enunciated by the Supreme Court of Alabama that could appropriately "be taken into consideration in determining whether the award was excessive or inadequate."

103. 111 S.Ct. 1032 (1991).

104. *Id.* at 1044.

These were:

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other similar awards against the defendant for the same conduct, these also to be taken in mitigation.¹⁰⁵

In a footnote, the Court noted that some states had imposed the requirement that punitive damages might only be awarded under a clear-and-convincing-evidence standard of proof or even a beyond-a-reasonable-doubt standard. The Court declared, however, that it was "not persuaded that the Due Process Clause requires that much. We feel that the lesser standard prevailing in Alabama – 'reasonably satisfied from the evidence' – when buttressed as it is by the procedural and substantive protections outlined above, is constitutionally sufficient."¹⁰⁶ Justice Scalia, concurring, felt that, given the ancient antecedents of punitive damages, the methods by which they were imposed could not be challenged under the due process clause, although of course individual verdicts might be challenged as being the product of jury prejudice or passion. Justice Kennedy in his concurrence was not prepared to give history as conclusive a role in all cases as was Justice Scalia but agreed that, in *Haslip*, "the judgment of history should govern the outcome in the case before us." Justice O'Connor in her dissent concluded that the Alabama scheme for imposing punitive damages was void for vagueness and, even if not void for vagueness, was constitutionally infirm because it did not give the jury as much guidance as it was practicably possible to give. Two weeks after the *Haslip* decision, the Court disposed of nine of the punitive damages cases then pending by denying *certiorari* in the two cases from Alabama and remanding the other seven for reconsideration in the light of *Haslip*.¹⁰⁷ Three more recently filed cases, including one from Alabama, were left pending.

105. *Id.* at 1045.

106. *Id.* at note 4. Alabama has enacted legislation that, except for wrongful death actions, imposes a \$250,000 punitive damages cap in all actions, except those for wrongful death, accruing after June 11, 1987, and requiring proof by "clear and convincing evidence" of conscious or deliberate "oppression, fraud, wantonness, or malice" with regard to the plaintiff. Ala.Code §§ 6-11-20 to 6-11-30 (Supp. 1990).

107. 59 U.S.L.W. 3628 *et seq.* (U.S. Mar. 18, 1991).