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PUNITIVE DAMAGES AWARDS IN PRODUCT LIABILITY
LITIGATION: STRONG MEDICINE OR POISON PILL?
INTRODUCTION

Punitive Damages: Through the Five Prisms

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I. INTRODUCTION

The role of an introduction to a symposium is awkward at best. Some introductions merely set forth a brief synopsis of the positions taken by the various contributors. That hardly seems worth the effort. Others attempt to comment on the various articles and to provide a hasty critique. That, however, is unfair. Like a boxer who lands a jab and runs for cover, a hasty critique is more of an annoyance than a body blow. It demonstrates that the reviewer has read the articles and is at least moderately intelligent; but that hardly serves as a justification for taking the reader's time. Having eschewed these models, my introductory remarks instead, will reflect on aspects of punitive damages that were not touched on by the participants to this most interesting symposium that I believe are worthy of some consideration. Because my field of special interest is products liability, and the formal topic of the symposium features "design defect" liability as the focus for the discussion of punitive damages, my remarks will be heavily, though not exclusively, directed toward that topic.

II. FROM THE PRISM OF COMPENSATORY DAMAGES

Generally speaking, punitive damages pick up where compensatory damages leave off. As such, the argument that punitive damages supplement the standard package of compensatory damages has merit. Not all forms of suffering are compensable,¹ and attorneys' fees generally reduce a plaintiff's recovery by one-third.²

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1. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 378-79 (1994). Intangible harm, such as loss of interpersonal relationships and missed opportunity, are not compensable under the rules of compensatory damage liability. *Id.*

2. *Id.* at 379.

Nonetheless, punitive damages are supposed to impose retribution in a measure not accomplished by compensatory damages.³

My difficulty with this subject is that there is no decent jurisprudence that informs the courts as to what standards should govern the most important element of compensatory damages — that of pain and suffering.⁴ One looks in vain at the decided cases to find anything resembling a judicial standard for evaluation of non-economic damages. Currently, the best answer seems to be that damages are excessive when they “shock the judicial conscience.”⁵ Borrowing from Mr. Justice Jackson’s famous dicta in *Williams v. North Carolina*,⁶ billions of dollars are transferred in our tort system utilizing standards that would not pass scrutiny if they were used for the collection of a grocery bill.⁷ In another forum, Professor Henderson and I observed a steady downward trend in damages.⁸ Legislative caps on non-economic damages, limits on joint and several liability and other damage limitation forms have taken hold.⁹ However, to the extent that these doctrines serve as surrogates for sensible damage jurisprudence, they are draconian in nature and always assume a one-sided quality.¹⁰

Academics have almost single-mindedly focused on liability

3. Jim Fieweger, Note, *The Need for Reform of Punitive Damages in Mass Tort Litigation: Juzwin v. Amtorg Trading Corp.*, 39 DEPAUL L. REV. 775, 777 (1990); see, e.g., *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1980) (recognizing that punitive damages are not meant to compensate, but to punish and deter); cf. Owen, *supra* note 1, at 374-75, 377-78 (suggesting that punitive damages serve educational and law enforcement functions).

4. Frederick S. Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement “Anomie”*, 22 U. MICH. J.L. REF. 303 (1989). The lack of judicial standards for measuring pain and suffering have resulted in a variety of pain and suffering awards, leaving one to wonder what justifies such disparity. *Id.* at 303.

5. *Precopio v. City of Detroit*, 330 N.W.2d 802, 805 (Mich. 1982).

6. 317 U.S. 287, 316 (1942) (Jackson, J., dissenting).

7. James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1339-40 (1991). Standards assessing whether damages are excessive have been vague. *Id.* at 1339 n.40 (listing cases and commentary that judicial standards are vague).

8. *Id.* at 1340 (discussing restrictions on punitive damages).

9. *Id.* at 1340 n.43; see also JAMES A. HENDERSON & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 302 (2d ed. 1991) (listing relevant statutes that limit scope of punitive damages). Joint and several tortfeasor recovery is now a minority rule in the United States. Henderson & Twerski, *supra* note 7, at 1340 n.49.

10. Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1225 (1989). State legislatures have adopted limitations on joint and several liability because of two main concerns. *Id.* at 1332. First, the doctrine “exponentially multiplies” the inherent unfairness of tort liability. *Id.* Second, state legislatures have recognized that the problem of liability was more serious than the reallocation of losses from insolvent defendants who were unable to pay their “fair share.” *Id.*

doctrine. They find it enjoyable to debate the theories of liability. Damages, for the most part, have been considered too pedestrian to merit the attention of serious scholars. It is a subject to be left to a course entitled Ambulance Chasing 101. Moreover, courts that left without a compass have fallen back on an empty verbalization as the standard for judicial review. Without a tolerable jurisprudence of damages, the distinction between "punitive" and "compensatory" has become blurred.¹¹ The reality is that the subject of tort damages is worthy of intense academic and judicial inquiry. It is a public law question of the first order. Until tort damages are examined in all their detail, a comprehensive evaluation of punitive damages will be impossible.

III. FROM THE PRISM OF INTENT

Most design defect cases are essentially intentional tort cases. Very few cases today result from "inadvertent design errors."¹² Cases where manufacturers simply fail to adequately design a product for its normal intended use are rare.¹³ Although such cases existed in the early days of product liability law, few sophisticated manufacturers in the modern era make such egregious errors. The cases that fill the reporters today are "conscious design choice" cases, all of which implicate a manufacturer's decisionmaking process concerning risk-utility.¹⁴ Manufacturers engaging in risk-utility balancing are charged with doing so improperly. In these cases, plaintiffs allege that had the defendant-manufacturers properly assessed risk and utility, such manufacturers would have been able to implement a reasonable alternative design and would have avoided

11. Sheila Birnbaum, Remarks at the *Villanova Law Review* Symposium: Punitive Damages Awards in Product Liability Litigation: Strong Medicine or Poison Pill? (Oct. 30, 1993) (transcript on file with the *Villanova Law Review*). Birnbaum asserts that large punitive damage awards interfere with the goal of compensation and should only be awarded once. *Id.* Punitive damages are not necessary for deterrence purposes because the threat of mass litigation and the potential for insolvency function as deterrents. *Id.*

12. The frequency of inadvertent design errors is greatly reduced today as a result of the emphasis on product safety. It is well recognized that such cases are a small percentage of all products liability cases.

13. James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 *COLUM. L. REV.* 1531, 1550 n.70 (1973) (estimating that inadvertent design errors constituted 20-25% of researched cases).

14. *Id.* at 1548. The design engineer consciously decides to accept the risks associated with the intended design in exchange for the increased benefits or reduced costs which justify acceptance of the risks. *Id.*; see, e.g., *Owens v. Allis-Chumbers*, 326 N.W.2d 372, 377 (Mich. 1982) (focusing upon availability of safety option in determining whether option should have been installed as standard equipment).

plaintiffs' injuries.¹⁵ Manufacturers classically defend these cases by arguing that the alternatives suggested could not have been adopted at an acceptable cost.¹⁶ They claim that an alternative would have negatively affected the usefulness of the product or would have otherwise imposed such increases in costs as to prohibit the product's implementation.¹⁷ The authority supporting risk-utility balancing as the governing test for design defect is overwhelming.¹⁸ In many jurisdictions, it is the law.¹⁹

A defendant whose product is found non-defective because it meets the risk-utility test has no worry. However, if a tribunal finds that risk-utility norms have not been met, the defendant is in deep trouble. By definition, risk-utility balancing requires a conscious weighing of alternative designs against the cost of implementing such changes.²⁰ Unlike the standard negligence case of yesteryear, the modern products liability case comes with "intent" built in.²¹

Admittedly, most product design cases do not meet the threshold of grossly negligent or wanton conduct necessary to make out a case for punitive damages.²² Yet, the threat lurks in the back-

15. RESTATEMENT (THIRD) OF TORTS § 2 cmt. c, at 16 (Tentative Draft No. 1, Apr. 1994) [hereinafter THIRD RESTATEMENT]. The plaintiff must prove that adoption of a reasonable alternative design would have reduced the foreseeable risk of harm. *Id.* The risk-utility test is analyzed using an objective standard. *Id.*

16. *Id.* § 2 cmt. c, at 48. If there was no practical alternative design at the time of sale, the product is not deemed defective. For a list of cases holding that a product is not defective because there was not an available alternate feasible design, see RESTATEMENT (THIRD) OF TORTS § 2 cmt. c, at 48-49.

17. *Id.* § 2 cmt. d, at 19. In determining whether the failure to adopt a proposed alternative design renders a product defective, the effects of the implementation of the alternative design on product function and costs of production are relevant factors to be considered. *Id.*

18. *See id.* § 2 cmt. c., at 39 (listing cases that relied upon risk-utility analysis in determining whether product was defective).

19. *Id.* at 39. An overwhelming majority of American jurisdictions use the risk-utility test. *Id.*

20. Aaron D. Twerski, *A Moderate and Restrained Federal Products Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REF. 575, 611 (1985).

21. David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHIC. L. REV. 1, 21 (1982) (noting that courts have chosen to apply more traditional standards of liability such as consciousness, willfulness, maliciousness, wantonness and recklessness).

22. S. REP. NO. 203, 103d Cong., 1st Sess. 75 (1993) (stating that "punitive damages are not a significant factor in product liability cases"). This report noted that, as Professor Eisenberg testified to the Senate Committee on Commerce, Science and Transportation, "[t]here is a widespread perception that punitive damages are awarded frequently and in great amounts [in product liability cases]. Yet, every serious study of the area finds that punitive damage awards are relatively infrequent. . . . [P]unitive damages are awarded in not more than one percent of filed cases." *Id.* (quoting Testimony of Professor Theodore Eisenberg, Cornell Law School, Responses to Post-hearing questions of Senator Rockefeller, at 4-6).

ground. This does not speak for the abolition of punitive damages. It does mean, however, that well articulated standards for punitive damages are necessary and courts must consistently apply them. It is no answer to say that ultimately imprudent punitive damage awards get reversed or drastically reduced.²³ A loose canon is one thing; a loose hydrogen bomb is quite another. It is too scary a weapon to brandish improperly. If punitive damages are to be saved, courts at both the trial and appellate levels will have to treat them with greater respect.

IV. FROM THE PRISM OF TIME

The time dimension in products liability law affects punitive damages in several ways. First, the culprits guilty of truly wanton conduct are rarely around to suffer the sting when punitive damages are assessed.²⁴ If they have not passed on to their heavenly reward (or its opposite), they are usually not around to suffer the indignities and whatever corporate censure is appropriate for malfactors. Even if such culprits are still in existence, the financial burden does not fall upon them individually. I do not find it easy at all to understand why innocent purchasers of stock should have their life savings diminished to punish the misdeeds of corporate executives who have retired to the Riviera. It is one thing to compensate out of corporate assets, it is quite another to punish the innocent—especially when the truly guilty avoid all liability.

Commentators have noted that executives are prone to short-term high-profit decisions and are willing to let others face the consequences years later.²⁵ If that observation is true, how does one

23. See *Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir.) (reducing punitive damage award from \$2 million to \$1 million due to effect of successive punitive damage awards in asbestos litigation), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn*, 114 S. Ct. 650 (1993); see also *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 586 (8th Cir. 1981) (reducing punitive damages award because it was "irrational and excessive").

24. See *Fischer v. Johns-Manville Sales Corp.*, 512 A.2d 466, 476 (N.J. 1986) (noting that "although the responsible management personnel may escape punishment, the corporation itself will not," and that goal of deterrence is served regardless of change of personnel); *Johns-Manville Sales Corp. v. Janssens*, 463, So. 2d 242, 252 (Fla. Dist. Ct. App. 1984) (dismissing corporation's argument that punitive damage award would only punish current management who had nothing to do with wrongdoing because, "a corporate entity continues to be liable for its past tortious acts, regardless of any change in its ownership, its directors, or the personnel through whom it acts").

25. See, e.g., Alan Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689, 710-11 (1985) (noting that corporations operating without insurance make substantial profit during accident-free period). Schwartz asserts that firms operating without

effectively deter such conduct? Taking it out on the whipping boy may assuage some primitive feeling of anger, but it is hardly civilized behavior. More attention will have to be paid to direct criminal sanctions for the more outrageous forms of corporate behavior.²⁶ When people or corporate entities malevolently withhold information or falsify test results, they should be prosecuted; as should those who act with complicity to conceal the truth. Once again, it is no answer to say that, to date, there has been little activity in that direction. If a message has to be sent, it should be addressed to the right party.

Care must also be taken to ensure that our sense of outrage reflects the social values existing at the time the outrageous or wanton conduct took place. Many of the cases in which punitive demands have been made involve toxic torts, where injuries arise after long latency periods.²⁷ In these circumstances, judges and juries should not blindly apply contemporary attitudes toward safety to risk-utility decisions made over twenty years ago;²⁸ finding conduct that at the time was simply negligent to be wanton and grossly negligent. Citizens cannot, of course, divest themselves entirely of our present day cultural attitudes, but if society seeks to punish for malevolence it had best be sure not to try these cases with new found religion.

insurance will be forced to dissolve when faced with large uninsured liabilities. *Id.* at 711.

26. See W. Allen Spurgeon & Terence P. Fagan, *Criminal Liability for Life-Endangering Corporate Conduct*, 72 J. CRIM. L. & CRIMINOLOGY 400 (1981) (suggesting that criminal sanctions may deter corporations from participating in harmful conduct); see also E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct*, 40 ALA. L. REV. 1053, 1060 (1989) (asserting that criminal sanctions against individual corporate employees responsible for wrongful decisions may be effective in deterring outrageous misconduct).

27. Toxic tort cases dealing with asbestos and Agent Orange were coupled with demands for punitive damages. See e.g., *Fischer v. Johns-Manville Sales Corp.*, 512 A.2d 466 (N.J. 1986) (upholding award of punitive damages in asbestos mass-tort litigation occurring years after exposure to asbestos); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 902, 908 (E.D.N.Y. 1991) (affirming \$180 million settlement to class members for injuries resulting from exposure to Agent Orange during Vietnam War). For a thorough analysis of the Agent Orange litigation and settlement decision, see PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

28. See, e.g., HENDERSON & TWERSKI, *supra* note 9, at 622-24 (recognizing increased public sensitivity towards product-related risks as result of 1960's Nader Revolution). See generally M. DOUGLAS & A. WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS* (1982) (suggesting that society's attention to certain risks are culturally determined and often unrelated to true magnitude of problem).

V. FROM THE PRISM OF EXPERIENCE

My own experience leads me to believe that punitive damages do play a deterrent role, albeit in a set of cases very different from those that have received notoriety. Manufacturers of products that have low utility and moderate risk attached to their use are deeply concerned with the possible impact of punitive damages.²⁹ In many instances, the products are faddish and hold the potential for enormous short-range profits. Frankly, these manufacturers are quite willing to take their chances with compensatory damages. From their perspective, the possible range of damage is not sufficiently high to warrant the adoption of more stringent safety features.³⁰ The specter of punitive damages gives them pause.

Manufacturers of products that have substantial risk and high utility are probably less affected by punitive damages in their decision making.³¹ These manufacturers are fully aware of the enormous impact that compensatory damages will have upon poor risk-utility decisions. Thus, the punitive damages threat may be directed against the wrong class of manufacturers, while having its maximum impact on the decisionmaking of manufacturers whose products never see the light of day.

VI. FROM THE PRISM OF MORALITY

Though the twin goals of deterrence and retribution provide some support for the imposition of punitive damages, it is difficult to counter the critics who argue that punitive damages do not provide adequate grounds for recovery in mass tort cases.³² I believe,

29. The observation with regard to products liability is that of the author, taken from personal experience. A close analogy can be drawn to cases that awarded punitive damages for contract and business losses, where punitive damages had a powerful deterrent effect because compensatory damages were low enough to have been an acceptable risk for the defendant to take. *See e.g.*, TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2718 (1993) (upholding \$10 million punitive damages award in slander of title action, which was 526 times greater than \$19,000 compensatory damages awarded by jury); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991) (finding punitive damages award against insurer, that was four times amount of compensatory damages and more than two hundred times out-of-pocket expenses of insured, to be constitutional).

30. *See, e.g.*, Owen, *supra* note 21, at 16 (noting difficulty in determining culpability of automobile manufacturer because use of high-utility product will result in death regardless of intentional design).

31. *See* Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 934 (1989) (recognizing that after estimation of compensatory damages, there remains no incentive to use defective model).

32. *See* Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415, 418-19 (1994) (suggesting that punitive damages are unnecessary to

however, that tort law in this country plays another role. It is uniquely American. A mass tort case is a passion or morality play. It speaks to the conscience of the country and asks whether we have gone badly astray. It examines values and probes motives; and when it is completed, it has a cathartic effect.³³ When courts speak of punitive damages as reflecting a sense of outrage, they utter an important truth: when society bears witness to truly outrageous conduct it must react. Swift and certain justice is necessary not only because it will deter future wrongdoers, but also because it substantiates society's intolerance for malevolent corporate behavior that brings injury to thousands.

For better or worse, the American judicial theater plays a role in our society that has no parallel in any other country. It is not only a place to resolve disputes, it is a dynamic and powerful organ of creative government.³⁴ When the morality play has been set forth in all its gory detail, and when the actors have been found to be truly malevolent, the moral conscience cannot be complacent. It must speak out. The courthouse is the bully pulpit, and the jury is the body politic, speaking in echo chamber voice through its representatives. It is tempting to say, as I did earlier, that we need to develop criminal sanctions for the malfactors. However, that is unacceptable to those who, through a lengthy trial, bore witness to evils which they believed should not have been countenanced by

promote deterrence); Birnbaum, *supra* note 11 (arguing that compensatory damages effectively promote deterrence); *see also* Owen, *supra* note 1, at 389-96 (suggesting that punitive damages are inappropriate remedy). Owen argues that punitive damages are inappropriate for the following reasons: (1) the impact of punitive damages is avoided through insurance; (2) the effect of punitive damages is transferred to third parties through vicarious liability, governmental liability and insurance; (3) society does not receive any monetary benefit from the plaintiff's award; and (4) the award may result in a company's dissolution, thereby denying future plaintiffs any recovery. *Id.*

33. *See* SCHUCK, *supra* note 27, at 257 (examining several meanings that American society placed upon Agent Orange litigation). Schuck suggests that for American society, the case was an effort to: (1) understand the Vietnam War; (2) recognize the risks accompanied by the chemical revolution of the 1970s; and (3) achieve justice for Vietnam veterans suffering from physical and psychological conditions caused by the war. *Id.* at 255-57. Furthermore, the fairness hearings conducted by Judge Weinstein after the finalization of the settlement expressed society's need to assess blame and voice dissatisfaction concerning the settlement. *In Re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 857 (E.D.N.Y. 1984).

34. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 96-101 (1899). The involvement of the American legal system in public policy issues is unique. The partnership that exists between the judiciary and the legislature has been involved in a range of controversial public policy issues including abortion, the Vietnam War, environmental issues and nuclear energy. *Id.*

decent people anywhere. They are impelled to react, and punitive damages provide the voice for their outrage.

VII. CONCLUSION

Few commentators believe that all is well with punitive damages.³⁵ It is not a trouble free doctrine. The doctrine is larger than life and has withstood some powerful attacks.³⁶ For all of the trouble associated with the punitive damage doctrine, it will not go away. Although it may be curtailed or refined at times; the doctrine has staying power.³⁷ If I am right that it serves as a voice of outrage for the body politic, then courts have a duty to assure that only cases that truly fit the profile of outrageousness are awarded punitive damages.³⁸ If normal risk-utility errors are allowed to serve as a predicate for punitive damages, the morality message will be lost. Labelling every day errors in judgment as outrageous because results turned out worse than expected is not only unfair, but ultimately waters down the moral message. The contributors to this symposium have provoked me to think about this subject and to

35. See Fieweger, *supra* note 3, at 782-83 (discussing constitutional and procedural problems associated with punitive damages). For a brief discussion of the history fueling the controversy over the propriety of punitive damages, see *id.* at 782 n.40. Additionally, for a review of scholarly works that discuss the appropriateness of punitive damages, see Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 VA. L. REV. 269, 269 n.1 (1983).

36. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (holding that punitive damages are not per se unconstitutional); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (holding that Eighth Amendment did not apply to punitive damages in civil proceedings). For scholarly commentary, see Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975 (1989) (arguing that procedure for determining punitive damages violates due process); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986) (arguing that repetitive punitive damages violate due process and Eighth Amendment); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COL. L. REV. 142 (1991) (arguing that discretionary nature of punitive damages violates Seventh Amendment); Wheeler, *supra* note 35, at 273, 374-345 (discussing due process challenge and Fourth, Fifth and Sixth Amendment challenges); Thomas P. Mannion, Note, *The Constitutionality of Punitive Damages*, 25 AKRON L. REV. 273 (1991) (reviewing constitutional challenges to punitive damages).

37. HENDERSON & TWERSKI, *supra* note 9, at 304 (noting that punitive damages have withstood Constitutional attacks and predicting that they will "remain part of the American tort scene").

38. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2713 (1993) (holding that \$10 million punitive damage award is not so "grossly excessive" as to violate due process). It was reasonable for the jury to conclude that TXO acted in bad faith, participated in fraudulent and deceitful conduct, and engaged in trickery. *Id.*; see also Owen, *supra* note 21, at 27 (arguing that punitive damages are appropriate only in cases of "extreme departure from accepted safety norms in the particular industry"). Owen argues that manufacturers must be given leeway in making "good faith mistakes." *Id.*

ponder its complexities. Read on. Read on. You will be the wiser for it.