

Winter 1992

Loitz v. Remington Arms Co.: The Illinois Supreme Court Sets a Tougher Standard for Reviewing Punitive Damage Awards in Products Liability Cases, 25 J. Marshall L. Rev. 427 (1992)

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Recommended Citation

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CASENOTE

LOITZ v. REMINGTON ARMS CO.:* THE ILLINOIS SUPREME COURT SETS A TOUGHER STANDARD FOR REVIEWING PUNITIVE DAMAGE AWARDS IN PRODUCTS LIABILITY CASES

Courts award punitive damages in products liability cases to punish the defendant's conduct and deter the defendant and others from engaging in similar conduct.¹ In Illinois, the trial judge ini-

* 563 N.E.2d 397 (Ill. 1990).

1. Punitive damages have also been referred to as "vindictive" or "exemplary" damages, or as "smart money" ("smart" as in sting or hurt), and are awarded in tort actions beyond the amount required to compensate the plaintiff, most often when the defendant's conduct is the result of malice or recklessness. See, e.g., CHARLES T. MCCORMICK, DAMAGES §§ 77-85 (1935); JABEZ G. SUTHERLAND, DAMAGES §§ 390-412 (4th ed. 1916); THEODORE SEDGWICK, MEASURE OF DAMAGES §§ 347-88 (9th ed. 1912).

Punitive damages in the common law evolved from the concept of multiple damages, which were recognized in Roman and Mosaic law. Multiple damages provided a recovery greater than the actual loss suffered. In Roman law, multiple damages were always awarded for the actions of *metus* and *quasi ex delicto*. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 217-22 (1977). The action called *metus*, or duress, allowed up to four times the actual loss where one was induced by threat to act against his own interests, and *quasi ex delicto* awarded double recovery where damage was caused to person or property by an occupier of a building throwing or pouring anything out of the building. *Id.* at 223-25. In Mosaic law, multiple damages were common for offenses like stealing. "If a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep." *Exodus* 22:1. Also, multiple damages appeared in the common law in the Statute of Gloucester, 1278, 6 Edw. I, c. 5, which awarded treble damages for waste. See Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518 (1957) [hereinafter Note, *Exemplary Damages*].

Punitive damages originated in the common law as a means of justifying awards of damages in excess of the plaintiff's actual loss. George T. Washington, *Damages in Contract at the Common Law*, 47 L. Q. REV. 345, 351 (1931). However, award amounts soon got out of hand, and by the late 1600's, courts began exercising the power to set aside excessive verdicts in tort actions. See, e.g., *Wood v. Gunston*, 82 Eng. Rep. 867 (K.B. 1655) (£ 1,500 verdict for slander set aside, counsel described jury as a "packed business"); *Ash v. Lady Ash*, 90 Eng. Rep. 526 (K.B. 1696) (£ 2,000 verdict set aside in part for jury misconduct).

The first recorded award of punitive damages in the common law appeared in *Wilkes v. Wood*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763). Wilkes published a pamphlet that was claimed to be libelous to the King, and the King had Wilkes' house searched. The King seized property on a general warrant, and when Wilkes sued for trespass, he was awarded punitive damages. *Wilkes*, 95 Eng. Rep. at 768. In *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 769 (C.P.

1763), the plaintiff brought an action for trespass, assault and false imprisonment after being wrongfully arrested. *Id.* The jury awarded the plaintiff £ 300 in damages, and Lord Camden refused to set aside the verdict as excessive, after conceding that the actual damages were no more than £ 20, saying:

[I] think they have done right in giving exemplary damages. To enter a man's home by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no English-man would wish to live an hour; it was a most daring attack upon the liberty of the [plaintiff].

Huckle, 95 Eng. Rep. at 769.

The courts at this time emphasized that punitive damages were imposed as compensation for hurt feelings and wounded dignity, which were not legally compensable at common law. See, e.g., Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1160-61 (1966) [hereinafter Note, *Imposition of Punishment*]; Note, *Exemplary Damages*, *supra*, at 519. This was illustrated in *Tullidge v. Wade*, 3 Wils. K.B. 18, 95 Eng. Rep. 909 (C.P. 1769), where punitive damages were awarded to the plaintiff after the defendant seduced the plaintiff's daughter in the plaintiff's home. Judge Bathurst stated: "In actions of this nature, and of assaults, the circumstances of time and place, when and where the insult is given, require different damages, as it is a greater insult to be beaten upon the Royal Exchange than in a private room." *Id.* at 910.

However, deterrence of the wrongdoer also began to appear as the theory behind a punitive damages award. For instance, in *Tullidge*, Lord Chief Justice Wilmut stated: "Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages." *Id.* at 909. Also, in *Merest v. Harvey*, 5 Taunt. 442, 128 Eng. Rep. 761, 761 (C.P. 1814), Justice Heath discussed deterrence as a reason for awarding punitive damages:

I remember a case where the jury gave £ 500 damages for merely knocking a man's hat off; and the courts refused a new trial. There was not one country gentleman in a hundred who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages.

In contrast to the English ambivalence over whether punitive damages serve a deterrent or a compensatory function, it is well-settled in this country that punitive damages are non-compensatory in character. Note, *Exemplary Damages*, *supra*, at 520. Since the award of actual or compensatory damages in tort are available for mental anguish and indignity, the award of punitive damages for these wrongs would be redundant. In fact, only three states assign punitive damages any compensatory function: 1) Connecticut: see, e.g., *Doroszka v. Levine*, 150 A. 692, 693 (Conn. 1930) (purpose of punitive damages is not punishment of defendant, but compensation of plaintiff for injury); 2) Michigan: see, e.g., *Wise v. Daniel*, 190 N.W. 746 (Mich. 1922); and 3) New Hampshire: see e.g., *Fay v. Parker*, 53 N.H. 342 (1872) (Michigan and New Hampshire allow wounded feelings, injured dignity, and sense of outrage at defendant's conduct to increase the amount of compensation available through punitive damages). See also KENNETH R. REDDEN, PUNITIVE DAMAGES §§ 2.2-2.3(A), at 24-32 (1980).

Other states, including Illinois, award punitive damages for the purposes of deterrence and punishment. See e.g., *Eshelman v. Rawalt*, 131 N.E. 675, 677 (Ill. 1921) (punitive, vindictive, or exemplary damages assessed and allowed in the interest of society in the nature of punishment, and as a warning to deter defendant and others from committing like offenses in the future); *Consolidated Coal v. Haenni*, 35 N.E. 162 (Ill. 1893) (exemplary damages given as punishment when torts are committed with fraud, actual malice, deliberate violence or oppression, where defendant acts wilfully, or with such gross negligence as to indi-

tially decides whether to impose punitive damages² by deciding

cate a wanton disregard of the rights of others). See also RESTATEMENT (SECOND) OF TORTS, § 908(1) & cmt. a, at 464 (1979).

Four states do not allow punitive damages: 1) Louisiana: see, e.g., Ricard v. State, 390 So. 2d 882, 884 (La. 1980); 2) Massachusetts: see, e.g., Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir. 1968), cert. denied, 393 U.S. 940 (1968); 3) Nebraska: see, e.g., Prather v. Eisenmann, 261 N.W.2d 766, 772 (Neb. 1978); and 4) Washington: see, e.g., Kammerer v. Western Gear Corp., 618 P.2d 1330, 1337 (Wash. Ct. App. 1980), aff'd, 635 P.2d 708 (Wash. 1981). Connecticut limits punitive damage awards in products liability cases to twice the amount of compensatory damages. CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1981). See *infra* notes 14 and 60 for Illinois statutes that apply to punitive damage awards in products liability cases.

As of 1986, 22 jurisdictions allowed insurance companies to provide coverage against punitive damage judgments: Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Iowa, Kentucky, Maryland, Mississippi, New Hampshire, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia and Wisconsin. See Steven G. Schumaier & Brian A. McKinsey, *The Insurability of Punitive Damages*, 72 A.B.A. J. 68, 69 (1986). Eight states prohibit insurance coverage of punitive damages: California, Colorado, Kansas, Maine, Minnesota, New York, North Dakota and Idaho. *Id.* Illinois allows insurance coverage for punitive damages in the case of vicarious liability only. *Id.*

The first reported punitive damages award in this country was *Genay v. Norris*, 1 S.C. 3, 1 Bay 6 (1784). David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1263 (1976). In *Genay*, the plaintiff became ill after drinking a glass of wine which the defendant, a physician, had adulterated with cantharides (Spanish Fly) as a practical joke. *Id.* at 1263 n.20. There were two early decisions awarding punitive damages in what may be called "products liability" cases. The first was *Fleet v. Hollenkamp*, 52 Ky. 175, 13 B. Mon. 219 (1852), where the plaintiff sued for damages resulting from the sale of an adulterated drug. *Id.* The second was *Standard Oil v. Gunn*, 176 So. 332 (Ala. 1937), where the plaintiff brought action for breach of contract and deceit for damages to his car due to the sale of low-grade oil to him by defendant's agent, who also misrepresented the oil as being high-grade. *Id.* The Alabama Supreme Court upheld the award of punitive damages, but on the grounds of deceit. *Id.* at 334.

It was not until *Toole v. Richardson-Merrell, Inc.*, 60 Cal. Rptr. 398 (Cal. Ct. App. 1967), that punitive damage awards in products liability suits gained significant recognition. In that case the defendant sold a cholesterol-lowering drug, triparanol, also known as MER/29, which had the undisclosed side effect, known to the defendant, of producing cataracts in a high proportion of users. *Id.* at 417. The initial punitive damages award was \$500,000, but was reduced by remittitur to \$25,000. *Id.* at 418. See also KENNETH R. REDDEN, PUNITIVE DAMAGES § 4.2(A)(2), at 82-86 (1980); Michael C. Garrett, Note, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613, 616-26 (1972); Emanuel Emroch, *Caveat Emptor to Strict Liability: One Hundred Years of Products Liability Law*, 4 U. RICH. L. REV. 155, 157-62 (1970).

2. Illinois initially recognized the dual nature of punitive damages as the English courts did. See *McNamara v. King*, 7 Ill. (2 Gilm.) 432, 437 (1845), where the court stated that the function of punitive damages is "not only to compensate the plaintiff, but to punish the defendant." See also *Foote v. Nichols*, 28 Ill. 486 (1862). Then, as courts began to award actual damages for intangible harm, the courts focused on the punitive aspect of applying the doctrine. See *Hawk v. Ridgeway*, 33 Ill. 473, 476 (1864) ("Where the wrong is wanton, or it is willful, the jury is authorized to give an amount of damages beyond the actual injury sustained, as a punishment, and to preserve the public tranquility.").

Today, the purpose of punitive damages in Illinois is punishment and deterrence. *Mattyasovszky v. West Towns Bus Co.*, 330 N.E.2d 509, 511 (Ill. 1975).

whether the defendant's conduct is either "willful and wanton"³ or shows a "flagrant indifference to the public safety."⁴ Traditionally,

Since this purpose is similar to that of a criminal penalty, the judge is charged with determining whether the plaintiff has proved misconduct aggravated enough to present the issue of punitive damages to the jury. *Id.* at 512. See *Lipke v. Celotex Corp.*, 505 N.E.2d 1213, 1218 (Ill. App. Ct. 1987); *O'Brien v. State St. Bank & Trust Co.*, 401 N.E.2d 1356, 1357 (Ill. App. Ct. 1980), *appeal denied*, 503 N.E.2d 876 (Ill. 1986). See also *Eshelman v. Rawalt*, 131 N.E. 675, 677 (Ill. 1921) (judge must not let plaintiff "characterize the acts of the defendant with degrees of enormity and turpitude which the law does not affix to them.")

3. "Wilful and wanton misconduct" is the traditional Illinois standard to determine whether a defendant is liable for punitive damages. "[I]t has been defined in myriads of cases, each one reiterating or embellishing the phraseology of its predecessors." *Hering v. Hilton*, 147 N.E.2d 311, 313 (Ill. 1958). See, e.g., *Schneiderman v. Interstate Transit Lines*, 69 N.E.2d 293, 300 (Ill. 1946) (the injury must be intentional, or exhibit "a reckless disregard for the safety of others, such as failure after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care"); *Bartolucci v. Falleti*, 46 N.E.2d 980, 983 (Ill. 1943) ("An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person, and property of others, such as exhibits a conscious indifference to consequences"); *Bresland v. Ideal Roller & Graphics Co.*, 501 N.E.2d 830, 839-40 (Ill. App. Ct. 1986) ("Where an act is performed with intent or with a conscious disregard or indifference for the consequences when the known safety of other persons is involved, even constructive knowledge concerning those persons is sufficient for a finding of wilful and wanton misconduct").

4. The award of punitive damages within the context of a products liability case presents unique problems. The defendants are generally manufacturers, frequently large national concerns, which command little sympathy from jurors. Ascribing the human qualities of intent, malice, and willfulness to corporate entities is often paradoxical. See, e.g., *Boddie v. Litton Unit Handling Sys.*, 455 N.E.2d 142, 152 (Ill. App. Ct. 1983); *Owen*, *supra* note 1, at 1361-66. *Owen* identified two fundamental types of manufacturer misbehavior which most often result in the imposition of punitive damages: (1) the manufacturer's lack of concern for the public safety, a spirit of utter indifference to whether the product might cause unnecessary injuries; and (2) the flagrancy of this indifference as reflected by the extent of the manufacturer's awareness of the danger, the magnitude of the danger to the public, the ease of reducing the risk, and the motives underlying the manufacturer's failure to reduce the risk. *Id.* at 1366. *Owen* then proposed assessing punitive damages against a manufacturer of a product injuring the plaintiff if the injury is attributable to conduct which reflects a flagrant indifference to the public safety. *Id.* at 1366-67. *Owen's* contention is that this new definition will limit punitive damages in mass tort situations because the plaintiff must prove "flagrant" misconduct, a more specific standard of proof. *Id.* at 1368-69. However, most plaintiffs in mass tort cases are forming groups to pool information and evidence, and can now meet the new standard more easily. See Ann G. Pietrick, Note, *Punitive Damages in Mass Tort Litigation*, 32 DEPAUL L. REV. 457, 471-72 (1983). Moreover, another commentator has criticized *Owen's* use of "flagrant" as being equally as broad a term as those currently employed. Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 51 (1982).

The "flagrant indifference" standard was first applied in an Illinois products liability case in *Moore v. Remington Arms Co.*, 427 N.E.2d 608, 617 (Ill. App. Ct. 1981). The Illinois Supreme Court will assess evidence under either the "flagrant indifference" or the "wilful and wanton" standard. See *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 407 (Ill. 1990); *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating*, 516 N.E.2d 260, 263 (Ill. 1987).

a plaintiff could meet this burden, and submit the issue of punitive damages to the jury, by presenting evidence of prior occurrences of similar injuries with the same product.⁵ This evidence was sufficient to show that the defendant had prior knowledge of the defect, that the defect caused injury, and that the defendant failed to warn the plaintiff or remedy the defect.⁶ However, the Illinois Supreme

5. See, e.g., *Davis v. International Harvester Co.*, 521 N.E.2d 1282, 1289 (Ill. App. Ct.) (court properly directed verdict for defendant on punitive damages claim because plaintiff failed to produce evidence that defendant had received complaints of similar accidents, thus failing to establish that defendant was aware of the defect), *appeal denied*, 530 N.E.2d 242 (Ill. 1988); *Collins v. Interroyal Corp.*, 466 N.E.2d 1191, 1200 (Ill. App. Ct. 1984) (evidence of prior lawsuits against defendant for injuries due to collapse of defendant's stool was held admissible to show that defendant had notice of the defect before plaintiff was injured); *Stambaugh v. International Harvester Co.*, 435 N.E.2d 729, 743 (Ill. App. Ct. 1982) (evidence of prior tractor fires was held properly admitted to disprove expert testimony showing the integrity of tractor fuel cap), *rev'd on other grounds*, 464 N.E.2d 1011 (Ill. 1988); *Moore v. Jewel Tea Co.*, 253 N.E.2d 636, 645 (Ill. App. Ct. 1969), (prior evidence of spontaneous explosions of cans of Drano is competent evidence to show the common cause of the accidents is a dangerous and unsafe thing, and to show notice of this to the defendant), *aff'd*, 263 N.E.2d 103 (Ill. 1970).

6. See *Bastian v. TPI Corp.*, 663 F. Supp. 474, 476-77 (N.D. Ill. 1987) (defendant's motion to dismiss punitive damages claim denied because plaintiff provided evidence that defendant had notice of three prior fires involving its baseboard heater; court stated that a manufacturer's awareness that its product poses a danger coupled with a failure to act to reduce the risk amounts to willful and wanton misconduct); *J.I. Case Co.*, 516 N.E.2d at 263 (plaintiff's evidence of prior accidents involving the machinery that injured plaintiff was too dissimilar from plaintiff's accident to constitute notice to defendant of plaintiff's accident); *Bass v. Cincinnati*, 536 N.E.2d 831, 835 (Ill. App. Ct.) (evidence of prior occurrences admissible to show that defendant was on notice of a dangerous condition in its product which would probably result in further injury if nothing was done, and to establish that defendant was aware of the dangerous condition at the time of plaintiff's injury and failed to act to lessen or eliminate the danger to plaintiff), *appeal denied*, 545 N.E.2d 105 (Ill. 1989); *Elliott v. Sears, Roebuck & Co.*, 527 N.E.2d 574, 578 (Ill. App. Ct.) (trial court properly directed verdict for defendant on wilful and wanton misconduct count because plaintiff presented no evidence to show defendant had notice of defect in product prior to plaintiff's injury), *appeal denied*, 535 N.E.2d 400 (Ill. 1988); *Collins*, 466 N.E.2d at 1200 ("[Defendant's] decision to place into the stream of commerce, without warning, a stool known to be defective and to have caused injury, clearly demonstrates a conscious disregard for the safety of others. The jury's verdict finding [defendant] guilty of wilful and wanton conduct is supported by the evidence."); *Ogg v. City of Springfield*, 458 N.E.2d 1331, 1342 (Ill. App. Ct. 1984) (evidence of one prior accident involving defendant's product was relevant to show defendant's prior knowledge of the dangerous condition of the product, but punitive damages reversed because the claim does not survive death of plaintiff's decedent); *Boddie*, 455 N.E.2d at 152 (summary judgment for defendant on wilful and wanton count reversed given evidence that defendant knew a totally enclosed guard for machine that injured plaintiff was safer than the open guard defendant actually supplied); *Stambaugh*, 435 N.E.2d at 746-47 (punitive damages affirmed because defendant was alerted to occurrence of prior tractor fires. This was sufficient to raise jury question as to whether defendant exhibited conscious indifference to its duty toward users of tractors); *Galindo v. Riddell, Inc.*, 437 N.E.2d 376, 384 (Ill. App. Ct. 1982) (new trial ordered because of error in permitting plaintiff to present evidence showing that defendant had notice of the dangerous condition of its product prior to

Court changed the plaintiff's customary burden of proof in *Loitz v. Remington Arms Co.*⁷

In *Loitz*, the court decided that evidence of ninety-four prior shot gun explosions was insufficient for the plaintiff to show that the defendant had prior notice of a defect in the barrel.⁸ The court reversed a \$1.6 million punitive damage award to the plaintiff.⁹ Three justices dissented, stating that the majority's re-evaluation of the evidence invaded the province of the jury.¹⁰ The *Loitz* decision means that plaintiffs in Illinois products liability cases must now do more than establish that the defendant had notice of a defect by proof of prior similar occurrences. Also plaintiffs must now show that the defendant had actual knowledge that the defect caused plaintiff's injuries.¹¹

On June 19, 1983, Robert Loitz was competing in a trapshooting meet at a gun club near Newman, Illinois, when the barrel of his Remington Model 1100 shotgun exploded.¹² Loitz sustained injuries to his left hand and incurred special damages of \$5000 in medical expenses and lost time from work.¹³ Loitz subsequently sued Remington, alleging negligence, wilful and wanton misconduct and

plaintiff's accident, without defendant being allowed to rebut by presenting its evidence of state of the art in manufacturing its product); *Moore v. Remington Arms Co.*, 427 N.E.2d 608, 615 (Ill. App. Ct. 1981) (purpose of admission of prior occurrences to establish punitive damages in products liability cases is to show that the manufacturer had or should have had knowledge of harm inflicted on consumers by its product, and with flagrant indifference to public safety failed to warn consumers or remedy the defect); *Johnson v. Amerco, Inc.*, 409 N.E.2d 299, 316 (Ill. App. Ct. 1980) (trial court did not abuse discretion in refusing to admit evidence of two prior accidents in support of plaintiff's punitive damages claim, due to uncertainty over the extent of plaintiff's conduct in causing the accident); *Jewel Tea Co.*, 253 N.E.2d at 649 (defendant's knowledge of potential danger of product, notice to defendant of prior claims of spontaneous explosions of Drano cans, and failure to warn public as defendant did its own employees presented a jury question to determine whether defendant was guilty of wilful and wanton misconduct).

7. 563 N.E.2d 397 (Ill. 1990). Loitz filed a petition for rehearing before the court. However, that petition was denied. *Loitz*, 563 N.E.2d at 397. See also Beger, *Higher Standard of Proof Now Required of Plaintiff in Products Cases to Submit Issue of Punitive Damages to the Jury*, 26(3) TORT TRENDS 5, 6 (Ill. State Bar Ass'n 1990).

8. *Loitz*, 563 N.E.2d at 404.

9. *Id.* at 407.

10. *Id.* at 410.

11. See Beger, *supra* note 7, at 6.

12. *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 398 (Ill. 1990). The Remington Model 1100 semi-automatic, gas-operated, 12-gauge shotgun is intended for target shooting and hunting game. *Id.* at 399. Loitz's shotgun was manufactured by Remington in 1972. *Id.* Loitz bought the gun secondhand in 1972 and had no problems with it until the accident which caused his injury. *Id.* Loitz was an experienced marksman and had fired more than 60 rounds in the trapshooting competition before the barrel of his shotgun exploded. *Id.*

13. *Id.* at 399. Loitz underwent reconstructive surgery on his left hand, and his recovery is complete. *Id.*

strict liability in tort, and requested compensatory and punitive damages.¹⁴

At trial, Loitz used expert testimony to attempt to prove the barrel of the Model 1100 shotgun was defective.¹⁵ Loitz also introduced evidence of ninety-four prior barrel explosions that resulted in personal injuries to show that Remington had sufficient notice of the defect to justify an award of punitive damages.¹⁶ Remington

14. *Id.* at 398-99. The trial court entered summary judgment for Remington on the strict tort liability count. *Id.* at 399. Under the Illinois statute of repose, a strict products liability action is barred if the product caused the injury more than 12 years after the date of first sale, delivery or possession by a seller, or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer or other non-seller. ILL. REV. STAT. ch. 110, para. 13-213(b) (1987). Loitz's strict liability action was barred because the barrel explosion (in 1983) occurred more than 10 years after Loitz acquired the gun secondhand (in 1972). *Loitz*, 563 N.E.2d at 399.

This statute has been construed as extinguishing the right of action before it arises, in contrast to a statute of limitations, which governs the time within which lawsuits may be commenced after a cause of action has accrued. *Elliott v. Sears, Roebuck & Co.*, 527 N.E.2d 574, 580 (Ill. App. Ct.), *appeal denied*, 535 N.E.2d 400 (Ill. 1988). The *Elliott* Court further stated:

[The statute of repose] does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action from ever arising. Thus injury occurring more than 10 years after the negligent act allegedly responsible for the harm, forms no basis for recovery. The injured party literally has no cause of action. The harm that has been done is *damnum absque injuria* - a wrong for which the law offers no redress. The function of the statute is thus rather to define substantive rights rather than to alter or modify a remedy. The Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed.

Id. at 580.

15. *Loitz*, 563 N.E.2d at 399-400. Loitz's expert witness was Dr. David Levinson, a professor of metallurgy at the University of Illinois at Chicago. *Id.* at 399. Levinson's theory was that the Remington Model 1100 shotgun barrel exploded because of a fatigue failure in the steel, in response to the firing of a normal pressure shotgun shell. *Id.* Normal shotgun shells produce intra-barrel pressures ranging between 18,000 and 22,000 psi (pounds per square inch). *Id.* Levinson believed that the steel Remington used in its Model 1100 barrels (American Iron and Steel Institute (AISI) 1140 modified steel) was not a suitable material for use as a shotgun barrel. *Id.* Levinson explained that AISI 1140 modified steel has a relatively high sulfur content, which permits the formation of manganese sulfide inclusions in the gun barrel when it is machined. *Id.* Manganese sulfide inclusions weaken the steel and permit the formation of fatigue cracks, which can then cause the barrel to explode when a normal pressure shell is fired. *Id.*

16. *Id.* at 400. The parties stipulated that by the time of Loitz's accident in June, 1983, Remington had received notice of ninety-four other barrel explosions involving Model 1100 shotguns that resulted in personal injuries. *Id.* Over Remington's objection, Loitz was permitted to present testimony of three persons whose accidents were among the ninety-four reported to Remington. *Id.* Nicholas King stated that he was using a "reloaded" shell when his gun barrel exploded, but Terry Glover and Delores Moore stated that they were using factory-made shells. *Id.* See *infra* note 18 for a discussion of the distinction between a reloaded shell and a factory-made shell.

Delores Moore was the plaintiff in a previous suit against Remington. *Moore v. Remington Arms Co.*, 427 N.E.2d 608, 609 (Ill. App. Ct. 1981). Moore was awarded \$161,288.79 in compensatory damages for her injuries. *Id.* The

maintained that the barrel explosion was not due to a defect in the barrel,¹⁷ but due to the use of a reloaded shell that produced pressures which the barrel was not designed to withstand.¹⁸ Remington's gun examination committee determined that all ninety-four prior barrel explosions were due to abnormally high pressure caused by reloaded shells, but no documentary evidence was available because the committee was disbanded in 1983, and all records were destroyed.¹⁹ Remington's evidence conflicted with that of-

court reversed Moore's punitive damages award of \$85,000, however, when it found that the wording of the interrogatories Moore submitted to Remington requesting information about prior reported accidents was too "generalized and vague." *Id.* at 615. As a result, the court could not be sure that the sixty-seven accidents reported by Remington in response to Moore's interrogatories were "substantially similar to" Moore's accident, thus not allowing the inference that Remington was put on notice of the dangerous nature of the Model 1100 barrel. *Id.*

17. *Loitz*, 563 N.E.2d at 400. Remington's expert witness was Dr. David Hertzberg, a professor of metallurgy at Lehigh University. Hertzberg testified that he had conducted tests on the AISI 1140 modified steel Remington used in the Model 1100 shotgun barrel. *Id.* Hertzberg stated that the tests showed the AISI 1140 modified steel was a safe and suitable material for the purpose it was designed to serve and the range of pressures to which it would normally be exposed. *Id.* See *infra* notes 51-52 for a discussion of the tests Hertzberg conducted on the steel.

18. *Id.* at 399. The Model 1100 shotgun can fire either a factory shell (one made and sold by Remington) or a "reloaded" shell (one made by the shotgun owner on a special machine, using a previously fired shell casing). *Id.* Reloaded shells, being "homemade," are less expensive than factory shells, and are commonly used among competitive shooters. Loitz reloaded his shells on a Ponsness-Warren Model 800-b multi-station reloading machine. *Id.* The primer, powder, wadding and shot are sequentially added to the previously fired casings at different stations on the machine. *Loitz v. Remington Arms*, 532 N.E.2d 1091 (Ill. App. Ct. 1989), *rev'd in part*, 563 N.E.2d 397 (Ill. 1990).

Remington maintained that a reloaded shell producing an intra-barrel pressure of at least 60,000 psi was responsible for Loitz's barrel explosion. *Id.* at 1095. Since normal shells produce pressures ranging from 18,000 to 22,000 psi, Remington suggested that Loitz made a reloaded shell that contained three powder charges instead of one. *Id.* at 1094. Two pieces of evidence were inconsistent with Remington's theory. First, Loitz testified as to his familiarity with the reloading machine. *Id.* He stated that while it was possible to make a human error on the machine, in order to load multiples of any shell component and then load the shell into the gun, one would have to intentionally ignore the safety features of the reloading machine and ignore an improperly crimped shell. *Id.* Second, Glenn Jackson, Remington's reloading expert and former owner of the Ponsness-Warren Co., was unable to make a reloaded shell containing three powder charges on the reloading machine during his trial demonstration. *Id.*

19. James Hutton, Remington's representative at trial, testified that ninety-four similar Model 1100 shotgun barrel explosions were reported to Remington before Loitz's barrel exploded. *Id.* at 1097. Of the ninety-four reports, eighty-nine involved reloaded shells, and five involved people who claimed they were using new, factory-made shells. *Id.* Hutton testified that the barrel explosions would have been impossible if a factory shell was used. *Id.* While not admitting the Model 1100 shotgun barrel was defective, Hutton agreed that it would be a "bad barrel" if it exploded on the firing of a normal pressure shell. *Id.*

James Stekl, Remington's product services representative, testified that the gun examination committee was disbanded in 1983 (and also stated that dur-

ferred by Loitz. Three individuals previously injured in Model 1100 barrel explosions testified on behalf of Loitz. Two of them testified that they had been using factory-made ammunition, which Remington claimed could not have caused a barrel explosion.²⁰ In addition, Remington's "reloaded shell expert" was unable to make a shell that could produce the pressure Remington claimed was necessary to cause a barrel explosion.²¹

The jury returned a verdict for Loitz, awarding him \$75,000 in compensatory damages and \$1.6 million in punitive damages, and the Circuit Court for Douglas County entered judgment on the verdict for Loitz.²² The Illinois Appellate Court affirmed, stating that the punitive damage award was justified by the evidence of the ninety-four prior barrel explosions reported to Remington.²³ In the appellate court's opinion, this evidence supported Loitz's claim that Remington wilfully failed to warn owners of the Model 1100 shotgun of the alleged defect in the barrel.²⁴ The appellate court also

ing some years, the "committee" was composed of only one Remington employee). *Id.* The committee was responsible for examining failed shotguns that were returned to Remington with a complaint. *Id.* No explanation was given by either Hutton or Stekl as to the nature of the investigation procedures the committee used to determine that all ninety-four explosions were due to high-pressure shells. *Id.* Remington destroyed all records on gun complaints three years after the final correspondence, including all gun examination committee records. *Id.* At the time of trial, all documentary evidence supporting Remington's conclusion that high-pressure shells were responsible for the ninety-four reported barrel explosions had been destroyed. *Id.* at 1097.

20. *Id.*

21. *Id.*

22. *Loitz*, 563 N.E.2d at 401.

23. *Loitz*, 532 N.E.2d at 1105-06. The appellate court concluded that Remington's conduct violated the "flagrant indifference to the public safety" standard. *Id.* See *supra* note 4 for further discussion of this standard. The appellate court also stated there was no question of the sufficiency of the evidence in support of a punitive damages award in some amount, regardless of whether the "Pedrick standard" or a manifest weight standard of review was applied. *Id.* See *Pedrick v. Peoria & E.R.*, 229 N.E.2d 504, 513-14 (Ill. 1967). See *infra* note 78 for discussion of the standard of review of jury verdicts in Illinois.

24. *Loitz*, 532 N.E.2d at 1105. It is well-established in Illinois that a defendant can be liable for a failure to warn if the plaintiff establishes that the defendant has a duty to warn. See, e.g., *Kirk v. Michael Reese Hosp. & Medical Ctr.*, 513 N.E.2d 387, 396 (Ill. 1987) (defendant's duty to warn of a product's danger is a function of the reasonable foreseeability of injury to plaintiff, the likelihood of injury to plaintiff, the magnitude of the burden of guarding against it, and consequences of placing that burden on defendant); *Mobile & Ohio Ry. Co. v. Vallowe*, 73 N.E. 416, 417-18 (Ill. 1905) (when danger is known to defendant but unknown to plaintiff, and would not be ascertained by plaintiff in the exercise of ordinary care and prudence, defendant has a duty to warn); *Mazikoske v. Firestone Tire & Rubber Co.*, 500 N.E.2d 622, 626 (Ill. App. Ct. 1986) (manufacturer's failure to warn of product's dangerous propensities may make product unreasonably dangerous; purpose of warning is to apprise party of danger of which he has no knowledge, enabling party to take protective action); *Galindo v. Riddell, Inc.*, 437 N.E.2d 376, 384 (Ill. App. Ct. 1982) (plaintiff can base punitive damage award on defendant's alleged knowledge of the dangerous condi-

determined that the punitive damage award was not excessive.²⁵

The Illinois Supreme Court reviewed the evidence and held that it was sufficient to find Remington negligent, but insufficient to warrant submitting Loitz's claim for punitive damages to the jury.²⁶ Moreover, the court stated that the mere occurrence of prior explosions is not enough to establish Remington's wilful and wanton misconduct.²⁷ The court emphasized that ninety-four prior accidents only amounts to 0.003% of Remington's production of over three million barrels and an even smaller percentage of the number of times each gun was actually fired.²⁸ Thus, the court deferred to Remington's conclusion that all ninety-four prior accidents were due to high pressure shells. In addition, the court stated

tion of its product and its subsequent failure to warn the plaintiff of that danger).

25. *Loitz*, 532 N.E.2d at 1109-10. The test for determining whether a punitive damage award is excessive was first set out in *Hazelwood v. Illinois Cent. Gulf R.R.*, 450 N.E.2d 1199, 1207-08 (Ill. App. Ct. 1983). Under the *Hazelwood* test three factors are considered: 1) the nature and enormity of the wrong; 2) the financial status of the defendant; and 3) the potential liability of the defendant. *Id.* In *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986) the court emphasized that the most important factor in the *Hazelwood* test is the financial position of the wrongdoer, and stated that an immensely profitable defendant would require a relatively higher amount of punitive damages assessed against it for the damages to serve the purposes of punishment and deterrence. *Id.* at 1131.

The appellate court found that the nature and enormity of Remington's wrong was sufficient to justify the amount of punitive damages awarded since there had been detailed testimony about prior, similar occurrences made known to Remington before Loitz's gun barrel exploded, and Remington did nothing to prevent further occurrences. *Loitz*, 532 N.E.2d at 1109-10. With regard to Remington's financial status, the appellate court determined that the punitive damages award was less than 1% of Remington's net worth of over \$160 million. *Id.* The appellate court finally addressed the issue of Remington's potential liability and concluded that the purpose of the \$1.6 million award in penalizing and deterring Remington outweighed any windfall to Loitz. *Id.* The appellate court then stated that it should not necessarily be concerned with the general argument that manufacturers might go out of business, for the activity of a particular manufacturer may be so reprehensible that it ought to be put out of business. *Id.*

The court in *Cash v. Beltmann North Am. Co.*, 900 F.2d 109, 111 (7th Cir. 1990) presented an analysis relating the amount of punitive damage awards to the net worth of defendants. This analysis showed that recent awards are approximately 1% of a defendant's net worth. *Id.* at 111 n.3.

26. *Loitz*, 563 N.E.2d at 401.

27. *Id.* at 404. The court took this statement directly from *Moore v. Remington Arms Co.*, 427 N.E.2d 608, 615 (Ill. App. Ct. 1981) which refers to the "generalized and vague" interrogatories that the plaintiff had submitted to Remington in trying to identify prior reported barrel explosions. The court reversed plaintiff's award of punitive damages in *Moore* because it was based largely on Remington's answer to discovery. *Id.* The discovery request placed no time limit on similar occurrences, so Remington's answer could have included only incidents that occurred after plaintiff's accident, and "only prior occurrences are relevant to establishing plaintiff's claim for punitive damages." *Id.*

28. *Loitz*, 563 N.E.2d at 404.

that the testimony of two witnesses who claimed they were using factory shells when their Model 1100 barrels exploded was not necessarily inconsistent with Remington's theory.²⁹ The court further stated that Loitz presented no evidence that would cast doubt on Remington's good faith in investigating the prior reported barrel explosions.³⁰ In conclusion, the court found that in order to submit the issue of punitive damages to the jury, Loitz would have to prove Remington conducted its investigations in bad faith to conceal the defect in the barrel which caused the explosions.³¹

In its analysis, the court first recounted Remington's challenge to the punitive damage award. Remington argued that it was being punished for failing to provide a warning about a defect that it, in good faith, did not believe existed.³² Remington insisted there was no evidence that it had actual knowledge of the claimed defect.³³ The court then determined whether the evidence Loitz cited to support his punitive damage claim in fact showed that Remington's conduct amounted to a failure to warn of a known defect in flagrant indifference to the public's safety.³⁴

The court first examined the evidence of the ninety-four prior Model 1100 barrel explosions that resulted in injury. The court deferred to the results of Remington's investigations of these accidents, that the explosions were due to high pressure shells.³⁵ The court deferred to Remington's conclusion even though the investigation committee was composed entirely of Remington employees,³⁶ the record failed to show the nature of the investigation,³⁷ and Remington admitted that it destroyed all records of prior accidents three years after they were first received.³⁸ The court maintained that the mere occurrence of prior explosions was not

29. *Id.* at 407. By this statement the court seems to suggest that the factory shells these two witnesses were using were high-pressure shells. This inference contradicts the testimony of James Hutton, a Remington employee, who stated that it was impossible for a Model 1100 barrel to explode when a factory shell is used. *See supra* note 19 for a discussion of Hutton's testimony.

30. *Id.* at 407. It is also true that Remington presented no evidence to show that they conducted their investigations in good faith. In fact, Remington's deliberate destruction of documents relating to the investigation of prior accidents, plus their disbanding of the gun examination committee without any apparent reason suggests a conspiracy of silence.

31. *Id.* This is a difficult burden for Loitz, since Remington admitted to destroying all records of the 94 prior barrel explosion complaints. *Loitz*, 532 N.E.2d at 1097.

32. *Loitz*, 563 N.E.2d at 403.

33. *Id.*

34. *Id.*

35. *See supra* note 19 for a discussion of the investigations.

36. *Loitz*, 563 N.E.2d at 404.

37. *Id.*

38. *Loitz*, 532 N.E.2d at 1097.

sufficient to warrant the imposition of punitive damages.³⁹ The court minimized the import of the ninety-four prior barrel explosions by emphasizing that only ninety-four out of three million barrels did in fact explode, and that each gun is fired literally thousands of times.⁴⁰

The court then analyzed the evidence presented by Loitz's expert witness, Dr. Levinson, to show that the Model 1100 shotgun barrel was defective. Levinson testified extensively about the properties of the AISI 1140 modified steel used in the Model 1100 gun barrel.⁴¹ Levinson testified that the relatively high sulfur content of AISI 1140 modified steel made the barrel susceptible to exploding when a normal pressure shell is fired.⁴² Levinson also stated that he had previously made Remington aware of his findings.⁴³ However, the court again deferred to Remington's conclusion, based on their research and testing of the Model 1100 shotgun, that any barrel explosions were due to the use of high pressure shells.⁴⁴

Levinson also testified that Remington could have made a safer shotgun barrel by using chrome molybdenum steel, which has a much lower sulfur content than the AISI 1140 modified steel Remington actually used.⁴⁵ In fact, a Remington employee agreed that the use of chrome molybdenum steel would result in a stronger bar-

39. See *supra* note 27 for discussion of this statement in the context of the faulty interrogatories in the *Moore* case.

40. *Loitz*, 563 N.E.2d at 404.

41. See *supra* note 15 for further discussion of Levinson's testimony.

42. *Loitz*, 563 N.E.2d at 399.

43. *Id.* at 404-05. Dr. Levinson also acted as Delores Moore's expert witness in her strict tort liability suit against Remington when her Model 1100 gun barrel exploded, injuring her in 1978. *Moore v. Remington Arms Co.*, 427 N.E.2d 608, 610-11 (Ill. App. Ct. 1981). Dr. Levinson's opinion, that the high sulfur content of the AISI 1140 modified steel contributed to the occurrence of Model 1100 gun barrel explosions, was a factor in the jury's award of damages to the plaintiff. *Id.* at 618.

Loitz maintained that Remington's disregard of this earlier adverse judgment was an aggravating factor that entitled him to punitive damages, since Remington had notice of the defect in the Model 1100 barrel by way of this decision, and took no action. *Loitz*, 563 N.E.2d at 404-05. The appellate court agreed with this argument in affirming the punitive damages award. *Id.* The Illinois Supreme Court's response was simply that Remington need not pay attention to the earlier adverse judgment. *Id.* at 405.

44. *Id.*

45. *Id.* at 406. Levinson noted that while chrome molybdenum steel was stronger, and another gun manufacturer (Winchester) made its shotgun barrels from chrome molybdenum, it was also about 30% more expensive than the AISI 1140 modified steel that Remington used in the Model 1100 shotgun. *Loitz*, 532 N.E.2d at 1103. Chrome molybdenum steel makes for a stronger barrel because the low sulfur content results in virtually no manganese sulfide inclusions, so there is no opportunity for cracks to form in the barrel. *Id.*

rel.⁴⁶ However, the court stated that this did not establish that the AISI 1140 modified steel Remington used was defective, nor that Remington was aware of a defect.⁴⁷

Levinson then testified about the barrel manufacturing process Remington used between 1970 and 1980, the time period when Loitz's barrel was made. Levinson claimed that the "Verson extrusion" process which Remington used results in larger sulfur inclusions in the steel than the process Remington used before 1970 or after 1980.⁴⁸ These inclusions made the barrel more likely to crack and explode under normal shell pressures.⁴⁹ The court deferred to the testimony of a Remington employee, who stated that the specifications for the Model 1100 shotgun had never changed, despite

46. *Id.* Phillip Johnson, Remington's supervisor of chemical and metallurgical control, was examined as an adverse witness in the *Moore* trial, and his testimony was introduced into evidence in the *Loitz* case. *Id.* Johnson agreed that chrome molybdenum steel contained fewer sulfur inclusions than AISI 1140 modified steel, and agreed that chrome molybdenum was a better steel. *Id.*

47. *Loitz*, 563 N.E.2d at 406-07. While Loitz did not expressly argue that Remington's use of chrome molybdenum steel was a feasible alternative design for the Model 1100 shotgun barrel, Illinois courts do allow evidence of alternative design in products liability cases. *See, e.g.*, *Kerns v. Engelke*, 390 N.E.2d 859, 863 (Ill. 1979) (plaintiff can present evidence to the fact finder of an alternative design which is economical, practical and effective. The fact finder then determines whether the complained-of condition was an unreasonably dangerous defect, regardless of whether the basis of liability sounds in negligence or strict tort liability); *Murphy v. Chestnut Mountain Lodge, Inc.*, 464 N.E.2d 818, 823 (Ill. App. Ct. 1984) (feasibility of alternative design may be shown by expert opinion or by the existence of safety devices on other products); *Gelsumino v. E.W. Bliss Co.*, 295 N.E.2d 110, 113 (Ill. App. Ct. 1973) (industry custom is relevant in determining feasibility of an alternative design, in suggesting what the defendant should be aware of, and in warning of the possibility of liability if a higher standard is required, but custom should never be conclusive); *Sutkowski v. Universal Marion Corp.*, 281 N.E.2d 749, 753 (Ill. App. Ct. 1972) (possible existence of alternative designs raises questions of feasibility, since a manufacturer's product cannot be faulted if safer alternatives are not feasible; feasibility includes considering technological possibilities viewed in the present state of the art).

48. *Loitz*, 563 N.E.2d at 405-06. The one advantage to using a high-sulfur content steel is that it can be worked more easily. It is also 30% less expensive than chrome molybdenum steel. Levinson's testimony suggested that the distribution of sulfur inclusions within a given piece of AISI 1140 modified steel can be affected by the manufacturing process used. *Loitz*, 532 N.E.2d at 1102-03. Thus, a Model 1100 gun barrel manufactured one way may be more likely to crack and explode under normal pressures than a barrel manufactured another way. *Id.* From 1965-1970, Model 1100 barrels were made by a "conventional drilling and turning operation." *Id.* From 1970-1980, Remington switched to the "Verson extrusion method." *Id.* Then, in 1980, Remington reverted to the old drilling and turning process, which was now automated and called "autodrilling." *Id.* Levinson maintained that the Verson extrusion barrels (which included Loitz's barrel, made in 1972) contained larger, longer and less well-distributed sulfur inclusions than the barrels that were drilled and turned (either before 1970 or after 1980). *Id.* at 1103. As a result, Levinson stated that fatigue cracks were more likely to start in the Verson extrusion barrels. *Id.*

49. *Loitz*, 563 N.E.2d at 405-06.

changes in Remington's method of manufacturing the gun barrel.⁵⁰

The court then relied on the testimony of Remington's expert witness, Dr. Hertzberg. Hertzberg stated that his own tests showed that the Model 1100 barrel could withstand normal shell pressures.⁵¹ The court did so despite additional testimony offered by Loitz which contradicted the results of Hertzberg's testing.⁵²

The *Loitz* Court unjustifiably concluded that Loitz presented insufficient evidence of Remington's "flagrant indifference to the public safety" to submit the issue of punitive damages to the jury. This decision was incorrect for three reasons. The first reason is the court's unjustifiable requirement that Loitz prove that Remington had actual knowledge of the claimed defect. The second reason is the court incorrectly conditioned the import of the number of prior occurrences made known to the defendant on the total output of that product. The third reason is the court's unprecedented standard of review in disturbing a jury verdict that was not against the manifest weight of the evidence.

First, the court's requirement that the plaintiff in a products liability case prove that the defendant had actual knowledge of the defect to submit the issue of punitive damages to the jury unjustifiably departs from previous Illinois decisions. The court's decision departs from the standard of proof first established in *Moore v. Jewel Tea Co.*⁵³ The *Moore* Court stated that a defendant is guilty of wilful and wanton misconduct when the failure to exercise care is so gross that it shows a lack of regard for the safety of others.⁵⁴ The defendant in *Moore* knew its product was potentially dangerous, it had notice of prior claims of accidents, and it failed to warn the public of the danger.⁵⁵ The *Moore* Court held this sufficient to

50. *Id.* at 406. James Hutton, Remington's senior staff engineer for firearms research and development, testified only that the different manufacturing processes did not affect the thickness of the Model 1100 barrel. *Id.* However, Hutton offered no testimony on the possible variation in the distribution of sulfur inclusions in the steel as a function of the manufacturing process used. *Id.*

51. *Id.* at 400. Hertzberg was also an expert in fracture mechanics, and presented the results of his "C-ring tests" conducted with the AISI 1140 modified steel Remington used in the Model 1100 gun barrel. *Loitz*, 532 N.E.2d at 1096-97. Hertzberg concluded that the Model 1100 barrel could not fail at normal shell pressures (18,000 to 22,000 psi) because of his test results, so he stated that the barrel must have failed due to a high-pressure shell. *Id.*

52. *Loitz*, 563 N.E.2d at 400. Hertzberg was confronted with Remington's admission that at least one new Model 1100 barrel had failed with a normal-pressure shell during proof testing at the factory. *Loitz*, 532 N.E.2d at 1097. Hertzberg said he was not aware of this and could not reconcile it with the results of his "C-ring tests." *Id.*

53. 253 N.E.2d 636 (Ill. App. Ct. 1969), *aff'd*, 263 N.E.2d 103 (Ill. 1970).

54. *Moore*, 253 N.E.2d at 649.

55. *Id.* at 649. Drano contained caustic soda, which the defendant knew to be dangerous to human tissue, particularly the eyes. *Id.* The defendant also knew that if moisture got inside a sealed can of Drano, gas would be generated

submit the issue of punitive damages to the jury.⁵⁶ It is well-settled in Illinois that a plaintiff in a products liability case may provide evidence of the defendant's inaction after receiving notice of prior similar accidents as a means of establishing the defendant's "wilful and wanton misconduct"⁵⁷ or "flagrant indifference to the public safety."⁵⁸ The *Loitz* Court has given no reason for departing from this standard.

The facts of *Loitz* illustrate the problem with the court's new "actual knowledge" standard. How can *Loitz* prove that Remington had actual knowledge of the defect in the gun barrel when Remington admitted to destroying all of its accident investigation records?⁵⁹ The better view is to abide by well-established precedent and not penalize a plaintiff for being unable to produce information

and pressure would build inside the can, but the defendant neglected to warn the public of this danger. *Id.* The plaintiff in this case sued the defendant when an unopened can of Drano spontaneously exploded, blinding her. *Id.* at 639. At trial, the plaintiff introduced evidence of three prior occurrences of spontaneously exploding Drano cans that resulted in injury. *Id.* at 645.

56. *Id.* at 649.

57. See *Davis v. International Harvester Co.*, 521 N.E.2d 1282, 1289 (Ill. App. Ct. 1988) (court directed verdict for defendant on punitive damages award because plaintiff failed to produce evidence of prior similar accidents that would give defendant notice of the defect); *Lipke v. Celotex Corp.*, 505 N.E.2d 1213, 1220 (Ill. App. Ct. 1987) (plaintiff entitled to punitive damages because defendant failed to warn of asbestosis for five years after the danger became known); *Collins v. Interroyal Corp.*, 466 N.E.2d 1191, 1199-1200 (Ill. App. Ct. 1984) (plaintiff permitted to produce evidence of previous lawsuits against defendant that arose from prior similar accidents; evidence sufficient for jury to believe that defendant had knowledge of the defect that injured other users, so defendant had a duty to remedy and warn of the known danger); *Froud v. Celotex Corp.*, 437 N.E.2d 910, 913 (Ill. App. Ct. 1982) (court rejected defendant's argument that public policy should prohibit punitive damages in asbestos cases due to danger of many awards; defendants should not be relieved of liability merely because they have managed to injure a large number of people through their outrageous misconduct), *rev'd on other grounds*, 456 N.E.2d 131 (Ill. 1983); *Stambaugh v. International Harvester Co.*, 435 N.E.2d 729, 743 (Ill. App. Ct. 1982) (plaintiff entitled to punitive damages by providing evidence of prior similar accidents which disproved defendant's expert testimony on the integrity of the alleged defective tractor part; prior accidents also gave defendant notice that tractor part was responsible for injuries), *rev'd*, 464 N.E.2d 1011 (Ill. 1984).

58. See *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 516 N.E.2d 260, 263 (Ill. 1987) (plaintiff not entitled to punitive damages for injuries suffered due to defendant's trenching machine because plaintiff's proffered evidence of two prior accidents with the same machinery was too dissimilar from facts of plaintiff's accident); *Boddie v. Litton Unit Handling Sys.*, 455 N.E.2d 142, 152 (Ill. App. Ct. 1983) (plaintiff's evidence establishing that defendant knew the guard it supplied with machine that injured plaintiff was not as safe as those in common use presented material issue of fact whether defendant's conduct constituted flagrant indifference to the public safety); *Moore v. Remington Arms Co.*, 427 N.E.2d 608, 614 (Ill. App. Ct. 1981) (prior similar occurrences admissible for the purpose of establishing knowledge on the manufacturer's part that a defect in the product existed prior to the injuries in the litigated case; establishment of knowledge can serve as part of the basis for a punitive damages award).

59. *Loitz*, 563 N.E.2d at 407.

which is within the defendant's exclusive control. The courts can use the discretion given to them by statute⁶⁰ and case law⁶¹ to reduce or reverse awards that they deem excessive.⁶²

The second flaw in the court's decision is its downplaying of the importance of prior reported accidents when the number of acci-

60. "The trial court may, in its discretion, with respect to punitive damages, determine whether a jury award for punitive damages is excessive, and if so, enter a remittitur and a conditional new trial." ILL. REV. STAT. ch. 110, para. 2-1207 (1987).

ILL. REV. STAT. ch. 110, para. 2-604.1 (1987) attempts to discourage plaintiffs from seeking punitive damages awards by prohibiting any request for them until discovery is completed, and limiting the time to request them after discovery is completed. Under this statute, plaintiffs cannot include punitive damages in the prayer for relief in the complaint if the products liability action is based on negligence or strict tort liability. *Id.* The plaintiff can amend the complaint if, after a pretrial motion and hearing, the plaintiff can establish to the court that there is a reasonable likelihood of proving facts at trial which would support a punitive damages award. *Id.* Plaintiff must make this pretrial motion to amend within 30 days of the close of discovery. *Id.*

In *Belkow v. Celotex Corp.*, 722 F. Supp. 1547 (N.D. Ill. 1989), the court held that § 2-604.1 is procedural in nature and will not be applied in federal diversity actions that apply substantive Illinois law. *Id.* at 1551. First, the court reasoned that § 2-604.1 was in the pleadings portion of the Illinois Code of Civil Procedure, so it was intended to be a procedural provision. *Id.* Second, the court stated that the non-application of § 2-604.1 in federal diversity cases will not promote forum-shopping since the burden placed on an Illinois plaintiff by § 2-604.1 is similar to the burden placed on a federal plaintiff under Federal Rule of Civil Procedure 11, which requires that counsel make a reasonable inquiry to assure that any claims made are well-grounded in fact. *Id.* at 1552.

61. See *Hammond v. North Am. Asbestos Corp.*, 454 N.E.2d 210, 219 (Ill. 1983) ("Because of their penal nature, punitive damages are not favored in the law, and the courts must take caution to see that punitive damages are not improperly or unwisely awarded") (quoting *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 359 (Ill. 1978)); *Stambaugh*, 435 N.E.2d at 747 (review of a punitive damages award in consideration of the factors of punishment, deterrence, and profit with respect to the defendant, and windfall with respect to the plaintiff); *Kelsay*, 384 N.E.2d at 359 ("And, while the measurement of punitive damages is a jury question, the preliminary question of whether the facts of a particular case justify the imposition of punitive damages is properly one of law"); *Gass v. Gamble-Skogmo, Inc.*, 357 F.2d 215, 220-21 (7th Cir. 1966) (jury assessment of punitive damages, left undisturbed by trial court, is not subject to arbitrary action on review, but in this case, "we are convinced . . . the damages awarded are in any event excessive," and remittitur ordered).

62. Lord Devlin stated in *Rookes v. Barnard*, 1 All E.R. 367, 411-12 (1964), that punitive damages could be used against liberty. "Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 293 (1989). See also *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 877 F.2d 614, 622-23 (7th Cir. 1989) (concern in recent cases over constitutionality of punitive damage awards as violating the Excessive Fines Clause of the Eighth Amendment centers on awards that are huge multiples of the compensatory damages; however, the reasonableness of an award must be assessed in relation to the injury done by defendant); *Hazelwood v. Illinois Cent. Gulf R.R.*, 450 N.E.2d 1199, 1207 (Ill. App. Ct. 1983) ("Simply stated, the amount of the award should send a message loud enough to be heard, but not so loud as to deafen the listener. A deafening award is excessive.")

dents is small relative to the total number of products the defendant has put into the stream of commerce.⁶³ This reasoning is faulty for three reasons. First, the court borrowed this concept from a recent article by Professor Owen,⁶⁴ but misinterprets the concept. Owen suggests that the relative number of accidents is one factor among many that could establish or aggravate a defendant's liability for punitive damages in a products liability case.⁶⁵ However, Owen did not give this factor the dispositive weight the *Loitz* Court does.⁶⁶ The second problem is that Illinois case law does not support the court's reliance on the relative number of accidents.⁶⁷ The third

63. *Loitz*, 563 N.E.2d at 404.

64. David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 28-35 (1982).

65. *Id.* at 28-31. Owen states that the relative number of accidents should only be considered in light of the fact that feasible technology may not exist to substantially eliminate the dangers in some products. He states that while current technology has improved one's chances of surviving in an automobile accident, the manufacturer should not be subjected to punitive damages for failing to make a crash-proof automobile because such technology does not currently exist. *Id.*

This argument should not have been applied to the facts of *Loitz*. The evidence at trial established that Remington was aware of at least ninety-four prior barrel explosions that resulted in personal injury. Also, the evidence established that alternative materials and manufacturing processes were freely available, which could have reduced the incidence of Model 1100 barrel explosions. See *supra* notes 19 and 45-48 for further discussion of the evidence offered at trial.

66. Owen, *supra* note 64, at 28-29. Whenever a defendant has received a number of prior complaints, or has been the target of prior lawsuits concerning the danger of a product at issue in the case, this evidence is important in proving the existence of a hazard, its seriousness, and the manufacturer's probable knowledge of its existence. *Id.* Owen cites *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 374 (6th Cir. 1978), where Justice Keith opines on the defendant's reliance on the relative number of accidents: "defendant's callous argument that 'only' 59 other Liquid-plumr [caustic drain cleaner] injuries were reported to the defendant is further proof of the need for punitive damages." *Id.* at 28 n.126.

67. See, e.g., *Bastian v. TPI Corp.*, 663 F. Supp. 474, 476-78 (N.D. Ill. 1987) (evidence that defendant's heater caused three prior fires was sufficient for award of punitive damages, even though plaintiff's heater had a different model number than the heaters in the prior accidents); *Ogg v. City of Springfield*, 458 N.E.2d 1331, 1340 (Ill. App. Ct. 1984) (one prior electrocution accident involving defendant's sailboat was sufficient to send issue of punitive damages to jury); *Moore v. Jewel Tea Co.*, 253 N.E.2d 636, 645 (Ill. App. Ct. 1969), (plaintiff's evidence of three prior accidents where an unopened Drano can spontaneously exploded held sufficient evidence on the question of actual notice to defendant on possibility of an explosion, and to establish defendant's wilful and wanton misconduct in failing to warn of the danger), *aff'd*, 263 N.E.2d 103 (Ill. 1970).

The concept of the relative number of accidents has been referred to in two previous Illinois appellate decisions, but the concept was not given dispositive weight. See *Schaffner v. Chicago & North W. Transp. Co.*, 515 N.E.2d 298, 309 (Ill. App. Ct. 1987) (court allowed defendant to introduce evidence that only 0.0055% of its products were involved in prior accidents, but punitive damages were not at issue), *aff'd*, 541 N.E.2d 643 (Ill. 1989); *Turney v. Ford Motor Co.*, 418 N.E.2d 1079, 1085-86 (Ill. App. Ct. 1981) (evidence of six prior tractor roll-over accidents not sufficient to send issue of punitive damages to the jury, be-

problem is that the court's reliance on the relative number of accidents sends a message to manufacturers which is not consistent with the purpose of punitive damages. Punitive damages are meant to punish and deter a defendant who fails to act after receiving information that its product is injuring consumers.⁶⁸ The court tells manufacturers that they can ignore this information if they are productive.

The crucial issue is not the mere number of accidents reported to a defendant, but whether the prior accidents give the defendant sufficient notice of a defect in its product that causes injury.⁶⁹ If a defendant has notice of a defect and fails to warn of the danger, the defendant has displayed a flagrant indifference to the public safety, sufficient to send the issue of punitive damages to the jury.⁷⁰ Remington had notice of ninety-four prior barrel explosions prior to Loitz's accident which were similar in nature, and caused severe injury.⁷¹ Even if Remington believed that all of the explosions were due to high pressure shells, the court still had a duty to warn the public of this danger. Remington chose to do nothing. The court's analysis does not address Remington's inaction. Instead, the court excuses Remington because the number of reported accidents represented a small percentage of the number of Model 1100 shotguns Remington produced.

The court's third error was its decision to disturb a jury verdict which was not against the manifest weight of the evidence.⁷² Remington, through a written stipulation read to the jury, admitted that it knew prior to Loitz's accident that at least ninety-four Model 1100 shotgun barrels had exploded in a manner similar to the Loitz explosion.⁷³ Three of these victims testified at trial, and two of the

cause defendant presented sufficient evidence to show it was aware of the problem and made subsequent design changes).

68. *Loitz*, 532 N.E.2d at 1105.

69. "In a products liability case, a manufacturer's awareness that its product poses a danger coupled with a failure to act to reduce the risk amounts to wilful and wanton conduct." *Bass v. Cincinnati, Inc.*, 536 N.E.2d 831, 835 (Ill. App. Ct. 1989).

70. *See supra* note 4 for discussion of the "flagrant indifference" standard.

71. *Loitz*, 532 N.E.2d at 1107-08. The three witnesses who testified at trial about their Model 1100 shotgun barrels exploding, also related the extent of their injuries. *Id.* Nicholas King lost a thumb and parts of his other fingers on the same hand, and underwent 14 operations as the result of his 1982 accident. *Id.* Delores Moore had her thumb amputated and underwent 8 operations, during which nerves and tendons were removed from other parts of her body as the result of her 1978 accident. *Id.*

72. The majority's aberrant treatment of the standard of review is what disturbed the three dissenting justices the most. *Loitz*, 532 N.E.2d at 408-10.

73. *Id.* at 410. The dissenters stated the general rule that it is the jury's function to assess the credibility of witnesses, and the weight to be given their testimony. *Id.* They stated that "[t]he majority, without citing to the applicable standard for reviewing jury determinations, gives the [Remington] employees'

victims said they were using factory shells.⁷⁴ The *Loitz* Court held that Remington's purported investigation of these accidents negated the evidentiary impact of the ninety-four prior explosions.⁷⁵ By giving conclusive weight to Remington's investigations, even though the jury did not, the court violated the province of the jury as fact-finder.⁷⁶

It is well-established in American jurisprudence that it is the jury's function to assess the credibility of witnesses and the weight to be given their testimony.⁷⁷ A reviewing court will not, as a rule, overturn a jury's determination unless it is contrary to the manifest weight of the evidence.⁷⁸ The *Loitz* Court ignored this rule by weighing the testimony given at trial and reversing the punitive damages award.

testimony preclusive effect. In so doing, the majority invades the province of the jury." *Id.* The dissenters argued that the written stipulation, standing alone, was sufficient to support the jury's award of punitive damages, for the jury could have concluded that Remington acted wilfully and wantonly in failing to discover the defect after ninety-four people were injured. *Id.*

74. *Id.* at 400.

75. *Id.*

76. *Id.* at 410.

77. See, e.g., *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935): "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873):

Twelve men sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. The average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can any single judge.

78. See, e.g., *In re Estate of Wernick*, 535 N.E.2d 876, 887 (Ill. 1989) ("While a trial court's determination is always subject to review, we will not disturb that finding or substitute our own opinion unless it is against the manifest weight of the evidence."); *Midland Hotel Corp. v. Reuben H. Donnelly*, 515 N.E.2d 61, 64-65 (Ill. 1987) ("[T]he sufficiency of the evidence is not contingent upon the sheer number of witnesses; a jury is free to credit the testimony of one witness against the conflicting testimony of several witnesses. Ultimately, [the] case turns on whether [the jury] chooses to believe plaintiff's or defendant's witnesses."); *York v. Steifel*, 458 N.E.2d 488, 493 (Ill. 1983) ("Reversal of a jury verdict must be supported by evidence which, when viewed most favorably to the party prevailing in the trial court, nevertheless so overwhelmingly favors the appellant that no contrary verdict could stand."); *Pedrick v. Peoria & E. R.*, 229 N.E.2d 504, 513-14 (Ill. 1967) ("In our judgment verdicts ought to be directed and judgments n. o. v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."); *Elliott v. Sears, Roebuck & Co.*, 527 N.E.2d 574, 578 (Ill. App. Ct. 1988) ("This reviewing court will not substitute our judgment for that of the jury. [U]nless there is no evidence which fairly tends to support the jury's verdict, a court of review will not disturb a verdict."); *Bautista v. Verson Allsteel Press Co.*, 504 N.E.2d 772, 776 (Ill. App. Ct. 1987) ("A jury verdict should not be set aside merely because the jury could have drawn different inferences and conclusions from conflicting testimony. Only if the verdict was erroneous, wholly unwar-

To fully understand the court's decision in *Loitz*, it is necessary to look beyond the facts. The court's requirement that a plaintiff in a products liability case must prove a defendant had actual knowledge of a defect in order to submit the issue of punitive damages to a jury means that there will be fewer punitive damage awards in products liability cases. To that extent, the court is making a policy statement against the award of punitive damages in products liabil-

ranted, the result of passion or prejudice, or arbitrary, unreasonable, and not based upon the evidence will it be overturned.").

In the *Loitz* case, it would not have been against the manifest weight of the evidence for the jury to have found the Remington employees' testimony less than credible. First, both witnesses were long-time Remington employees, indicating a potential for bias. Second, both employees conceded that the records of the ninety-four alleged investigations had been destroyed. Third, neither employee explained the procedures used during the investigations, nor why the committee was disbanded in 1983. *Loitz*, 563 N.E.2d at 410. These facts, coupled with the testimony of two witnesses who claimed they were using factory shells when their Model 1100 barrels exploded, were sufficient for a jury to conclude that *Loitz's* accident was due to a defective gun barrel, and not a high pressure shell. *See Id.*

The jury heard additional testimony which further discredited Remington's contention that high pressure shells were responsible for the barrel explosions. Remington's product services representative, James Stekl, admitted knowing that Dr. Levinson had advised Remington in 1979 or 1980 of claimed barrel defects caused by sulfur inclusions in the AISI 1140 modified steel used in the Model 1100 shotgun barrel. *Loitz*, 532 N.E.2d at 1097. Stekl also admitted that Remington's own metallurgist, Phillip Johnson, testified at the *Moore* trial in 1980 that "chrome molybdenum steel would probably be better to use for shotgun barrels, because it does not have sulfur inclusions." *Id.* The Illinois Supreme Court interpreted this testimony as not necessarily indicating that the AISI 1140 modified steel was inadequate. *Loitz*, 563 N.E.2d at 406-07. However, the jury could conceivably couple Johnson's statement with Levinson's testimony, showing that the presence of sulfur inclusions can lead to cracking and barrel explosions, and with evidence showing that Remington was aware of ninety-four reported explosions that resulted in injury. *See Loitz*, 532 N.E.2d at 1097. The jury could then reasonably conclude that the AISI 1140 modified steel Remington used was not fit for the purpose it was to be used. *See id.*

The court's curious conclusion that *Loitz* presented no evidence that would cast doubt on Remington's good faith in investigating the prior reported barrel explosions is inconsistent with two facts. First, Remington presented no documentary evidence to prove the scope, the nature, or even the occurrence of the alleged investigations. *Id.* Second, Remington failed to warn Model 1100 users of the reported danger, even in the face of a prior adverse judgment against them on that very issue. *See Loitz*, 563 N.E.2d at 404-05. These facts are consistent with several factors Professor Owen considers important in establishing that a manufacturer's conduct reflects a flagrant indifference to the public safety:

[A] manufacturer's fault in failing to deal with a product hazard increases with the magnitude of the resulting potential harm to the public. [A]s the manufacturer's awareness of the existence, magnitude and means to reduce a product hazard increases, so too does its duty to address the problem and its culpability for failing to do so. [T]he nature and duration of a manufacturer's failure to respond appropriately to a product hazard, its reasons for not responding more appropriately, and the nature and extent of any measures actually taken, all shed light on the extent to which the enterprise values profits over safety, and accordingly, on its culpability.

Owen, *supra* note 1, at 1369-70.

ity cases.⁷⁹ However, the court would best serve the interests of all parties that litigate and decide products liability cases in Illinois by clearly stating its policy on punitive damages. By not doing so, decisions like *Loitz* raise more questions for a prospective litigant than they answer. *Loitz* tells plaintiffs that they must now meet a higher standard of proof to submit the issue of punitive damages to the jury. Plaintiffs must now show that the defendant had actual knowledge of a defect, or at least show that the defendant did not exercise good faith in investigating prior occurrences. But the *Loitz* standard is not consistent with the punitive and deterrent function of punitive damages because Remington was able to escape liability by merely making it impossible for Loitz to provide evidence of Remington's actual knowledge of the defect.

Courts and commentators have argued at length over the positive⁸⁰

79. *Loitz* is not the first case in which the Illinois Supreme Court reversed a well-reasoned decision to award punitive damages in a products liability case, and it probably will not be the last. In *Froud v. Celotex Corp.*, 437 N.E.2d 910, 912 (Ill. App. Ct. 1982), the appellate court overruled one hundred years of Illinois case law and held that common law actions for punitive damages survive the death of the injured party. See also Pietrick, *supra* note 4, at 458. This decision was praised as a reform long overdue in Illinois law, for previously, the death of an injured party barred that party's punitive damages claim. This confirmed the old adage that it was cheaper to kill someone than injure him. *Id.* at 464.

However, the Illinois Supreme Court reversed the appellate opinion in *Froud v. Celotex Corp.*, 456 N.E.2d 131 (Ill. 1983). The court did not address the reasoning of the appellate opinion, and preferred to abide by its earlier decision in forbidding punitive damages in the event of the death of the injured party. See *Mattyasovszky v. West Towns Bus Co.*, 330 N.E.2d 509 (Ill. 1975). Commentators have criticized the court's reversal of the punitive damages award in *Froud*. See, e.g., Rick A. Gleason, *Illinois Reaffirms the Principle that Punitive Damages Die With the Victim*, 72 ILL. B. J. 570, 573 (1984):

The weaknesses in the *Froud* holding are perhaps a reflection of the more compelling reason why it will continue to be subject to attack. Punitive damages concern, by definition, the behavior of defendants. Such damages are meant to punish and deter. To disallow their imposition due to the death of the victim, whether done so in the name of judicial restraint or in the name of *stare decisis*, is inequitable and illogical.

The Illinois Supreme Court recently made it clear that it is not entertaining second thoughts on this issue in *Ballweg v. City of Springfield*, 499 N.E.2d 1373, 1377-78 (Ill. 1986), where it stated:

The plaintiff asks that we consider the oft-repeated adage that it is cheaper to kill your victim than to leave him maimed. While we are sympathetic to this argument, we believe it is being voiced in the wrong forum. It is the General Assembly which should be urged to pass legislation allowing the award of punitive damages in these cases, not the courts.

80. The self-defining and unhelpful argument that punitive damages are justified because they are well-established in our judicial history has been nonetheless relied on by Justice Scalia in his concurring opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1054 (1991) ("Since jury assessed punitive

damages are a part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity.”).

Recent studies of punitive damage awards have shown them not to be the widespread, pervasive menace that many commentators and business leaders have played them up to be. A recent American Bar Foundation study of more than 25,000 jury verdicts found that punitive damages were awarded in only 4.9% of cases, and a survey by the Rand Corporation found that only half of the punitive awards are upheld on appeal. Amy D. Marcus, *Punitive Awards are Rare, Data Show, But for Businesses the Risk is Still High*, WALL. ST. J., Mar. 5, 1991, at A2. More detailed results of the American Bar Foundation study on punitive damages reveal that juries render punitive damages awards only 2.2% of the time they reach a verdict in the circuit courts in Cook County, Illinois; only 1.6% of the time in New York City Supreme, Civil and County courts; and 8.6% of the time in Los Angeles County & Superior Courts. Stephen Daniels, *Damages, Punitive Damages: The Real Story*, 72 A.B.A. J. 60, 62 (Aug. 1986). In addition, the study showed that the large majority of punitive damages awards are relatively low in amount and are usually awarded in fraud cases. *Id.* The large awards that grab the headlines in products liability cases are few and far between. *Id.* at 63. *But see* Marcus, *supra*, at A2 (“It’s not enough to look at the aggregate data,” says David Rome, a lawyer for Aetna Life & Casualty Co. “An executive could be betting the company on one case.”).

There are a number of valid policy reasons supporting the continued availability of punitive damages in products liability cases. The first reason is the protection of the consumer. Punitive damages act as a special deterrent to manufacturers and as a general deterrent to others. Garrett, *supra* note 1, at 627. Most manufacturers are not deterred by an occasional award of compensatory damages, and those who make a practice of engaging in wrongful conduct often set aside funds to be paid out in compensatory damage awards. *Id.* These manufacturers are particularly likely to pause and consider the consequences when they are required to pay out more in damages than the plaintiff’s actual loss. *Id.* at 628.

Second, any available criminal sanctions that could be imposed against manufacturers who wilfully and wantonly market defective consumer products are relatively few and ineffectual. Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 424-27 (1966). The judicious use of punitive damages is advocated in response to the litany of annual industrial injuries, which have not been reduced by the threat or the imposition of civil or criminal statutes on manufacturers. Vincent M. Igoe, *Punitive Damages - An Analytical Perspective*, TRIAL, Nov. 1978, at 48, 49. For instance, in 1974, there were 105,500 accidental deaths in this country’s workplace; there were 11 million disabling injuries, of which 400,000 were permanent, and 16,000 of the 400,000 were amputations resulting from punch-press accidents. *Id.* at 48. Todd Smith, a Chicago plaintiff’s lawyer, argues that the uncertainty of punitive damages is precisely what helps keep bad products off the market and holds corporations responsible for their behavior. “The fact companies can’t calculate the risk is a good thing. It hangs over their heads and serves as a deterrent.” Marcus, *supra*, at A2.

Third, punitive damages have been approved as making it worthwhile for a plaintiff to sue a particular defendant when it is desirable in the interests of society to admonish that defendant for its conduct. Clarence Morris, Note, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1183 (1931). Related to this notion is the idea that where a plaintiff’s actual damages are nominal, but the potential exists for the defendant’s conduct to cause much more serious injury in the future, punitive damages may be the only effective means to deter that defendant. David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis*, 49 MARQ. L. REV. 369, 384 (1966).

Fourth, in response to the oft-recited argument that punitive damages are not consistent with the rest of tort law, is the argument that punitive damages are consistent with the goals of tort law, if tort law is recognized as providing

and negative⁸¹ policy reasons for imposing punitive damage awards

reparation by compensation as well as protecting society from injurious conduct. Steven H. Reisberg, Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303, 305-06 (1980). Punitive damages thus provide a critical element of flexibility that furthers the tort law's deterrent function. *Id.* at 306.

Fifth, plaintiffs who seek punitive damages are often motivated by a desire to revenge themselves on the defendant, and the award of punitive damages by the jury may resemble a form of public revenge or retribution that reflects society's indignation at the defendant's conduct. Note, *Exemplary Damages*, *supra* note 1, at 523. In this area, the function of punitive damages can supplement the function of the criminal law by permitting punishment for conduct not otherwise punishable under the criminal law. Note, *Imposition of Punishment*, *supra* note 1, at 1173. While the traditional safeguards of the criminal law are not present when punitive damages are awarded, see Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 410 (1967), certain fundamental safeguards are available to the defendant in a civil trial, such as the right to confront adverse witnesses and the right to trial by jury. Pietrick, *supra* note 4, at 468.

A final advantage of punitive damages is their compensatory function in paying the costs of litigation. If they were not available, legitimate plaintiffs would be deterred by high litigation costs from suing large corporate entities, and punitive damages would further compensate plaintiffs whose actual damages exceeded those recoverable by law or whose compensatory recovery is reduced by attorney fees. *Id.* at 465. See also Igoe, *supra*, at 50 ("It is virtually impossible for a sole practitioner to effectively handle a major products liability case, and needless to say, without serious injury or death, the economics make it impossible for major products liability cases to be tried.").

81. See *Fay v. Parker*, 53 N.H. 342, 382 (1873), where punitive damages were denounced as "a monstrous heresy, an unhealthy excrescence, deforming the symmetry of the body of the law." *Id.* at 382-83. But see *Luther v. Shaw*, 147 N.W. 18, 19-20 (Wis. 1914), which states "the law giving exemplary damages is an outgrowth of the English love of the law. It tends to elevate the jury as a responsible instrument of the government, to discourage private reprisals, restrain the strong, influential, and unscrupulous, [and] vindicates the rights of the weak."

Not surprisingly, the business community is not fond of punitive damages. A recent editorial, *Our Punitive Supreme Court*, WALL. ST. J., Mar. 6, 1991, at A8, stated:

For the fourth time in recent years, the Supreme Court has looked a legal monster in the eye - and blinked. By announcing that a typically outrageous punitive damages award met every test of constitutional due process, the Justices effectively sentenced dozens of corporate defendants to multi-million dollar judgments. These plaintiffs will be selected entirely at random, by the whim of juries egged on by contingency-fee plaintiff's lawyers.

Punitive damages have been likened to a cat's clavicle, in the familiar phrase by Holmes; they are a precedent in civil law which has survived long after the use for them has disappeared, and the reason for them has been long forgotten. Kurt M. Zitzer, Comment, *Punitive Damages: A Cat's Clavicle in Modern Civil Law*, 22 J. MARSHALL L. REV. 657 (1989). Punitive damages have been criticized as forcing a defendant to "choose between the Scylla of economically devastating discovery costs that can transform a favorable verdict into a pyrrhic economic victory and the Charybdis of outrageous and unwarranted monetary settlements." James R. Sales & Kenneth B. Cole, *Punitive Damages: A Relic that Has Outlived its Origins*, 37 VAND. L. REV. 1117, 1157-58 (1984). See also Marcus, *supra* note 80, at A2 ("Punitive damages are 'the sword of Damocles' in settlement talks, says Martin Connor of the American Tort Reform Association.").

In addition to the theoretical and largely unhelpful arguments that punitive damages serve no tort law purpose, and that compensatory damages alone

in civil cases. The area of products liability presents unique concerns and valid arguments for keeping punitive damage awards in

are a sufficient deterrent to defendants, there are a number of cogent arguments against punitive damages.

First, the doctrine of punitive damages is said to be inconsistent with the purpose of theories of recovery in products liability. Recovery in products liability is generally based on the notion of spreading the risk, in that the costs of liability are incorporated into the costs of producing a product. See JERRY J. PHILLIPS, *PRODUCTS LIABILITY*, 44-45 (3d ed. 1988); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 98 (5th ed. 1984). If the purpose of punitive damages is to impose an additional punishment on the defendant, it is difficult to appreciate the extent of the punishment since the defendant will simply pass along the costs of a punitive damages award to the corporation stockholders and the consuming public, just as the costs of a compensatory damages award would be passed along. See James D. Ghiardi & John J. Kircher, *Punitive Damage Recovery in Products Liability Cases*, 65 MARQ. L. REV. 1, 45-47 (1982). Thus, the corporate defendant is not being punished or deterred by punitive damages, in the practical sense. *Id.*

Second, while punitive damages have a function that closely resembles the criminal law, they lack the formal safeguards present in the criminal law. This lack of safeguards includes no protection from self-incrimination for the defendant, a lesser standard of proof for determining guilt (usually a preponderance standard and rarely, a clear and convincing standard, but not the criminal standard of proof beyond a reasonable doubt), the amount of the penalty is not fixed, and the jury is not trained in setting the penalty. Note, *Imposition of Punishment*, *supra* note 1, at 1169-71. Also, if a defendant is held liable for compensatory and punitive damages for the same wrong, the result is analogous to double jeopardy, which is forbidden by the criminal law. Walther & Plein, *supra* note 80, at 384.

Third, the trier of fact is allowed virtually unfettered discretion in establishing the amount of a punitive damages award. Since the jury often uses subjective means to arrive at a figure, the amount of punishment is rarely correlated with the culpability of the defendant. *Id.* at 383.

Fourth, when punitive damages are allowed, so is evidence of the defendant's financial status. However, damages have never been traditionally assessed based on the defendant's ability to pay, and the wealth of the defendant is not relevant to the extent of the plaintiff's injuries. It is argued that these conflicting rules cannot and should not be honored simultaneously in the same trial. John D. Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 886 (1976).

Fifth, punitive damages have been criticized as a windfall and an unjust enrichment to the plaintiff. Moreover, the apparent lack of objective standards by which awards are made and altered on appeal detract from the potential deterrent effect of the award on the defendant. *Id.*

Sixth, it has been argued that those states that allow insurance coverage of punitive damage awards (see *supra* note 1) are sabotaging their own attempt to punish and deter defendants. P.C.A. Snyman, *The Validity of Punitive Damages in Products Liability Cases*, 44 INS. COUNS. J. 402, 407 (1977). The reasoning is as follows:

While many courts are loathe to abolish the doctrine of punitive damages for fear of violating legislative prerogative, they have no perceptible qualms about emasculating the doctrine through the allowance of punitive damages insurance. To the extent that one accepts the proposition that punitive damages effectively punish and deter undesirable conduct, he should necessarily conclude that allowing punitive damages insurance negates these societal benefits. Therefore, insurance of punitive damages contravenes public policy.

check.⁸²

Gary S. Franklin, Comment, *Punitive Damages Insurance: Why Some Courts take the Smart out of "Smart" Money*, 40 U. MIAMI L. REV. 979, 980 (1986).

Seventh, punitive damages have been attacked on constitutional grounds in that the standards for determining their amount are so vague that they fail to satisfy due process requirements, or that the imposition of punitive damages in a civil proceeding subjects the defendant to a criminal penalty without proper procedural safeguards. Note, *Imposition of Punishment*, *supra* note 1, at 1177-81. More recent arguments focus on punitive damages violating the Excessive Fines Clause of the Eighth Amendment. Andrew M. Kenetick, Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1702 (1987). Several recent decisions, however, have rejected arguments that punitive damages violate: 1) The Excessive Fines Clause of the Eighth Amendment: *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2920 (1989) ("We shall not ignore the language of the Excessive Fines Clause, or its history, or the theory on which it is based, in order to apply it to punitive damages"); 2) The Cruel and Unusual Punishments Clause of the Eighth Amendment: *Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989) (following the Supreme Court's decision in *Kelco*); and 3) The Due Process Clause of the Fourteenth Amendment: *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043 (1991) ("Unlimited jury discretion - or unlimited judicial discretion - in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. We need not, and indeed we cannot, draw a mathematically bright line between the constitutionally acceptable and unacceptable."). See also Samuel Goldblatt et al., *Products, General Liability and Consumer Law: Annual Survey of Recent Developments*, 25 TORT & INS. L. J. 369, 371-73 (1990); Bruce J. Ennis, *Punitive Damages and the U.S. Constitution*, 25 TORT & INS. L. J. 587, 588-96 (1990).

Finally, punitive damages have been criticized because no general standards have been formulated which are applied consistently to determine when a manufacturer should be held liable. This inconsistency may lead manufacturers to decline taking calculated risks in research and development, and in the marketing of new products, leading to a court-imposed chilling effect on industrial and technological innovation. Douglas L. Carden, Note, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA L. REV. 895, 919-21 (1976). See also Marcus, *supra* note 80, at A2 ("Because punitive damages lurk in the background whenever a company treads off the beaten track, the prospect of such damages deters innovation, and makes U.S. businesses less competitive with foreign concerns.").

82. The specter of mass tort liability with punitive damages "overkill" is an issue unique to the area of products liability, and after experience with suits involving mass injury caused by drugs, asbestos, oil spills, Agent Orange, Ford Pintos, tampons, IUD's and nuclear accidents, the courts seem no closer to finding a common practical solution today than when the problem first became evident over twenty years ago. See Alan Schulkin, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L. J. 1797 (1979); Paul D. Rheingold, *The MER/29 Story: An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968).

The confusion and inconsistency in this area of the law is best illustrated by comparing the conflicting decisions of a California state court and a New York federal court over punitive damages in a drug products liability case. The suits resulted after the defendant, Richardson-Merrell, Inc., began marketing a drug called triparanol, or MER/29, which reduced blood cholesterol, but also caused cataracts. There was evidence that the defendant knew the drug was unsafe, and misrepresented the safety profile of the drug to the Food and Drug Administration to get it on the market. *Id.* at 120-22.

The California court awarded the plaintiff \$500,000 in punitive damages after finding defendant's acts were conceived in a spirit of mischief and criminal

A number of solutions have been proposed, ranging from a call for the abolition of punitive damage awards,⁸³

indifference. *Toole v. Richardson-Merrell, Inc.*, 60 Cal. Rptr. 398 (Cal. Ct. App. 1967).

In contrast, the New York court, presented with a nearly identical fact pattern, found the defendant did not act with the gross negligence New York required to award punitive damages. *Roginsky v. Richardson-Merrell, Inc.*, 254 F. Supp. 430 (S.D.N.Y. 1966), *aff'd in relevant part*, 378 F.2d 832 (2d Cir. 1967). Judge Friendly decided the case on policy grounds, stating, "We have the greatest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." *Id.* at 839. The judge further observed that "a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future." *Id.* at 841. He also recognized that the defendant's innocent shareholders and the product consumers would bear the ultimate brunt of any punitive damage award. *Id.*

A concept related to mass tort punitive damages liability is that of corporate successor liability for punitive damages. Lynda G. Wilson, Note, *Corporate Successor Liability for Punitive Damages in Products Liability Litigation*, 40 S.C. L. REV. 509 (1989). In general, the punitive damages liability of a predecessor will not be imposed on the successor unless: 1) the successor expressly or impliedly agrees to assume the predecessor's liability; 2) the transaction amounts to a merger or consolidation; 3) the successor is a mere continuation or reincarnation of its predecessor; or 4) the transaction is the result of a fraudulent or bad-faith transfer of assets. *Id.* at 519-20. There are four policy reasons for holding a successor liable for punitive damages for harm caused by the predecessor: 1) the preservation of a remedy for post-dissolution claimants; 2) the unfairness of allowing a manufacturer to avoid liability; 3) the prediction and minimization of the risks of defects is more easily borne by the successor than the claimant; and 4) the successor is in a better position to obtain insurance to cover the costs of the injuries caused by defective products. *Id.* at 527.

83. Three basic arguments are made in calling for the abolition of punitive damage awards. First, it is argued that strict products liability has a significant deterrent effect of its own, and that a negligent or reckless manufacturer is sufficiently punished by adverse publicity, costly recall campaigns, loss of customers in an increasingly competitive marketplace, exclusion of insurance coverage and high compensatory damage awards. Michael Hoenig, *Products Liability and Punitive Damages*, 651 INS. L. J. 198, 202 (1980).

Second, most lawsuits over punitive damages for defective products involve older products that are no longer on the market. How, it is asked, can punitive damages that are imposed for defects in "older" products deter the making of allegedly defective products in the future when they are no longer being made? *Id.* at 203-04.

Third, if punitive damages are awarded against a healthy company, the costs are passed on to consumers, and in the case of a less healthy or smaller business, bankruptcy is more likely. This elimination of smaller and weaker businesses through punitive damages awards means only the big and strong survive, frustrating our antitrust laws. *Id.* at 204; Michael Hoenig, *Products Liability and Proposed Reforms*, 651 INS. L. J. 213, 228-30 (1977). See also Michel A. Coccia & Francis D. Morrissey, *Punitive Damages in Products Liability Cases Should Not Be Allowed*, 22 TRIAL LAW. GUIDE 46, 49-50 (1978) (incongruity of punitive damages to individual harm suffered requires they be abolished in products liability litigation); Bob Carsey, *The Case Against Punitive Damages: An Annotative Argumentative Outline*, 11 FORUM 57, 58-61 (1975) (punitive damages have no valid purpose except forcing the public to subsidize multiple windfalls); Forrest L. Tozer, *Punitive Damages and Products Liability*, 29 INS. COUNS. J. 300, 300-04 (1972) (punitive damages should be eliminated in mass

to modifications of court procedures⁸⁴

tort cases because the punitive value is far outweighed by the potentially disastrous effect on the corporation).

This argument only works when it is assumed that punitive damages are not necessary to deter future misconduct. Defendants today are able to roughly estimate the injury a given product will cause, and incorporate the costs of the compensatory damages into the cost of the product. With such a defendant, the arbitrary and unpredictable nature of punitive damages may be an asset in deterring such misconduct.

84. One alternative is to consolidate all plaintiff's claims into one action against the defendant. While this would result in a single award of punitive damages in that action, procedural problems immediately arise. This approach requires an extraordinary degree of cooperation that may be unrealistic to expect within a single state court system, or federal circuit, let alone across many different court systems when injured litigants are spread across the country. Schulkin, *supra* note 82, at 1803. Closely related to this first alternative is the suggestion that punitive damages should only be allowed to the first plaintiff that obtains a verdict. See GA. CODE ANN. § 51-12-5.1 (e)(1) (1988) (in product liability actions, only one punitive damages award may be recovered by a court in Georgia for any act or omission). This approach has been criticized as creating an extreme windfall for one plaintiff even though harm has been inflicted on a much larger number of persons, and as fostering an inefficient race to trial where the contestants are the plaintiffs' lawyers. 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, 924-25 (1989).

A second alternative is to set a dollar limit on the size of a punitive damage award in a single trial. This alternative fails because it does not provide for treatment of individual defendants. An award within a set limit may bankrupt one defendant, and another may not even feel it. Schulkin, *supra* note 82, at 1804-05.

A third alternative for avoiding an excessive jury award is to simply inform the jury of any prior punitive awards against the defendant involving the same product. This alternative asks too much of the jury in that the information would most likely be prejudicial against the defendant. Also, it asks the jury to analyze the propriety of past awards and predict the outcome of any other actions that may be pending against the defendant. *Id.* at 1806-08.

A fourth alternative is to adopt the English rationale and not award punitive damages, but aggravated damages, which are not intended as a form of punishment for the defendant's conduct, but as additional compensation to the injured party, reflecting actual damages based on a determination of the plaintiff's physical and mental suffering. Zitzer, *supra* note 81, at 677-81. However, this approach does not acknowledge the role which the separate tort of intentional infliction of mental distress could play in such a situation, nor does it solve the problem of potential mass tort liability for damages, irrespective of whether they are called punitive or aggravated damages.

A fifth alternative would be to create a class exclusively for assessing punitive damages. The best known class action of this type involved the IUD litigation in California. See *In re Northern Dist. of California "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 897-98 (N.D. Cal. 1981). In this approach, plaintiffs try their compensatory damages separately. Those who successfully prove an injury caused by the manufacturer's wilful and wanton misconduct are then joined in a class action to determine whether punitive damages are appropriate, and if so, in what amount. *Id.* Such class actions have been proposed to apply to the federal court system using Federal Rule of Civil Procedure 23. See Timothy J. Phillips, Note, *The Punitive Damages Class Action: A Solution to the Problem of Multiple Punishment*, 1984 U. ILL. L. REV. 153, 163-72. Similar proposals have also been made regarding the Illinois state court system relying on sections 2-801 and 2-802 of the Illinois Code of Civil Procedure. See Edward

and legislative intervention.⁸⁵

J. Melia, *Punitive Damages in Mass Tort Litigation: Can "Overkill" be Avoided?* 77 ILL. B. J. 478, 482-83 (1989).

Problems with the class action approach were illustrated when the California IUD case reached the Ninth Circuit in *In re Northern Dist. of California "Dalkon Shield" IUD Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982). First, the unique issues the class presented outnumbered the common issues. There was no one set of facts sufficient to establish liability or proximate cause, and issues like the adequacy of warnings differed from one plaintiff to another. The court decertified the class because of such problems with commonality and typicality. *Id.* at 853-54.

Additional problems with class actions involve plaintiffs who choose to opt-out of a class. Should they be allowed to recover their own punitive damages, and if so, doesn't this defeat the purpose behind creating the class? See Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 847-48 (1986) (claimants who opt-out under Rule 23(b)(3) should be prohibited from pursuing individual claims for punitive damages because the opt-outs result in substantial litigation on identical issues, defeating the purpose of the class action); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 83 (1983) (class should be certified under Rule 23(b)(1)(B) to prevent plaintiffs from opting out). Also, how do you decide when the class closes? This is a particularly vexing problem if the case deals with the adverse effect of a drug that takes years to manifest itself. See Pietrick, *supra* note 4, at 473-75. Also, what type of notice would be required, and who pays for it? See Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L. J. 1, 119 (1985-86) (best notice requirement of Rule 23(b)(1)(B) places unwarranted expense and burden on defendant).

Because of these problems, class actions have been rejected in the following types of mass tort cases: 1) involving the drug diethylstilbestrol (DES): *Morrissy v. Eli Lilly & Co.*, 394 N.E.2d 1369 (Ill. App. Ct. 1979); 2) involving the Dalkon Shield intrauterine device (IUD): *Rosenfeld v. A.H. Robins Co.*, 407 N.Y.S.2d 196 (N.Y. App. Div.), *appeal dismissed*, 413 N.Y.S.2d 374 (N.Y. 1978); 3) involving asbestos: *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974); 4) involving a hotel skywalk collapse: *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.) (certification reversed on appeal), *cert. denied*, 103 S. Ct. 342 (1982); and 5) involving the Three Mile Island incident: *In re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D. Pa. 1980).

85. The simplest form of legislative intervention would be to set a statutory limit on the amount a single plaintiff could recover, or to establish a ceiling on the total amount of punitive damages recoverable against the manufacturer in actions arising out of injuries from the same product. Pietrick, *supra* note 4, at 472-73. One problem with this approach is that the established limit will be too low to deter some defendants, and it will bankrupt others. Second, this scheme would defeat the goal of deterrence, for manufacturers would be able to easily estimate their potential liability and adjust their prices accordingly. *Id.* at 473.

A second approach would be to have the state and federal legislatures establish guidelines as to product safety, and specify the punishment to be imposed for violation of those guidelines. This would require an expansion of the powers of agencies like the Consumer Product Safety Commission and the Food and Drug Administration, who are already vested with power to ban hazardous products and seek civil and criminal penalties against manufacturers. Carden, *supra* note 81, at 921-22. Questions that remain unanswered include: 1) How much do these agencies have to expand to exert sufficient deterrence on wayward manufacturers?; 2) Will the expansion exert such a deterrent effect?; and 3) Will the public willingly pay for the costs of this expansion?

A third legislative approach would be to seek stronger criminal sanctions against manufacturers who wilfully and wantonly produce unsafe products.

If the Illinois Supreme Court wishes to retain punitive damages in the field of products liability, and wishes to abandon its practice of haphazardly formulating policy on punitive damages, the court should vest the trial judge, not the jury, with the duty of determining the amount of punitive damages awards.⁸⁶ The jury would re-

Criminal sanctions will deter a defendant in a way unrelated to the monetary value of a punitive damages award. A criminal conviction of a manufacturer can result in a damaged reputation due to widespread adverse publicity, so the impact on the defendant's pocketbook is indirect. See Glenn A. Clark, Note, *Corporate Homicide: A New Assault on Corporate Decision-Making*, 54 NOTRE DAME L. REV. 911, 914 (1979); Harry Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions*, 17 STAN. L. REV. 197, 217 (1965).

There are two distinct advantages in applying criminal sanctions against a corporate defendant. First, unlike civil litigation costs and punitive damage awards, criminal fines and the costs of defending criminal cases are not tax deductible. Brock D. Phillips, Note, *The Tax Consequences of a Punitive Damages Award*, 31 HASTINGS L. J. 909, 915 (1980). Second, since criminal fines are relatively low, the threat of "overkill" could be avoided, and any proceeds from the fine would go to the state and not to the plaintiff as a windfall. See Pietrick, *supra* note 4, at 477-79. Besides the theoretical problems in "convicting" a corporate entity, criminal sanctions against corporations have been criticized in that they really punish the innocent shareholders, who have no real say in the corporate decision-making process. *Id.* at 478.

A final proposed legislative reform is to increase the burden of proof on the plaintiff, by statute, to show that the defendant is liable for punitive damages. The California Civil Liability Reform Act of 1987 changed the standard of proof for punitive damages liability from a preponderance of the evidence to clear and convincing evidence. Robert Egelko, *Are Punitive Damages an Endangered Species?*, CAL. LAW. 47, 50 (Apr. 1988). Egelko predicts that this change in the standard will have a dampening effect on the award of punitive damages in California, in that fewer pleadings for punitives will be filed, fewer claims will reach the jury, and more verdicts will be tipped to defendants in close cases. *Id.* at 51.

86. Several commentators have argued that the judge, rather than the jury, should determine the amount of a punitive damages award. See, e.g., Seltzer, *supra* note 84, at 60-61 (court, rather than jury, should determine amount of punitive award); J. Phillips, *supra* note 84, at 160-62 (court, rather than jury, should determine amount of punitive damages award); Jane Mallor & Barry Roberts, *Punitive Damages: Toward A Principled Approach*, 31 HASTINGS L.J. 639, 663-66 (1980) (by submitting question of whether punitive damages are merited to the jury, the jury acts as a check on judicial decision-making and can apply their individual knowledge of community standards; if punitives are deemed necessary by jury, the judge, by *in-camera* hearing, assesses amount to be awarded based on underlying policy and economic considerations).

The California Legislature's Joint Committee on Tort Liability submitted a questionnaire to California's 500 Superior Court judges, almost half of whom responded. Fifty-six of the responding judges supported divesting the jury of its discretion to determine both "the allowance and amount of punitive damages," and revesting this discretion in the trial court. Gary T. Schwarz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 146-47 (1982). Only 3.2% of the responding judges thought the jury's assessment of the amount of punitive damages was "almost always sensible," and 45.4% thought the jury's assessment was "sometimes sensible, sometimes not." *Id.* at 147.

The view that the judge should determine the amount of punitive damages was adopted in the INTERAGENCY TASK FORCE ON PRODUCT LIABILITY - FINAL REPORT, VII 75-80 (U.S. Dept. Commerce 1976). The task force recognized that many jurisdictions do not allow insurance coverage against punitive damages,

tain its role as fact-finder, and plaintiffs could continue to rely on

and in their opinion, punitive damages awards in products liability cases have not caused a substantial rise in liability insurance rates. *Id.* at VII-80. Nevertheless, the task force recognized the potential problems in a mass tort situation where a manufacturer is faced with multiple punitive damages awards for a single actionable wrong, which would involve costs far in excess of any criminal sanction that could be imposed. *Id.* By having the judge determine the amount of the award, instead of the jury, the judge could consider factors the jury could not, including the amount of punitive damages the defendant had already paid. *Id.*

The view that the judge determine the amount of punitive damages has also been taken in the Model Uniform Products Liability Act. See MODEL UNIFORM PRODUCTS LIABILITY ACT § 120 (3d ed. 1987). See also KENNETH R. REDDEN, PUNITIVE DAMAGES, 1983 Cum. Supp. 61-63 (1980).

Section 120 of the Model Uniform Products Liability Act deals with punitive damages as follows:

- A) Punitive damages may be awarded to the claimant if the claimant proves by clear and convincing evidence that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers, or others who might be harmed by the product.
- B) If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of those damages. In making this determination, the court shall consider:
 - 1) The likelihood at the relevant time that serious harm would arise from the product seller's misconduct;
 - 2) The degree of the product seller's awareness of that likelihood;
 - 3) The profitability of the misconduct to the product seller;
 - 4) The duration of the misconduct and any concealment of it by the product seller;
 - 5) The attitude and conduct of the product seller upon discovery of the misconduct and whether the condition has been terminated;
 - 6) The financial condition of the product seller;
 - 7) The total effect of other punishment imposed or likely to be imposed upon a product seller as the result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of criminal penalties to which the product seller has been or may be subjected; and
 - 8) Whether the harm suffered by the claimant was also the result of the claimant's own reckless disregard for personal safety.

Id. 1983 Cum. Supp. at 61.

The Drafter's Analysis accompanying section 120 states that its purpose is to provide legal structure for the award of punitive damages in products liability cases where none existed before, and to reduce the reasonable concerns of product sellers about punitive damages while retaining the important deterrent function of punitive damages. *Id.* at 62-63. This approach is in accord with the general pattern of criminal law where the jury determines "guilt or innocence" and the court imposes the "sentence." *Id.* at 62. The suggestion in the Act that the court, not the jury, determine the amount of punitive damages was borrowed from a then newly-enacted Minnesota statute. See MINN. STAT. ANN. § 549.21 (West Supp. 1978). However, the National Uniform Product Liability Act failed to win passage in the Senate. See Cong. Index, 9th Congress, 21,000 (Vol. 1) (CCH); Nora Wolf, *Federal Standard: Product Liability Rule Rejected*, A.B.A. J., Aug. 1985, at 19.

Illinois decisions in introducing evidence of prior similar occurrences to submit the issue of punitive damages to the jury.⁸⁷ Thus, if the jury decides that the imposition of punitive damages is proper, the judge would then determine the amount of the award.⁸⁸

This approach has four distinct advantages. First, the judge can draw on his or her experience and knowledge in comparing previous cases to the one at bar, so the judge is better able than the jury to determine the amount of punitive damages.⁸⁹ Second, the judge can freely consider whether the defendant has already paid punitive damages in other actions with respect to the same product and adjust the award accordingly. If this evidence were made available to the jury, it might prejudice the jury's determination of compensatory damages.⁹⁰ Third, this change in procedure would eliminate the need for a separate trial on the issue of punitive damages which would otherwise be required if the jury were permitted to consider the damages already paid by the defendant in prior suits.⁹¹ Fourth, since the judge is already vested with the powers of remittitur and vacation of damage awards, the practical and conceptual leap to having the judge initially determine the amount of the award is not prohibitive.⁹²

87. See *supra* note 6 for a discussion of evidence of prior similar occurrences.

88. INTERAGENCY TASK FORCE, *supra* note 86, at VII-78.

89. *Id.*

90. *Id.* at VII-79.

91. *Id.*

92. See *supra* notes 60-61 for further discussion of the court's powers of review of punitive damages awards in products liability cases in Illinois.

One potential problem with having the jury decide whether to award punitive damages and then have the judge determine the amount, is the possible tendency of the jury to award a higher amount of compensatory damages in an attempt to retain the "right" to "punish" a defendant whom it determines has acted recklessly. However, an award of compensatory damages is much easier to scrutinize on review, since it is related to the plaintiff's actual loss, so any such tendency by the jury could be kept in check.

A second potential problem with allowing the judicial assessment of punitive damages is that the jury's function as the conscience of the community is usurped, thus preventing punitive awards from reflecting a societal assessment of manufacturer culpability. See Judith C. Glasscock, *Emptying the Deep Pocket in Mass Tort Litigation*, 18 ST. MARY'S L. J. 977, 1000 (1987); Seltzer, *supra* note 84, at 60-61. The right to a trial by jury insures that a defendant will be judged by his peers and not by the reaction of a single judge. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

A larger question, beyond the scope of this article, is whether the judge or jury will do a better job of dispensing justice in determining the amount of a punitive damages award. The following quote should be considered in that light:

The need for the popular and nonprofessional perspective which the jury brings to the courtroom is particularly acute where punitive damages are involved, because it is upon contemporary community standards that conduct is judged as wanton, grossly negligent, outrageous, or malicious - and thus a proper basis for punitive damages. The jury is also said to be particu-

In conclusion, the court's decision in *Loitz* reflects its hostility towards punitive damage awards in products liability cases. This decision leaves unanswered the question of whether the court intends to abolish punitive awards in this area, or whether the court only desires more judicial control over the amounts awarded. If the latter is the Illinois Supreme Court's goal, it is a better solution that the judge, rather than the jury, determine the amount of a punitive damages award after the jury, as fact-finder, determines whether punitive damages are warranted. This solution would leave intact Illinois case law which allows plaintiffs to present evidence of prior similar occurrences to submit the issue of punitive damages to the jury. It would also help prevent the threats of arbitrariness and "overkill"⁹³ in punitive damage awards in products liability cases.

Eric P. Loukas

larly suited for setting the penalty for such conduct. The amount awarded is limited by the common conscience which is called into play by the jury system.

Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 420-21 (1967).

93. See *supra* notes 81-83 for discussion of criticisms of punitive damage awards.