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Summary

Depicting the American system of products liability in general and punitive damages in particular as bizarre is unlikely to offend anybody. People unable to provide their own anecdotal evidence of exactly how twisted the system is are hard to find. Proponents of it, usually lawyers arguing the plaintiffs' cases, are dismissed as biased and profiting from their quarter cuts in billion dollar awards.

This thesis describes the nature of punitive damages in products liability litigation and its position within the broader framework of torts. The emphasis is put on the rules of the state of California.

I give a brief introduction of tort law and its three main categories. The products liability section discusses the nature of products, defects and the tests for them, possible parties and finally the theories of recovery. Thereafter, I describe the concept of punitive damages. In general, there exists clear rules governing when and how to award punitive damages. There is a lack of good statistics on the actual awards in this type of litigation. One main conclusion can be made though; depending on what point you want to make, you choose the data that fit it.

I conclude with a brief analysis of the judicial, ethical and economic dimensions of punitive damages. The main justified criticism of the system in the judicial sense is the unpredictability of the size of the penalty. This weakness should not be overly hard to alleviate. A number of landmark cases[1], primarily involving car manufacturers, do stress the need of external means, e.g. punitive damages, to improve corporate responsibility and ethics. In terms of economics, the innovation of safe and thereby wanted products should not be hindered by punitive damages. One should also note the possibility to, through insurance companies, hedge the risk of punitive damages inherent in all corporate activities.

[1] Such as *Grimshaw v. Ford Motor Company* 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981) and *Hasson v. Ford Motor Company* (1982) 32 Cal.3d 388, 138 Cal.Rptr. 705.

1. Introduction

1.1 The issue

"When a company 's products turn out to have hurt people, or worse, that slavering sound you hear is of a thousand attorneys licking their lips. Shareholders, meanwhile, hold their breath."[2]

This description referred to a prospective award of punitive damages that have been a hot topic for the past twenty years in the U.S.[3] Punitive damages is an additional sum that the plaintiff is awarded in order to punish the defendant and to deter others in engaging in similar tortious conduct. Compensatory damages, the other element of compensation, intended to represent the closest possible financial equivalent of the loss or harm that the plaintiff suffered, has not been an issue in the debate.

Some argue that punitive damages are "smart money" for the plaintiff. Other claim that it is more than fair that big companies pay for knowingly or recklessly putting dangerous products on the market, encouraging the consumers with deceptive commercials.

Probably no subject in tort law has generated more heated controversy in recent years than the recoverability of punitive damages in torts. Everybody has heard some story about the American legal system. One issue that in particular has been discussed frequently is whether there has been an increase in the awards of punitive damages, both in amount and frequency. There are a number of products that are associated with extremely high amounts of punitive damages; motor vehicles, cigarettes, prescription drugs, silicon implants and asbestos. Even individuals have been awarded billions of dollars.

In the early 1950s tort law was of concern of those practicing the field; law students, law professors and attorneys. The public knew very little, if anything, about the law of tort. In the last half century, the area of tort has been the subject of a lot of attention and discussions and things have

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[2] *Hunting corporate criminals*, The Economist, Aug 31st 2000.

[3] In August 2000, Firestone had to do a recall of 6,5 million tyres. Firestone is part of Bridgestone Corporation in Japan, the world's biggest tyre-maker. Firestone was a major supplier of tyres to Ford Motor Co. and the tyres in question were fitted to Ford Explorer sport-utility vehicles (SUVs). The vehicle was, up to then, the best selling SUV in America. It was revealed that one out of every 4000 tyres was liable to suddenly split apart and lose its tread. This caused the Ford Explorer to roll and crash. Roll-over crashes are a big concern since it accounts for 60% of the deaths in crashes involving SUV's and pick-up trucks compared with only 22% in ordinary car models. *Tyre straits*, The Economist, Aug 31st 2000.

changed dramatically. Not only practitioners but also the general public has realized what remedies such as punitive damages that are available in tort.

This thesis aims to show that the issue of punitive damages involves many aspects to consider. It also shows the difficulty in giving a simple answer to questions such as whether punitive damages are available to the extent sometimes argued or not.

After a year as a student at a law school in San Jose, California, I got an insight in the California system of law. Because of that I wanted to present an issue that was exciting and even a bit exotic for a Swedish law student to read about: punitive damages. I also desired to put the issue into a perspective of real and ordinary law, not the extraordinary rare or extreme cases. I wanted the reader to get a view of the complicated system of rules behind those rare and extreme cases. That is why I have spent a considerable amount of time and space to describe the law of torts and the law of products liability.

1.2 Purpose and scope

The purpose of this thesis is primarily to introduce the reader to the American tort law in general and products liability and punitive damages in particular. It is also to provide a broad picture of the issue of punitive damages.

Products liability was chosen because it is the fastest growing and probably the most significant branch of tort law and also one of the areas of law where the highest amounts punitive damages are awarded.[4]

Because of my own experiences at a law school in California, the starting point is Californian law. The scope of the Californian system has been an advantage. It created a natural and easy way of limiting the scope of the thesis and most of the leading product liability cases are from Californian courts. However, if the law in California is different from the other American jurisdictions or when examples and situations are taken from other states or from federal courts, those aspects will be brought to the reader's attention. The law described is accepted in many and sometimes all the states, and I have therefore found it convenient to mention when there are exceptions from this situation.

[4] For the situation in California, see Kelso and Kelso, p. 8.

1.3 Disposition

The thesis will provide the reader with background information with the purpose of putting the concept of punitive damages in a wider perspective than disconnected stories about billion dollar awards reported in the media. This thesis is structured as follows: the first part introduces the reader to the American system of torts and explains important concepts in torts. The second part is an overview of products liability, giving the reader a connection to an area where punitive damages can be awarded. The third part focuses on punitive damages in products liability. Those three chapters are descriptive. The last chapter contains an analysis and will discuss punitive damages in relation to different aspects in the society.

For brevity and clarity, short descriptions and references to relevant court cases have been placed in the footnotes.

1.4 Material

The principal source of information in the area of tort, except the case law, is the Second Restatement of Torts. In product liability, one important source is the Third Restatement of Torts: Product Liability.

The Restatements are series of legal writings whose purpose is to clarify and analyze the current state of the law in various subjects, e.g. the Restatement of the Law of contracts and the Restatement of the law of Torts.[5] The American Law Institute is the official supervisor and gives the task of drafting a restatement in a given field to highly respected legal experts.

The Third Restatement of Torts is the first product of the American Law Institute's undertaking to revise and update The Second Restatement of Torts. Since the subject of tort has become too broad and to intricate to be encompassed in a single project, the American Law Institute decided to undertake The Third Restatement in segments. Many subjects in tort law have become controversial with conflicting views that made it more time-consuming and difficult to work out rationales and responsible solutions among the views. Products liability is a good example of one of those subjects and it also has certain political aspects with attention from both legislative forums and election campaigns.

Mind the reader that the Restatements are not in the same position as the law in itself and the courts are not obliged to follow the Restatements even if there is a both accepted and common tendency to follow the principles.

[5] Compared to Sweden, the Restatements could probably be compared with "Karnov" as a comment to the applied law.

During my year at Lincoln Law School in San Jose, California, I had the advantage of having the assistance of my professor in torts; Craig Needham, a personal injury attorney. He contributed to this thesis in many ways. As a personal injury attorney he introduced me of the sources of law that he used in his practice of law. He very much recommended The California Jury Instructions, Book of Approved Jury Instructions, (Baji).[6] These instructions are read for the jury and can be explained as the rules of law for the jury. Therefore the instructions are a good source of the rule of law, especially since the rule of law is being expressed in a way supposed to be understood by layman; the jury. The content of the instructions are clear, direct and broken down to small pieces, which make them fairly easy to understand. I have therefore used the instructions as a source of information in this thesis.

I have also used other material such as the case law, law school material printed and electronical articles and different web sites.

[6] A revised edition is put together every year by the Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County in California.

2. The Law of Torts

2.1 General comment

This chapter will give a general introduction to the law of torts and explain the different categories of torts that are relevant for an understanding in product liability.[7]

Tort law is primarily judge-made law and no American jurisdiction has so far adopted a tort "code". However recently, statutes are increasingly modifying tort law.

2.2 Nature and purpose of tort law

The law of tort is a fully developed body of law, independent of e.g. criminal law and contract law. It establishes many grounds for potential causes of actions. Tort is a general classification that includes several different civil causes of action providing a private remedy, usually money damages, for an injury to the plaintiff caused by the tortious conduct of the defendant.[8] There is no satisfactory definition of a "tort" which makes it possible to distinguish a tortious conduct from a non-tortious conduct and the courts are constantly changing their view of what constitutes a tort. However, one definition is "[a] tort is a civil wrong other than a breach of contract, for which the law provides a remedy."[9]

The area of tort law imposes duties on persons[10] to act in a way so that injuries will not incur to other persons. The major purposes of tort law are said to be: 1) to provide a peaceful means for adjusting the rights of parties who might otherwise take the law into their own hands; 2) to deter wrongful conduct; 3) to encourage socially responsible behavior and 4) to restore injured parties to their original condition as long as this can be done by compensation for the injuries sustained.

A few main features can help identify and explain the law of tort:

- *Consent*
Consent is not a requirement. The law of tort is thus not based on a contractual relationship.

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[7] For more extensive introductions see Schwartz, Kelly and Partlett, chapter 1-6.
[8] This could be compared to the Swedish system of liability that includes situations where there was a contractual relationship between the parties and where there was none; "utomobligatoriskt skadestånd" and "inomobligatoriskt skadestånd".
[9] Schwartz et al., p. 1.
[10] From here I will refer to both legal entities (compared to the Swedish legal term of "juridisk person") and individuals when I use the term person or persons.

- *Compensation*

The overall purpose of tort law is to compensate the plaintiffs for injuries because of a tortious conduct. To measure whether certain harm is unreasonable and demands compensation, the social utility of the defendant's conduct is evaluated.

- *Shifting the burden*

The courts desire to achieve economic efficiency where one goal is “shifting the costs”. The courts strive to find a defendant that is in a more suitable position than the plaintiff to carry the financial hardship. Besides letting the defendant pay the costs of unreasonable harm, one objective is also to impose the costs on the party who best can bear the financial burden. This often refers to the party that easily could have been covered by insurance.

This factor is of great importance in the court’s decisions and is especially recognized in product liability cases where the financial disparities between the parties often are great. Manufacturers and sellers of defective products may be required to bear the cost of injuries even if they not are at fault, based on the theory that the cost should be treated as a cost of doing business.

To impose the costs on the party that is in the best position to afford it is also associated with the theory of the defendant with “the deepest pocket.” Whether the defendant actually caused the unreasonable harm to the plaintiff or not, is not of unconditional priority but of greater importance is who is in the best position to pay damages.

The goals of economic efficiency is to determine who can at the lowest cost most easily prevent the injury and shifting the costs to those who best can afford them. Those two goals will often be at odds with each other. From about the 1960s through the 1980s there was an enormous expansion of the liability and courts seemed to be more engaged in shifting the costs to the deepest available pocket than making sure the causation was a question of no doubts. In the 1990s the courts were more focused on the economic-efficiency issue.

2.3 Categories of torts

2.3.1 General comment

The law of tort can be organized into three main categories relating to the nature of defendants conduct or activity*:* 1) intentional torts, 2) the tort of negligence and 3) strict liability. Under early common law (15th century), strict liability was often imposed but was replaced by the rules of negligence. In recent decades though, there has been a return to the principle of strict liability in many areas of the law.[11]

A number of torts can be based upon more than one of these three major types of defendant's conduct or activity. The tort of nuisance[12] and the tort of misrepresentation[13] can be founded on either intent, negligence or strict liability.

The differences between the three major categories of torts are most obvious in the scope of liability. The more blameworthy a defendant's conduct is, his liability extends to more far-reaching and unexpected consequences. Liability for an intentional tort reaches much further than liability for a negligent tort or a tort where strict liability applies.[14] The intentional tortfeasor (the defendant) will be liable for every result of the act, direct and indirect, even if at the time of the act, the result seemed unlikely.[15] If the defendant is negligent or strictly liable, he or she will generally be held liable for the results that were foreseeable.

[11] Emanuel, p. 2-3.

[12] The tort of nuisance refers to a type of injury. There is public and private nuisance. Public nuisance is an interference with a right common to the general public e.g. releasing harmful chemicals or noxious odors into the air. Private nuisance is an unreasonable and substantial interference with the plaintiff's use and enjoyment of his land. In a private nuisance action the plaintiff must show that he or she has an interest in land that has been substantially and unreasonable interfered with and that the defendant has behaved in a negligent, abnormally dangerous or intentional manner. Emanuel, p. 379.

[13] Misrepresentation is a false and misleading statement about a material fact that could be the ground for rescinding a contract or for the recovery of damages in contract or tort. Gilbert Law Dictionary. Misrepresentation could also involve the invasion of intangible interests e.g. the tort of defamation. Schwartz et al., p. 1009.

[14] Compared to the Swedish system, intentional and unintentional torts can be compared with "dolösa" and "culpösa" acts and the attaching various levels of liability.

[15] One example regarding an intentional tort is a defendant that intentionally hits the plaintiff in his head with a stick. The intentional tort is battery. The plaintiff receives treatment at a hospital but a physician mistreats the plaintiff and as a result thereof he suffers major complications. The defendant will then be liable to the plaintiff also for the unforeseeable consequences such as the physician's mistreatment.

2.3.2 Intentional torts

An intentional tort occurs when the defendant has a desire, intent, and/or knowledge of a substantial certainty that a result will occur from his or her actions. Intent to act is sufficient; intent to harm is not required.[16]

There are seven intentional torts and these include both intentional interference with person and property: battery, assault, false imprisonment, intentional infliction of mental distress, trespass to land, trespass to chattels and conversion.[17]

2.3.3 Strict liability

The defendant can be strictly liable because of the nature of the activities he or she is conducting, notwithstanding the degree of care that the defendant has exercised.[18]

One of the first areas selected by for the imposition of strict liability focused on the care and maintenance of particular animals. Not just the owner can be held strictly liable but also those who keep, posses or harbor the animal. Strict liability is also applicable in abnormally dangerous activity e.g. the operation of a nuclear power station or the storage of dangerous goods e.g. dynamite.[19] Strict liability also applies to the manufacturing of defective products in products liability.[20]

Causation is an important issue in strict liability cases and it must be established that the activity conducted by the defendant actually caused the plaintiff's injury.

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[16] Schwartz et al., p. 22, note 1.

[17] I will not go further in explaining the different intentional torts since it is not relevant in product liability.

[18] It has been discussed whether or not it is correct to call the defendant's conduct "liability without fault". This description suggests that negligence and intentional tort causes of action are always based on fault but there are examples of imposition of liability without fault under the negligence and intentional tort bases of liability. Intentional torts are characterised as the **intent to act** and does not have to include the **intent to harm**. Since the intent to act need not to include the knowledge about the expected result, it is not correct to say that intentional tort is liability with fault. Negligence is to act with a lower level of care than required but with no intent of bringing about the injury.

[19] *Rylands v. Fletcher*, 159 Eng. Rep. 737 (1865). This category of conduct concurs with the applicability of strict liability in the Swedish legal system.

[20] This will be further described in chapter 3.

2.3.4 Negligence

2.3.4.1 General comment

The theory of negligence is the essence of tort law and the most important theory of recovery. It was scarcely recognized as a separate tort before the earlier part of the nineteenth century and has been extensively developed before attaining the meaning and concepts the theory has today.

The recognition of negligence as a separate theory of recovery or as a cause of action coincided with the Industrial Revolution in England. The enormous increase of industrial machines and, in particular, the invention of the railway was contributing to an increased number of accidents. These strides forward had also become a highly important development that could not be compromised on safety issues and the law had to adjust to the society's need. Accidents brought up the problem of having no applicable theory of law to establish liability without the requisite of intent.

The negligent tortfeasor has no request of a particular result occurring from his or her actions or inactions. In intentional torts, the mental state of the tortfeasor is of utmost importance but in a negligent cause of action, the intentions of the defendant are immaterial. It is the conduct that is the essence. The California Jury Instructions (Baji) define negligence as:

> "Negligence is the doing of something that a reasonable prudent person would not do, or the failure to do something that a reasonable prudent person would do, under circumstances similar to those shown by the evidence. It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence." "…[T]he person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skilful one but a person of reasonable and ordinary prudence."[21]

The standard of care depends on the circumstances and who the actor is. A special standard of care is involved for children unless engaged in an adult activity where the ordinary standard of care applies. There are special standards of care for professionals such as physicians, psychotherapists, surgeons[22] and nurses[23].

The important issue is whether a person of ordinary prudence, in the same situation and with the same knowledge, would have foreseen or anticipated that someone, might have been injured by or as a result of his or her action

[21] Baji 3.10.
[22] Baji 6.00.1- 6.08.
[23] Baji 6.25.

or inaction. If the action or inaction reasonably could have been avoided, it would be negligence not to avoid it.

2.3.4.2 The elements

A cause of action for negligence requires the plaintiff to prove with a preponderance of the evidence[24] the establishment of four different elements: a *duty* for the defendant to act, *a breach* of that duty, *causation* between the defendant's breach of duty and the injury and finally, *damages.*

2.3.4.3 Duty

It is for the plaintiff to show that the defendant had a duty to use reasonable care towards the plaintiff. The law does not impose a general duty to act but there are many exceptions, e.g. when the defendant engages in some affirmative act such as driving a car. He or she is then under a duty to exercise reasonable care whenever defendant's conduct will involve an *unreasonable risk* of harm to others.

Most negligence cases focus on the duty aspect since there are situations where the defendant has a very limited duty or no duty at all to act with reasonable care to the plaintiff.[25]

Whether the defendant has a duty must be decided on a case-to-case basis except for situations where it has been established that conducting the type of activity that the defendant did, include a duty of care towards possible plaintiffs.[26] Duty is a relative concept and requires consideration to whether the plaintiff was within a class of persons who foreseeable would be injured as a result of the defendant's act.[27]

In determining whether a duty exists the courts have used an analysis that is rather complex. Several related factors have been weighed and balanced against each other: the nature of the underlying risk of harm that could injure plaintiff if defendant did not exercise his or her duty, the risk's foreseeability and severity, the opportunity and ability to exercise care to prevent the harm, the comparative interests of and the relationship between or among the parties and above all, based on considerations of public policy and fairness, the interest of society to the proposed solution.[28] Today, determination of a

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[24] Preponderance of the evidence is the standard of proof necessary to prevail at judgement in a civil action and to prove something to the preponderance of the evidence it is more likely to be true than not. Gilbert Law Dictionary.

[25] One example is when a driver has passengers in his car only of gratuitous reasons. The driver will only be liable towards the passengers for aggravated misconduct and not for negligent acts. Schwartz et al., p. 398.

[26] E.g. professional negligence (malpractice). Baji 6.00.1 Duty of physician, 6.00.2 Duty of psychotherapist, and 6.01 Duty of specialist.

[27] "The foreseeable plaintiff". *Palsgraf v. Long Island R.R. Co*. 248, N.Y. 339, 162, N.E. 99 (N.Y. 1928) infra note 41. This is more of a causation issue and will be discussed under section 2.3.4.5 Causation.

[28] *Hopkins v. Fox and Lazo Realtors,* 132 N.J. 426, 439, 625, A.2d 1110 (1993).

duty is used as a mechanism for limiting the range of negligent liability for public policy reasons.

The law does not impose a general duty to take affirmative action to rescue or help people.[29] But there are exceptions to this rule. If there is a special relationship between the plaintiff and the defendant or if the defendant and the plaintiff engage in a common pursuit as co-ventures, the defendant will be liable for failure to act. If the defendant has voluntarily assumed a duty of care and begun helping the plaintiff, there will be liability if she or he does not proceed with reasonable care. A duty may also be imposed when the plaintiff has relied upon defendant's voluntary undertaking and the reliance was to the plaintiff's detriment.[30]

The standard of care

The standard of care is the care of an ordinary reasonable and prudent person acting under the same circumstances. The term "ordinary" is given its real meaning by not requiring the conduct of an individual much more cautious than the average person.[31]

2.3.4.4 Breach of duty

If the defendant has failed to conform to the required standard of care for a reasonable person under the circumstances there has been a breach of that duty.

2.3.4.5 Causation

Causation is a complicated issue that must be established for the plaintiff to have a cause of action for negligence. If the defendant's conduct did not cause the plaintiff's injuries it does not matter how negligently the defendant

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[29] "With purely moral obligations the law does not deal", Schwartz et al., p. 415. Not only ordinary citizens are excluded from the duty but also does the tort law not impose a duty on physicians that come across situations where their help could be needed. This is probably a result of the tort system itself with the threat of being sued in a malpractice case and the ability for people of suing a physician that voluntarily helped a patient. Since it is likely that there is no proper medical assistance and equipment on the scene of an accident, the medical care is less probable to be successful. Every state and the District of Columbia have enacted Good Samaritan laws to relieve the group of physicians of some extent of liability. The Good Samaritan Rule states that "A person who is under no duty to care or render service to another but who voluntary assumes such a duty, is liable to the other for injury caused by a failure to exercise ordinary or reasonable care in the performance of that duty" Baji 4.45. It signifies that if a person engages in a voluntary undertaking, he or she has also assumed the risks in such acts but it is only the failure to exercise ordinary or reasonable care that can lead to liability. There have not been any empirical studies that demonstrate any beneficial impact because of the legislation. Schwartz et al., p. 420, note 15. The law of tort distinguishes between misfeasance, the affirmative action that harms or endangers the plaintiff, and nonfeasance, a mere passive failure to take action. The refusal of liability for nonfeasance is a unique product of Anglo-American law and which has been the target of much criticism. Schwartz et al., p. 414, note 5.

[30] Schwartz et al., p. 418, note 11.

[31] Schwartz et al., p. 146, note 5.

acted. Causation requires a reasonable close connection between the conduct of the defendant and the plaintiff's injuries and it involves the combination of two elements: causation in fact and proximate causation.

Causation in fact

Initially, the plaintiff must show that the defendant's conduct was the actual cause of his or her injuries. The "But for" test is used to determine whether or not the defendant's conduct resulted in the plaintiff's injuries; the injury would not have occurred but for the defendant's negligent conduct.[32]

Even though the "but for" test still is the standard method in establishing the cause in fact, California has adopted the substantial factor test.[33] The conduct of the defendant need not to be the sole cause of the injury but a negligent conduct that was a substantial factor in bringing about the injury will suffice. The conduct was not a substantial factor if the plaintiff would have suffered the injuries even without the negligent conduct of the defendant.[34]

Sometimes *expert testimony* is necessary to prove causation in fact, particularly in medical malpractice cases where the jury has sparse knowledge of what could be the basis to conclude that the defendant's treatment caused the plaintiff's injury.[35] It is also important in proving causation in products liability cases as well as *scientific evidence.* Scientific evidence has sometimes been called "junk science"[36] by critics regarding the issue of what level of scientific establishment that is required before a scientific theory can be presented for a jury. Different jurisdictions follow different standards. Some states hold that only generally accepted scientific methods may be presented to the jury while other courts allow any scientific theory or evidence to be placed in front of a jury as long as there are reasonable scientific credentials.[37]

Proximate cause

Causation in fact is a necessary predicate to an inquiry about proximate cause. If there is no cause in fact, there is no need of establishing a possible proximate cause. When the word proximate was first used in the context of causation it meant close in time or space. However, during the judicial

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[32] The test has been difficult to apply especially for the jury since one injury could have many causes.

[33] *Mitchell v. Gonzales* 817 P.2d 872 (Cal. 1991).

[34] *Perkins v. Texas & N. O. R. Co*., 243 La. 829, 147 So. 2d. 646 (La. 1962). Cause – substantial factor test: "The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage loss or harm." Baji 3.76.

[35] Emanuel, p. 131.

[36] "Junk science" refers to the alleged possibility of creating a scientific theory whenever there is a need for it.

[37] Emanuel, p. 132.

development, proximity in time or space was only one of many factors that were included in the determination whether the defendant's negligence was the proximate cause of the plaintiff's injury. Proximate cause has also been called legal cause in an attempt to make the name of the term more descriptive of its meaning.[38]

The distinction between cause in fact and proximate cause is extensive. When a cause in fact refers to the relationship between a cause and an effect, the "but for" or substantial factor test, proximate cause concerns the determination whether legal liability should be imposed. The question is how far legal liability should extend and where the liability should be cut off even if a cause in fact has been established.[39] Proximate or legal cause is a policy decision made by the legislator or the courts to deny liability for a conduct that otherwise would be actionable. This policy decision is based on considerations on logic, common sense, policy and arguments and ideas of what administratively is possible and convenient.[40]

In the most famous American tort case of all times, the prevailing view was established of how to determine whether or not defendant's conduct was the proximate cause of the plaintiff's injury.[41]

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[38] The Restatement (Second) of Torts § 431 has substituted the term "legal cause" instead of proximate cause.

[39] In *Atlantic Coast Line R. Co. v. Daniels*, 8 Ga. App. 775, 70 S.E. 203 (Ga. App. 1911) the court explained the reasons for putting a "limit" or a cap on the extent of the defendant's liability: "Cause and effect find their beginning and end in the limitless and unknowable. Therefore courts, in their finitude, do not attempt to deal with cause and effect in any absolute degree, but only in such a limited way as is practical and is within the scope of ordinary human understanding."

[40] *Snyder v. LTG Lufttechnische, GmbH*, 955 S.W. 2d. 252 (Tenn. 1997).

[41] *Palsgraf v. Long Island R.R Co*., 248, N.Y. 339, 162, N.E. 99 (N.Y. 1928). A man was running to board the defendant's train but was about to fall and one of the defendant's employees therefore attempted to push the man on board. While attempting to help the passenger on to the train, the passenger's package fell down on the rail and exploded. The package contained fireworks unbeknownst to anyone but perhaps the passenger. The shock of the explosion made some scales at the other end of the platform to fall down and the plaintiff was injured when hit by the scales. The issue in Palsgraf concerned the proximate cause, whether the defendant railroad company could be regarded liable for the plaintiff's injury. The prevailing holding of the case was that the defendant was not liable since the plaintiff was not "a foreseeable plaintiff". The negligence of the defendant towards the passenger on the train was not sufficient to give rise to liability to the plaintiff who was injured in the surrounding circumstances of the explosion. The conduct of the defendant did not involve a foreseeable risk of harm to the plaintiff and therefore it did not matter that the defendant's had imposed an unreasonable risk on someone else – the plaintiff was not a foreseeable plaintiff and therefore her injuries were not proximately caused by the defendant's conduct. The dissent in Palsgraf argued with the support from many authorities, that the defendant bear a burden of due care, like every member of society, to protect the society from unnecessary danger, not only to protect certain plaintiffs. However, there was also a need of cutting the defendant's liability short of all possible consequences that might stem from his conduct. This should not be decided upon foreseeable plaintiff/foreseeable consequences but on a test of remoteness. The test included various factors to be considered: if there was a natural and continuous sequence between cause and effect, if there was a direct connection between them without too many intervening causes and if the result was too remote in time and space from the cause.

2.3.4.6 Damages

Personal injury cases
In both intentional and unintentional torts, proof of damages is an essential part of the plaintiff's cause of action. However, in an intentional tort case, the plaintiff does not need to show that he or she has suffered any harm but is entitled to recovery anyway. It is sufficient for the plaintiff to have a cause of action if the protected interest has been invaded.[42] But in unintentional tort, such as negligence and strict liability, the plaintiff must show that he or she suffered some sort of physical harm.[43]

There are three basic kinds of damages that can be relevant in both intentional and unintentional torts:

Nominal damages consist of a small sum of money awarded to the plaintiff in order to recognize a legal injury or vindicate rights when the damages are non-existent or where the plaintiff has not established a recoverable loss. The amount of the award is unimportant as long as it is trivial.

Punitive damages are only awarded in cases concerning an intentional tort or in a cause of action for negligence when the defendant's conduct is outrageous, reckless, willful and/or wanton. The plaintiff is awarded an additional sum in order to punish the defendant and to deter others in engaging in similar tortious conduct.[44]

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[42] Schwartz et al., p. 518.

[43] It has always been accepted that where the defendant causes an actual physical impact to the plaintiff's person, the defendant is liable not only for the physical consequences but also for nearly all the emotional or mental suffering that flows naturally from the physical impact. Damages from mental suffering are sometimes called "parasitic", they attach to the physical injury. Where there has been no physical impact or direct injury to the plaintiff courts has been less willing to award damages for emotional distress because of the possibility of fraudulent claims. Where there has been no physical impact and no physical symptoms of emotional distress, most jurisdictions deny recovery. The theory behind this rule is that where the plaintiff cannot even point to objective physical symptoms of the distress, the risk for fraudulent claims is so great that as a matter of administrative policy, recovery should never be allowed. Another argument is that emotional distress that is not so serious as to have physical consequences is normally subject of speculation and therefore falls within the maxim that the law does not concern itself with trifles. (Rest. 2d, §436A, Comment b.) However, California was one of the few states that in the last decade abandoned the requirement of physical impact and physical symptoms for recovery of emotional distress. See Baji 12.80: Negligent infliction of emotional distress. There is a requirement though that the plaintiff has suffered serious emotional distress. A well-known case is *Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813 (Cal. 1980). The defendant doctors and hospital had mistakenly told the plaintiff's wife that she had syphilis. Due to her suspicions of her husband's extramarital affairs because of the diagnos, the marriage broke up. The plaintiff recovered damages for emotional distress after the court concluded that the requirement of physical injury could encourage exaggeration or false allegations of symptoms like headache, nausea and insomnia. The court also observed that the border between physical and emotional injury is not easy to draw and the real requirement should therefore be the guarantee of genuineness in the case.

[44] See infra section 4.2 The concept of punitive damages and 4.3 When are punitive damages awarded?

Compensatory damages are intended to represent the closest possible financial equivalent of the loss or harm that the plaintiff suffered. The intention is to make the plaintiff whole again and to restore the plaintiff to the position that he or she attained before the tort occurred. Compensatory damages can be divided into separate categories.[45]

Judicial control of amounts recovered

A trial judge, through a motion for a new trial, or an appellate panel can question the jury's finding on the amount of the damages if the verdict is excessive or inadequate in a way that it demonstrates that the jury has acted contrary to the law.[46]

There have also been legislative attempts to control excessive verdicts. In response to the tort reform efforts in the 1980's about half of the state legislatures passed laws that in some way limited the recoverable amount of damages. Medical malpractice claims and claims against the government are claims that have been subject to caps on the amount recoverable.[47]

Proof of damages

Over the past few decades there has been an extensive development concerning the techniques for presenting proof of damages. Demonstrative evidence is a form of evidence used by a growing number of attorneys. The evidence consists of tangible items such as charts, photographs, motion pictures, and models. The purpose is to give the jury a complete impression

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[45] *Economic and non-economic damages*

Economic damages refer to past and future medical expenses, lost wages and loss or impairment of future earning capacity and the plaintiff's out of pocket expenses that are subject to an objective measurement. Non-economic damages on the other hand are difficult to measure objectively and include past and future physical pain and suffering. The plaintiff may also recover for various mental or emotional consequences of the injury such as fright and shock at the time of the injury, loss of function and appearance, the loss of enjoyment of life and anxiety about the future.

Physical injury to land and property

Injury to property is rarely discussed in ordinary negligence cases since the requirement is some type of physical injury in the majority of jurisdictions. In cases regarding intentional torts, injury to property can be relevant e.g. in trespass to land, trespass to chattel and conversion. In intentional torts the plaintiff does not need to prove damages in order to recover. Damages for physical harm to land or chattel is closely connected with the value of the destroyed property. In the majority of cases the standard set for value is the market value of the property.

Pure economical loss

Pure economic loss arises when a person suffers pecuniary loss without any injury to person or property. Most jurisdictions decline recovery for pure economic loss where there has not been a physical injury.

[46] According to jury instructions the jury must not be influenced by sympathy, passion or prejudice. California jury instructions (Baji) 1.00. Courts have used terms like "grossly excessive or inadequate", "shocking to the judicial conscience" or "outrageous" to describe verdicts that have been questioned. Schwartz et al., p. 537 note 21.

[47] In California there is a cap of $250,000 on non-economic damages but no limit on economic damages.

of the extent of the plaintiff's injuries. It has been empirically showed that this type of evidence may greatly enlarge the amount that the plaintiff is awarded in damages.[48] This development has been the subject of criticism where observers believe that demonstrative evidence could be misleading rather than assisting. Expert testimony is also used in many cases, especially in product liability cases and in proving damages; to point out a plaintiff's earnings and to give details of a plaintiff's physical and psychological medical difficulties.

2.3.5 Negligence vs. a cause of action for negligence

Negligence refers to carelessness and describes the conduct of the person being evaluated. But negligence in itself is not sufficient to establish a cause of action for negligence. The difference between negligence and a negligent cause of action has been explained in the following way:

> "Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.'"[49]

2.3.6 Contributory and Comparative negligence

The plaintiff's conduct can also be evaluated and measured against the standard of the reasonable person. The defendant can plead the affirmative defense[50] of contributory negligence in situations where the plaintiff has contributed to his or her injury.[51]

The common law doctrine of contributory negligence completely bars recovery for the plaintiff if it is found that he or she has contributed to his or her injuries. However, in most American jurisdictions today, contributory negligence is no longer a complete defense. The doctrine of comparative fault instead compares the relative degree of fault attributed to a defendant and the plaintiff in a negligence suit.[52] A plaintiff may therefore recover damages even though he or she may be guilty of contributing negligence. The damages are reduced by the percentage of negligence that is attributable to the plaintiff.[53]

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[48] Schwartz et al., p. 530, note 5.
[49] Judge Cardozo in *Palsgraf v. Long Island R.R. Co*. 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).
[50] Affirmative defence: A defendant's answer to a complaint which is more than a denial of the plaintiff's charge and which presents evidence and or arguments in favour of the defendant. Gilbert Law Dictionary.
[51] Schwartz et al., p. 130 – 131.
[52] Only four states (Alabama, Maryland, North Carolina and Virginia) and the District of Columbia continue to apply the common law doctrine of contributory negligence. Schwartz et al., p. 598, note 2.
[53] The California Jury Instructions (Baji) 3.50. There are different types of comparative negligence; pure, modified (plaintiff "not as great as") and modified (plaintiff "not greater

3. Products Liability

3.1 General comment

Containing as many aspects of torts as it does, products liability is in fact a microperspective of torts. It is also an area in constant development and change. Some parts of the law are uncertain and remain unclear. Discussions have taken place in the media, the courts and the general public where strong interests stand on each side. The law of products liability has been argued to cause so-called "liability crises" such as the problem of product manufacturers going out of business or declining to put new and useful products on the market because of the risk of a law suit or paying damages.[54]

3.2 Scope and definition

3.2.1 What is product?

A product is usually a tangible personal property, a good or a chattel[55]. Drugs, pharmaceuticals, alcohol, food and medical devices such as pacemakers all are products within the meaning of product liability. Even goods that are not tangible such as electricity and computer software are products. In many situations a transaction can have the characteristics of both a sale of a product and the sale of a service. The courts will have to determine what predominates the transaction; a service or a sale of goods.[56]

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than"). In pure comparative negligence (e.g. California) the plaintiff's negligence is reduced by the percentage of fault attributable to the plaintiff. This means that the plaintiff can recover even if his or her negligence is greater than the defendant's. The second type is a modified form of comparative negligence. The recovery is reduced by the percentage of fault attributable to the plaintiff as long as the plaintiff's fault is not as great as the defendant's. If the plaintiff's fault is equal to or greater than the defendant's, he or she is completely barred from recovery. The third type is also a modified form where plaintiff's recovery will be completely barred if the plaintiff's fault is greater than the fault of the defendant. Schwartz et al., p. 599, note 6.

[54] The Federal Government and the state governments have studied these "liability crises" and there have been a trend towards federal involvement in product liability. In 1995 the Federal Government desired to reform the product liability law but it did not lead to legislation at that point of time. Schwartz et al., p. 800.

[55] Chattel is an item of personal property as opposed to real property. It is movable and not attached and also called a personal chattel. Gilbert Law Dictionary.

[56] There is a reluctance to extend strict liability to service providers because of two underlying policy rationale: in a service transaction there is no mass production and distribution and this leads to no real ability to spread the risk of loss to the consumers which is the case for manufacturer of products. Second, service transactions do not involve a group of consumers needing protection from a remote and unknown manufacturer. This distinction is however not completely uncontroversial since this means that a category of important and risky business will be exempted from liability, e.g. an engineering company

Electricity is a good example of a transaction that can involve both aspects.[57]

Writings, such as a mass-produced aircraft navigational chart, and real estate fixtures[58] such as a house, are also products within the law of product liability.[59]

There have been differing opinions whether animals constitute products or not. One authority states that a living animal that is sold commercially in a diseased condition is a product.[60]

Whether a product is a product within the meaning of product liability is sometimes a question of what theory of recovery that is relevant: negligence, warranty or strict liability. For example, strict liability is not applicable on the ideas and expressions of a book when the contents of a book have influenced someone with the result of the plaintiff suffering injury.[61]

3.2.2 Types of defects

3.2.2.1 Manufacturing defects

There are three types of product defects: manufacturing defects, design defects and warning defects. A manufacturing defect exists when the product differs from the intended design and identical products in the same manufacturing process.[62] Examples of manufacturing defects are products that are physically flawed or incorrectly assembled. A manufacturing defect could also arise when the product is shipped or while in storage[63].

Not only a manufacturer but also a commercial seller or distributor in the chain of commerce could be liable for a manufacturing defect. The plaintiff

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that constructed a chemical plant *see La Rossa v. Scientific Design Co*. 402 F.2d 937 (3d Cir. 1968). Schwartz et al., p. 794 note 1.

[57] It has been determined that when electricity passes through the transmission lines, it is a service but after it has been delivered to the consumer's meter or transformer it is a product. Schwartz et al., p. 795, note 5. *Stein v. Southern California Edison*, 7 Cal. App. 4th 565, 8 Cal. Rptr. 2d 907 (1992).

[58] Fixtures are items that once were personal property but have become so annexed or physically attached to realty that they are considered to be part of the real property.

[59] Schwartz et al., p. 795, note 5. Charts and maps: *Fluor Corp. v. Jeppesen & Co.*, 170 Cal.App. 3d 468, 216 Ca. Rptr. 68 (1985) and *Brocklesby v. United States*, 767 F.2d 1288 (9th Cir. 1985).

[60] Restatement (Third) of Torts: Product Liability § 19 cmt. B (1998).

[61] If the appearance of a book were harmful to the intended consumer, e.g. a book for small children that contained small devices that easily could be swallowed, probably all theories of recovery would be applicable. In one case the plaintiff unsuccessfully argued that his guidebook should have warned for dangerous conditions of a beach where the plaintiff was injured when surfing. *Birmingham v. Fodor's Travel Publications, Inc.*, 73 Haw. 359, 833, P.2d 70 (1992).

[62] "…a departure from a product unit's design specifications". Restatement Third, Torts: Products Liablity §2 comment c.

[63] *Ibid.*

then has to prove that the product did not conform to the manufacturer's intended design or specifications and that the product was defective when it left the hands of the seller.[64]

However, manufacturing defect cases are rare in product liability litigation and usually settle before they go to court.[65]

3.2.2.2 Design defects

A design defect exists when all products in a product line bear a feature whose design is defective and unreasonably dangerous.

Most design defects fall within three general categories: 1) structural defects, 2) absence of safety features, and 3) suitability for unusual purposes.

Structural defects

A structural defect could depend upon defendant's choice of materials and the product could have a structural weakness that causes the product to break and create a situation of potential injury for the plaintiff. A test for this defect is whether the product is less durable than a reasonable consumer would expect it to be. The price of the product and the prospective life length of the product are factors taken into account.[66]

Absence of safety measures

Absence of safety measures could be a design defect where the expense to install a safety measure would be little compared with the cost of the product and the risk of the danger without the safety feature.[67] The obviousness of a danger could be one factor in the process of determining the danger and the need for safety measures. A concealed risk of danger would be more likely to cause harm than a known and obvious danger that the plaintiff can protect himself against. A recently discovered safety device at the time of trial is not admitted as evidence but what is relevant is the design at the time of manufacture and sale to the plaintiff.

Suitability for unusual purposes

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[64] *Ibid.*

[65] The reason why manufacturing defects rarely go to court is that it is fairly easy for the plaintiff to show that a product has a manufacturing defect. Contrary to e.g. design defects that cannot be objectively compared with other products that are not defective, a manufacturing defect will be shown if the product differs from other products in the same product line.

[66] The seller or manufacturer does not undertake to manufacture a product that will never wear out but if the product wears out before it is supposed to, it cold be held to be defectively undurable. Emanuel, p. 341-342.

[67] Defendants have sometimes argued that a product was as safe as the competitor's products. Against this view the courts have stated that it is not an excuse even if an entire industry could be late in applying certain safety devices. In the end the courts must say what is required when there are precautions so urgent that even universal disregard will not excuse the omission. Judge Learned Hand in *The T.J. Hooper* 60 F.2d 737 (2d Cir. 1932).

A manufacturer has a duty to take reasonable design precautions against a misuse of the product as long as the misuse is reasonably foreseeable.[68] As an alternative, a warning to the purchaser could be a sufficient precaution.[69]

3.2.2.3 Warning defects

A warning defect exists when a product requires a warning for its safe use and no such warning has been provided. A warning will never make a defective product non-defective but can only be used on properly designed and manufactured products. The duty to warn is essentially an extra obligation placed on the manufacturer. The manufacturer also has to warn against foreseeable misuse of the product.[70] The failure to provide an adequate warning is closely connected with design defects and the plaintiff could argue that it constituted a design defect not to provide an adequate warning on the product.

A warning must be in a manner comprehensible to a person without professional or specialized knowledge, a layman. It has been observed that most jurisdictions use the defense of the "sophisticated user" as a defense in failure to warn cases.[71] The warning must disclose the nature and the gravity of the known and knowable risks and the likelihood that it will occur during use of the product.[72] A warning could therefore be defect because it did not sufficiently emphasize the risk.

The entire environment in which a product has been marketed should be taken into account in determining whether the warning was adequate or not; the surrounding advertising and publicity campaign are relevant.[73] A variety

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[68] *Barker v. Lull Engineering Co. Inc*., 143 Cal.Rptr. 225, 573 P.2d 443 (Cal. 1978).

The duty of automobile manufacturers to manufacture "crashworthy" vehicles has been frequently discussed in terms of unintended but foreseeable (mis)use. Plaintiffs have argued that the defendant could have minimized the results of an accident that occurred. It has sometimes been called that the defendant should take design precautions to "second collisions", the collisions between the passenger and the inside of the vehicle following the initial impact. When this issue was first being tried, the court said that a car manufacturer had no duty to take design precautions since collisions was not the intended use of a motor vehicle and also because there was no obligation on behalf of the producers to make a crash proof vehicle. *Evans v. General Motors Corp*., 359 F.2d 822(7th Cir. 966). However, today the prevailing rule is that a car manufacturer does have a duty to protect the car occupant in an accident because the risk of collisions is foreseeable and the design of the vehicle must reflect that. *Larsen v. General Motors Corp*., 391 F.2d 495 (8th Cir. 1968) and *Blankenship v. General Motors Corp.*, 185 W.V.a. 350, 406 S.E.2d 781 (1991).

[69] See infra 3.2.2.3 Warning defects.

[70] Foreseeable misuse: See supra 3.2.2.2 Design defects.

[71] Schwartz et al., 761, note 10. For example an experienced trampoline user who landed on his head and suffered injuries, users of chemicals to manufacture Gore Tex waterproof fabrics and a plastic pipe manufacturer did not have a duty to warn gas company or its employees since a failure to take certain precautions was regarded common knowledge.

[72] For example, if a chemical household product is corrosive but also can cause blindness, the warning must include both hazards.

[73] Phillips, p. 228.

of circumstances that surround the packaging, marketing and appearance of a product could even counteract the given warning.

The most common category of failure-to-warn cases concerns prescription drugs.[74]

Government labeling standards

Most courts admit the fact that the defendant has complied with a federal or state-labeling requirement as evidence of the adequacy of the warning. However, even though the labeling requirement was complied with, a jury can always reach the conclusion that a reasonable manufacturer would have given a different type of warning.

Federal pre-emption and product labeling

Since the 1980s a number of cases have been filed against tobacco companies contending that the warnings on cigarette packs were not adequate. Regarding the sale of cigarette packs after 1966, the argument of failure to warn is pre-empted by federal law.[75] Pre-emption is a doctrine based on the Supremacy Clause of the U.S. Constitution.[76] The doctrine holds that federal legislation overrides state legislation when both deal with the same subject matter.[77] The pre-emption doctrine applies only where the Congress intended to pre-empt more demanding state labeling rules. The pre-emption doctrine will block the state from awarding tort damages for the failure to warn since the state was not permitted to require different or additional warnings.[78]

Duty to warn of obvious danger

The defendant's duty of warning can be reduced if the danger is obvious to a person of ordinary knowledge and experience. However, in recent decisions

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[74] The manufacturer's duty in such cases is generally limited to warn the physician who prescribes the drug rather than the patient. The physician is called the learned intermediary and is in the best position to consider the risks and decide whether a drug should be prescribed and to inform the patient.

[75] In the famous case of *Cipollone v. Liggett Group Inc*., 112 S. Ct. 2608 (1992). the U.S. Supreme Court held that a cigarette smoker's state common law damage claim for failure to warn was pre-empted by the federal Cigarette Labelling and Advertising Act of 1965.

[76] The Supremacy Clause is a clause in Article IV, section 2 of the U.S. Constitution that establishes that the law, treaties and actions of the federal government pursuant to the Constitution are superior to those of the states. Thus, if a federal and state law conflict, federal law governs. Gilbert Law Dictionaries.

[77] The federal government's requirement of product labelling is more indicative than a regulation prescribed by state law. Gilbert Law Dictionaries.

[78] In the case of *King v. Collagen Corp.* 983 F.2d 1130 (1st Cir. 1993), the Federal Medical Device Act (MDA) was intended by Congress to completely pre-empt the field of regulating medical devices and thereby preventing states from imposing additional or different requirements that relates to the safety and effectiveness of a certain medical device.

the courts have been reluctant to admit that obviousness of a danger is sufficient to hold that there is no duty of the manufacturer to warn.[79]

Post-sale duties to warn
A defendant may also have a post-sale duty to warn of dangers associated with the product even after the defendant has completed manufacturing the product.[80] A successor can be liable for defective products sold by the predecessor in situations where a corporation has bought the business of another corporation and continues to run the business in essentially the same way.[81]

3.3 Conceptual standards for determining defectiveness

3.3.1 The test of consumer expectations

One definition of product unsatisfactoriness is the test of "unreasonable danger" or the test of consumer expectations:

> "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[82]

This test is well applicable to manufacturing defects since a random departure of a product can be objectively measured against a non-defective product that often is the standard of consumer expectations.[83]

Not all types of warning and design defects are suitable for the test of consumer expectations. In design defect cases there are no readily ascertainable external measures of defectiveness and no definite standard of the particular product. A manufacturing defect can be evaluated against the intended design of the product but no such objective standard exists in the situation of evaluating design defects.[84]

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[79] In *Emery v. Federated Foods, Inc*., 262 Mont. 83, 863 P.2d 426 (Mont. 1993) the court held a manufacturer liable for failure to warn of the danger of a young child choking on a marshmallow. The case points out the difficulties of what should be expected to be of ordinary knowledge among people.
[80] *Owens-Illinois v. Zenobia* 325 Md. 420, 601 A.2d 633 (Md. 1992).
[81] See infra section 3.4.2 Who can be a defendant? - The doctrine of successors corporate liability.
[82] Comment of the Rest. 2d Torts § 402A.
[83] For example, an ordinary consumer could easily determine that pieces of glass in food do not meet the ordinary expectations of a consumer.
[84] *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 880 (Alaska 1979).

> "Rather, the standard to measure the product reflects a policy judgment that some products are so dangerous that they create a risk of harm outweighing their usefulness."[85]

Expert testimony is thus required in many situations to determine whether a product has a warning or a design defect.[86] Expert testimony is thus not necessary but is sometimes admissible when the consumer expectation test will not suffice and the issue is complex.

3.3.2 Risk utility balancing test

Most jurisdictions use a risk-benefit or risk-utility analysis to determine defectiveness, particularly in design defect cases. If the cost of making the product safer is greater than the risk created by not making the change, the benefit or utility of the product, as it is without safety improvements, outweighs the risk and the product is not defective. If the cost is less than the risk, the utility or benefit of not making the change is outweighed by the risk and the product is defective in its unchanged condition.[87]

The consumer expectation test and risk utility test have been used in different approaches. Most jurisdictions use the risk utility test in design cases while some other jurisdictions use the consumer expectation test. In California the plaintiff has the option of proceeding on either theory or both.[88] If the plaintiff decides for the risk-benefit test he or she must prove that the design of the product caused the injuries. The burden of proof then shifts to the defendant that has to prove that the benefits outweigh the risks with the product's design.

In some jurisdictions the plaintiff must show that a safer alternative design exists.[89] In other jurisdictions the plaintiff may bring up alternative design as an argument to establish that the risk of danger of a product outweighs its benefits.[90]

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[85] *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (N.J. 1983).
[86] Warnings required for medical devices and pharmaceuticals and how much impact the metal of a motor vehicle should withstand are examples of situations where expert testimony probably is required.
[87] The test could also be described in terms of the risk versus the cost or the burden. If the risk of danger is greater than the cost or burden of eliminating the danger, the product is defective. If on the other hand the burden of eliminating the danger is greater, then the product's benefit or utility outweighs the risk of the danger and the product is not defective. Phillips, p. 16.
[88] *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 573 P.2d 443.
[89] *Dancy v. Hyster Co*., 127 F.3d 649 (8th Cir. 1997).
[90] *Potter v. Chicago Pneumatic Tool Co*., 241 Conn. 199, 694 A.2d 1319 (Conn. 1997).

3.3.3 Unavoidably unsafe products

Some courts apply a standard of unavoidably unsafe products for the determination if a product is defective or not. The product is unavoidably unsafe when there are no safer alternatives to the product and the product therefore requires a warning.[91]

Prescription drugs and weapons are products that are unavoidable unsafe considering their intended use. There are different opinions regarding what products are within the scope of unavoidable unsafe products. This affects what theories of recovery that is available to the plaintiff.[92]

3.3.4 State of the art

An important issue in design and warning liability cases is whether the defendant can show compliance with the state of the art at the time the product was made.[93] The product is evaluated in light of the knowledge and the technology that were available at the time of manufacture rather than at the time of trial. State of the art is useful in the risk utility balancing test when the costs of eliminating a risk may be greater than the risk of that danger if the danger is unknown or cannot be eliminated.

A successful use of state of the art for the defendant signifies that the product will most likely be held unavoidably unsafe which makes a claim for strict liability impossible.[94]

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[91] Rest. 2d of Torts, § 402A, comment k. The courts are split whether the standard of unavoidably unsafe products is applicable to both design and manufacturing defect cases or only to design defects. Phillips, p. 23.

[92] If manufacturers of prescription drugs would be absolved from liability because the drug was unknown or known but unavoidable unsafe, the incentives for the manufacturers to develop new and safer products would be limited. But costs due to litigation and fear of litigation if new products were introduced could also be likely to have an inhibiting effect if manufacturers would be liable for injuries because of defective prescription drugs. To prevent scenarios like this, most jurisdictions have declined to apply strict liability in design defects for prescription drugs and medical devices. Schwartz et al., p. 754, note 9. These jurisdictions have followed Rest. 2d of Torts §402A, comment k, which provided for no liability in the case of unavoidably unsafe products and comment k used prescription drugs as an example of such products. The rationale would be that if the products are properly prepared and marketed with a proper warning given, manufacturers should not be held strictly liable when undertaken to supply the public with a useful and desirable product that is attended with a known but reasonable risk.

[93] Different courts ascribe different meanings to the concept of the state of the art. It is not to be confused with the term of compliance with industry custom that is introduced to show that the defendant exercised reasonable care or to rebut allegations of product defect. State of the art should be used as describing the requirement of the defendant as a user of the best technological expertise and scientific and medical knowledge existing at the time the product was made. *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (N.J 1983).

[94] In O'Brien v. Muskin Corp., the plaintiff dove into an above-the-ground swimming pool manufactured by the defendant. When plaintiff's hands touched the bottom they slipped and

Some jurisdictions have rejected the state of the art defense because it is a concept that raises difficulties in proving what was scientifically knowable at the time of manufacture. Critics argue that it is complicated, time consuming and costly to produce proof since it will always be a need of expert testimony. Another issue is the jury's capabilities of understanding and resolving questions of this defense. On the contrary, if the defense was rejected and the costs of failing to discover hazards were imposed on the manufacturers, that would constitute an incentive for the manufacturers to invest more in safety research.

In a well-known California case concerning failure to warn, the court concluded that on a theory of strict liability, the plaintiff must prove that the risk was known or knowable "in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution."[95] However, if the scientific community knew some danger at the time of manufacture of the product, the manufacturer had an obligation to warn even though the risk involved was so small that it was outweighed by the benefits of the product.

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the plaintiff injured his head. The plaintiff claimed that the bottom of the pool was defective since it was made of vinyl and was extremely slippery and proximately caused his injuries. The Supreme Court of New Jersey held that the defendant manufacturer was entitled to prove, that according to the state-of-the-art in the business of above-the-ground pools, there was no alternative material available. But the court also said that even if the defendant showed that vinyl was the single alternative in pool bottoms, plaintiff would not necessarily lose but that a jury could reasonable find that even though there was no alternative methods of making pools, the risks of the pool outweighed the benefits (at least in the absence of better warnings). The case of O'Brien v. Muskin is interesting from the point of view of the differences between the American system of torts and the Swedish system of liability. When reading this case, the difference becomes clear regarding individual responsibility and liability and the purposes with a liability system. The Swedish reader should consider that the plaintiff in question first arrived uninvited to the owner of the pool that was situated on her property. Second, the pool was twenty-foot by twenty-four-foot (approximately 7 x 8 metres) with walls that were 4 foot high (1,3 metres). The pool was filled with water to a depth of approximately 3 ½ feet (1 metre). As if it would not be clear to the 23-year-old plaintiff, there even was a warning on the outer wall of the pool, "Do not dive" in one centimetres letters. Third, it was unclear whether the plaintiff had been diving from the platform by the pool or from the roof of the adjacent 8-foot garage (2 ½ metres). From a Swedish law student's perspective, it seems like the own individual responsibility for keeping out of potential dangers is of no importance.

[95] *Andersson v. Owens-Corning Fiberglass Corp.*, 810 P. 2d 549 (Cal. 1991). The plaintiff sued an asbestos manufacturer claiming that his lung ailments was a result of working in an environment where he had been exposed to asbestos for many years. The plaintiff argued that the manufacturer of the asbestos products (insulation products on a shipyard) should have warned the plaintiff of the dangers of asbestos. (The defendant was not the plaintiff's employer). The defendant argued that at the time of the exposure he did not know or could have known of the danger and was acting in accordance to the scientific standard in the society, the state of the art.

3.4 The parties

3.4.1 Who may be a plaintiff?

The abolishment of privity of contract[96] has made an action possible for all foreseeable plaintiffs for personal injuries.[97] A plaintiff may sue any products defendant on any available theory to recover for personal injuries.

The plaintiff can be any foreseeable plaintiff such as a user or a consumer of the product, bystanders; people who just happen to be near and are injured as a result of the defect. It has been argued that bystanders should be entitled to greater protection than the consumer or user when the danger to bystanders is reasonable foreseeable. The consumer or user of a product has a choice of inspecting the product and can chose between different manufacturers of a product.[98]

Non-smokers who are involuntarily subjected to cigarette smoke could be an area developing in products liability. The cigarette companies could argue that non-smokers have assumed the risks of smoking. Several states have passed statutes, ordinances or regulations that prohibits or restricts smoking in public places.[99] Violations of those statutes might be used as evidence, not only in actions against smokers but also against the manufacturers of cigarettes that reasonable can foresee such violations. One development in the 1990s has been the filing of suits by individual states against tobacco companies to recoup medical expenses paid by the states in smoking related illnesses. Several of those disputes have been settled.

Witnesses and rescuers
A person that suffers of emotional distress from witnessing the tortious injury of a close relative can recover for the resulting injuries.[100] Some courts have required the emotional distress to be accompanied with physical injury but other court has stated that emotional distress by itself is sufficient. However, all courts demand that the mental or physical injury occur at about the same time and place as the injury to the relative or friend.[101]

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[96] For an explanation of privity of contract see infra section 3.4.2 Who can be a defendant? and 3.5.1 The breakdown of privity.
[97] A few jurisdictions still require privity of contract for an action in warranty.
[98] *Elmore v. American Motors Corp.*, 70 Cal.2d 578, 75 Cal.Rptr. 652, 451 P.2d 84 (Cal. 1969).
[99] There have been cases admitting an employee suing the employer for exposing the employee to cigarette smoke in the workplace. Phillips, p. 82.
[100] A close friend of the plaintiff can constitute a close relative but this is not accepted in all jurisdictions. In California it must be a relative by blood or marriage. Baji 12.83, Comment to 12.83.
[101] In California: "Bystander Recovery of Emotional Distress". The requirements are: 1) the defendant was negligent or manufactured or supplied a defective product, 2) that the defendant's negligence/defective product was a cause of injury or death to the victim, 3) the plaintiff was the spouse, parent or child of the victim, 4) that the plaintiff was present at the

Rescuers of injured persons are permitted in most jurisdictions to recover against the manufacturer of a defect product for injuries that the rescuer obtained in the attempted rescue.[102]

3.4.2 Who can be a defendant?

With the breakdown of privity of contract, an injured plaintiff could seek recovery even if there was no contractual relationship between the plaintiff and the defendant.[103]

In the principal case[104] the court held that irrespective of a contractual relationship between the plaintiff and the defendant, the defendant had a duty to inspect the final product notwithstanding that the some parts were manufactured by a third party. The defendant had a duty to the plaintiff of exercising reasonable care and the plaintiff prevailed on a cause of action for negligence. A general rule thereby emerged imposing negligence liability upon all sellers of chattels despite damage to person or property, if the manufacturer produced the whole product or a significant part and if the injured party was the immediate purchaser or not.[105]

Manufacturer vs. Seller
A seller includes all these categories of possible defendants in the distributive chain.

> "One sells a product, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers and retailers."[106]

A seller of a defective product can be sued on any of the three theories of recovery: negligence, strict liability and warranty. However, it may be more or less convenient for the plaintiff to proceed with a certain theory

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scene of the injury-producing event or accident at the time it occurred, 5) that the plaintiff was aware that such event caused the injury to the victim and that the plaintiff suffered serious emotional distress as a result. The plaintiff has to contemporaneously observe or have the understanding about the injury happening to the victim. It is not sufficient that plaintiff finds the victim after the accident happened even if it is only a very short period of time after. Baji 12.83, *Thing v. La Chusa* 257 Cal.Rptr. 865, 771 P.2d 814 (Cal. 1989).

[102] Baji 4.60.

[103] *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916). In the principal case where the requirement of privity was abolished, the plaintiff had purchased a car from a retail dealer. The defendant had sold the car in question to the retail dealer but the defective wheel was purchased from another manufacturer. The breakdown of privity will be further discussed under section 3.5.1 The breakdown of privity.

[104] Supra.

[105] Schwartz et al., p. 716, note 3.

[106] Restatement Third, Torts: Products Liability § 20.

depending on where in the distributive chain the defendant is.[107] It could be difficult to prove negligence against a non-manufacturing seller.[108] A majority view is that such sellers do not have an affirmative duty to inspect or test the products for latent defects.[109] If a retailer does undertake to inspect, test or assemble a product, the retailer may be liable for failing to do so with reasonable care in an action for negligence.

Not only the final assembler of a product but even a manufacturer of a component part can be sued if the part is defective when it leaves the component manufacturer.[110] But a manufacturer can be held liable for the negligence of a component supplier. A manufacturer who puts out, as his own product, a chattel that partly is manufactured by another manufacturer is subject to same liability as if he was the manufacturer of the whole product.[111]

Defendant as a used product seller

The jurisdictions are split on the issue whether to hold commercial sellers of used goods to the same legal standard of liability for defects as commercial sellers of new products. Some courts hold used product sellers strictly liable for harm caused by product defects that existed at the time of the sale. The majority of courts hold commercial sellers of used products to a lesser standard of liability. Since there are a great variety in the type and conditions of used products, the applicable rules are much less precise and strict than the rules applicable to new products.

The doctrine of successors corporate liability

A growing number of cases concern the liability of corporations that purchase the business of another. These corporations have been held vicariously strictly liable for injuries that were caused by a defective product that was sold by the predecessor before the business purchase. This particularly involves products containing some sort of asbestos.

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[107] Negligence is most commonly used to make a manufacturer liable where he or she has failed to use reasonable care in designing, manufacturing or labelling the product. Emanuel, p. 317.

[108] See infra section 3.5.2 Negligence for further discussion.

[109] Phillips, p. 87.

[110] If the component supplier is unaware of the use of the product or has no control of the use, it is not likely that he or she will be held liable. Important issues when deciding the component manufacturer's liability, has been whether the implant manufacturer was a sophisticated user, if there was no special relationship between the manufacturers and whether the component supplier was involved in the design or production of the finished product.

[111] Section 400 of the Rest. 2d of Torts. *See* also Rest. 3d of Torts: Product Liability § 14: "Selling or distributing as One's Own a product Manufactured by Another
One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer."

Two principal products liability rules have developed for imposing corporate successor liability: the continuity-of-enterprise rule[112] and the product-line rule[113]. The continuity-of-enterprise rule requires for successor's liability: 1) a continuity of management, personnel, physical location, assets and general business of the predecessor; 2) dissolution of the predecessor as soon at it is legally and practically possible; 3) assumption by the successor of all liabilities of the predecessor necessary for normal business operations to continue and; 4) a holding out of itself to the public by the successor as the effective continuation of the predecessor.[114]

The product-line rule applies when the successor acquires all or a substantial part of the predecessor's manufacturing assets and when he undertakes essentially the same manufacturing operation as the predecessor. The policy reasons for the rule are based on the scarcity of remedial alternatives against the predecessor through the acquisition: the ability of the successor to spread the risk and the fairness of requiring the successor to do so as a burden attached to the benefit of acquiring the good will of the predecessor.

If the predecessor continues to exist the courts have different opinions whether liability still should be imposed on the successor or if the he should be free from liability. When it is required that there is a continuance of the product line or the continuity of management and control, it is also uncertain to what extent that is required.[115]

Defendant lessors of products

Even the lessor of a product can be held strictly responsible for injuries resulting from the use of the product.[116] In the principal case that concerned rental cars, the court stated that there was no good reasons to restrict warranties to the sale of goods since the parties often reach the same business ends that is being achieved by the means of selling and buying. The offering of vehicles for hire to the public also involved the representation of that the vehicles were fit for operation.[117] In California, the courts have refused to apply strict liability to the commercial lessor of used goods since the consumer of used goods seeks economy and practical utility.[118]

Defendant providers of services

There has been a reluctance to apply strict liability to services. Rather, a service can only be performed with or without care or negligence. There are two general policy rationales underlying that rule. In a service transaction

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[112] Even called the mere-continuation rule of *Turner v. Bituminous Cas. Co*., 397 Mich. 406, 244 N.W 2d 873.
[113] The product-line rule of *Ray v. Alad. Corp*., 136 Cal Rptr. 574, 560 P.2d 3.
[114] Phillips, p. 94.
[115] *George v. Parke-Davis*, 107 Wash.2d 584. 733 P 2d. 507.
[116] The landmark case of *Cintrone v. Hertz Truck Leasing and Rental Service*, 45 N.J. 434, 212 A.2d 769 (N.J. 1965).
[117] Supra.
[118] *Pacific Nat. Ins. v. Gormsen Appliance*, 284 Cal. Rptr. 78 (Cal. App. 1991).

there is no mass production and distribution and accordingly, there is no real ability to spread the risk of loss to consumers. Service transactions do not involve a group of consumers needing protection from a remote and unknown manufacturer.[119] In recent years there have been several attempts to impose strict liability on health care providers when patients got injured during medical treatment but almost all of these cases have been unsuccessful.[120]

Strict liability has also been applied against *mass builder-vendor* of a new home that caused personal injury because of defective construction.[121]

3.5 Theories of recovery

3.5.1 The breakdown of privity

The requirement of privity was the requirement that in order to maintain an action, the plaintiff had to show that he had contracted directly with defendant. The breakdown of the privity requirement was one hallmark of modern products liability and has come to be of great importance for the development of the theories of recovery in product liability.[122] There are three theories of recovery in product liability: negligence, warranty and strict liability. The plaintiff must have suffered some sort of physical injury but need not to be in a contractual relationship with the defendant.

[119] Schwartz et al., p. 794, footnote 1.
[120] Products such as breast implants and hip prosthesis. Schwartz et al., p. 794, footnote 2.
[121] *Schipper v. Levitt & Sons, Inc*., 44 N.J. 70, 207 A.2d 314 (N.J. 1965). The court could not see any reason for differentiating between mass sales of homes and mass sales of automobiles. The buyer of either type of product relies on the skill and knowledge of the developer and on the developers implied representations that the house will be erected in a workmanlike manner and will be reasonable fit for habitation. In Schipper v. Levitt & Sons there was a water heater without a mixing valve which caused personal injury to the plaintiff.
[122] The breakdown of privity is accepted in all states. In the principal case *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916), the defendant was the manufacturer of an automobile that was sold to a retail dealer. The plaintiff bought the car from the dealer and was injured when the car collapsed because of defective wheels. The defendant manufacturer had bought the wheels from another manufacturer. The court stated that the defendant owed a duty of care (it was a charge of negligence) to the plaintiff even though the plaintiff was not the immediate purchaser of the car from the defendant. The duty of care existed when there was a probable danger that could have been discoverable by reasonable inspection by the defendant and since the defendant was responsible for putting the finished product on the market.

3.5.2 Negligence

One who negligently manufactures a product is liable for any personal injuries proximately caused by his or her negligence.[123] Harm need not to be anticipated and most jurisdictions allow a cause of action for negligence even when there is only property damage.[124]

Even with the alternative means of recovery such as warranty and strict liability, negligence continues to be an important cause of action for plaintiffs injured by products. It has been observed that it might be easier to prevail on a theory of negligence instead of strict liability since the defendant then did something blameworthy when he or she did not act as an ordinary prudent person would do. The jury's willingness to award damages might be affected if the plaintiff does not have to show that the defectiveness of the product did not have anything to do with the defendant's state of mind.[125]

The defendant must have a duty of care to the plaintiff, there must have been a breach of that duty and the breach must have caused the plaintiff's injuries.

Failure to warn

A seller has a duty to use reasonable care to give a warning of a known dangerous condition of a product as long as it is used for its purpose. Otherwise a negligent cause of action for a failure to warn exists. The warning must be given to those whom the seller should expect to use the product if the seller has reason to believe that they will not realize its dangerous condition.[126] The supplier does not have a duty if there is reason to believe that the user of the product will realize the product's dangerous condition.[127] The duty to warn extends to all persons supplying chattels for the use of others, whether as manufacturers, seller, lessor or bailor, either for hire or gratuitous.

Retailer's liability for negligence and failure to warn

A retailer who merely resells the product manufactured by another is much less likely to be successfully charged with negligence. It is difficult for the plaintiff to show that the retailer has failed to use reasonable care by the mere fact that the retailer has sold a negligently manufactured or designed product. The retailer may not have had a duty to inspect and even if there

[123] A general rule that emerged from *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916).
[124] Schwartz et al., p. 716, note 3.
[125] Schwartz et al., p. 716-717, note 4.
[126] Baji 9.20, *Anderson v. Owens-Corning Fiberglas Corp*., 281 Cal.Rptr. 528, 810 P.2d 549 (Cal. 1991).
[127] Baji 9.20.

was a duty, it required more than reasonable care to find the defect.[128] If there is no reason for the retailer to believe that the product is defective and thereby dangerous, the retailer has no duty to inspect the product even if the defect could have been discovered by a very simple and superficial examination.[129] Negligence liability may also arise if a retailer fails to use reasonable care to avoid selling a product to a person incapable of using it safely.[130] But if the retailer knows or should know, that the product is unreasonably dangerous, the retailer is negligent if he or she does not at least warn the plaintiff.[131] Suits against retailers are thus generally brought on theories of warranty or strict liability rather than negligence.

Design and manufacturing defects

If a seller has undertaken to inspect, test or assemble a product a seller may be liable for failing to do so with reasonable care in an action for negligence.[132] Since design and manufacturing defects arise during the manufacturing process it can be difficult to attach liability to a seller for those types of defects.

The manufacturer of a product that is reasonable certain to be dangerous if negligently made, has a duty to exercise reasonable care in the design, manufacture, testing and inspection of the product. There is also a duty to inspect components that are made by another manufacturer so that the product may be safely used for its intended purpose.[133] A manufacturer is not liable for injuries resulting from the unforeseeable negligent use of the product.[134]

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[128] "Negligence is the doing of something which a reasonable prudent person would not do or the failure to do something which a reasonable prudent person would do, under circumstances similar to those shown by the evidence." Baji 3.10. The standard is not the extraordinarily cautious individual nor the exceptionally skilful one but a person of reasonable and ordinary prudence.

[129] Restatement 2d, §402A.

[130] E.g. selling a weapon to a child.

[131] Restatement 2d, §401.

[132] Phillips, p. 88. See supra section 3.4.2, Who can be a defendant? – Manufacturer v. Seller.

[133] Baji 9.21. The manufacturer's duty of care includes designing the product in a reasonably safe way, to provide the product with an adequate warning, the duty to set up a reasonably error-free manufacturing procedure, the duty to perform reasonable inspections and tests of the finished products, the duty to package and ship the product in a reasonably safe way and the duty of a final "maker" to take reasonable care to obtain components from a reliable source and to make a reasonable inspection of the components before incorporation.

[134] Comment to Baji 9.21. See supra section 3.2.2.2 Design Defects – Suitability for unusual purposes.

3.5.3 Strict liability

The development of strict liability for defective products evolved out of the tort doctrine of strict liability for abnormally dangerous activity.[135] The rationale for imposing strict liability is the spreading of the costs to those in the best position to bear them. When the loss may be overwhelming to the individual injured person, a manufacturer can be effectively insured against it and distributed among the public as a cost of doing business by raising the price of products. The manufacturer is also responsible for the product being put on the market and the consumer lacks the means and skill to investigate the soundness of the product.[136] Another important factor is that the

[135] Abnormally dangerous activity: Strict liability (liability without fault) is imposed for abnormally dangerous activity (sometimes even called ultrahazardous activity). The Second Restatement has almost codified the rule of *Rylands v. Fletcher* (159 Eng. Rep. 737 (1865), the first case to impose strict liability for abnormally dangerous activity. The Rest. 2d, § 520 lists six factors to be considered in determining whether an activity is "abnormally dangerous": 1) a high degree of risk of some harm, 2) risk of *serious* harm, 3) the risk cannot be eliminated by reasonable care, 4) to what extent is the activity a matter of common usage, 5) the appropriateness of the place that is used for the activity and 6) the extent to which the activity's value of the community is outweighed by its dangerous attributes. The running of a nuclear reactor is the kind of activity that would constitute abnormally dangerous activity.

[136] *Greenman v. Yuba Power Products Inc*., 59 Cal.2d. 57, 27 Cal. Rptr. 697, 377, P.2d 897 (Cal. 1963). The plaintiff brought an action for damages against the manufacturer and the retailer of a combination power tool. According to the instructions and by demonstrations, the combination power tool could be used as a saw, a drill and a wood lathe. While he was working with the machine, a piece of wood suddenly flew out and struck him on the forehead that resulted in serious injuries to the plaintiff. Ten and a half months later plaintiff gave written notice to the retailer and the manufacturer for breach of warranty. In his complaint the plaintiff alleged breach of such warranty (express and implied) and negligence. The manufacturer contended that the plaintiff did not give notice of breach within a reasonable time and that therefore his cause of action for breach of warranty was barred by a provision in the Civil Code. The Supreme Court of California stated that the notice requirement was a commercial rule between the immediate parties of a sale to protect the seller against unduly delayed claims for damages. Regarding remote sellers where the plaintiff purchased the product from a retailer or another intermediary, the requirement would become a hazard for the unwary plaintiff. It would not be obvious for an injured consumer to give notice to one with whom he had no dealings with. The court concluded that even if the plaintiff did not give timely notice of breach of warranty to the manufacturer, his cause of action based on the representations contained in the brochure that the plaintiff read before he bought the power tool, was not barred. The theories of express and implied warranties had its origin in the law of contract and required an agreement between the parties. The court considered various factors such as the abandonment of the requirement of a contract between the manufacturer and the plaintiff and thereby the recognition that the liability is not assumed by an agreement but imposed by law, the refusal to permit the manufacturer to define the scope of its own responsibility for defective products and the fact that the need of commercial warranties was once developed to meet the need of commercial transactions and cannot and should not be used in transactions between a private individual and a manufacturer. These public policy issues together with the purpose of spreading the costs made the court reach the conclusion that it should not be controlling whether the plaintiff had chosen the machine because of the explicit statements in the brochure or because of the machines presence on the market. The products (the machines) presence on the market represented to the plaintiff that it would safely do the job and the plaintiff should be able to assume that it would safely do the job it was built for.

consumer's caution and critical ability might be reduced by the manufacturer's advertising and trademark of a product.

The essential elements of a claim based on strict liability are that the defect existed when the product left the defendant's possession, that the defect caused the plaintiff's injuries and that the plaintiff's injuries resulted from a foreseeable use[137] of the product.[138] Whether a defect existed or not is determined in accordance with the different conceptual standards that are available. A manufacturing defect is compared to a non-defective product in the same product line. A design defect is established by using either or both of the tests of consumer expectations and risk utility balancing. Whether or not there has been a failure to warn is recognized if the danger was known or knowable in the light of the generally recognized and prevailing best scientific knowledge available at the of manufacture and distribution – state of the art.[139]

One of the policy considerations supporting the imposition of strict liability was to ease the burden of proof for a plaintiff injured by a defective product. This was achieved by eliminating the requirement that the plaintiff must prove that the defendant had been negligent. The necessity of proving a defect in the product distinguishes strict liability from absolute liability where it would suffice that the product caused the injury but without being defective.[140]

3.5.4 Warranty

The development of warranty in torts

Warranty is a hybrid between tort and contract. It arose out of common law in situations where there had a been a contract for sale of goods between the parties. A purchaser has always been able to sue the immediate seller on the grounds that the goods were not as they were contracted to be.[141]

Liability should no longer be governed by the law of contracts but by the law of strict liability in tort.

[137] See supra section 3.2.2.2 Design Defects - Suitability for unusual purposes.

[138] Baji 9.00.3, 9.00.5, 9.00.7.

[139] See supra section 3.3 Conceptual standards for determining defectiveness.

[140] *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (N.J. 1983).

[141] In the principal case of *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (Wash. 1932) where privity in expressed warranty cases was abolished, the plaintiff had read in printed material that the windshield of a car was made of nonshatterable glass. After purchasing the car and while driving, a small stone from a passing car struck the windshield causing small pieces of glass to fly into plaintiff's left eye causing injures. The court considered that the way of doing business had changed rapidly with new methods such as radio, billboards and the printing press to reach out to the public. The representations constituted an express warranty since the plaintiff might have relied on the qualities when making the purchase of or using the product. The plaintiff had a right to rely upon the representations about the product and it would be unfair if a manufacturer could escape liability only because there was no privity of contract between the parties.
The privity requirement for implied warranties was also abolished in a famous case *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (N.J. 1960). The plaintiff

Warranty is an affirmation of a fact or promise by the seller that a good possess certain characteristics. The seller can make a warranty expressly in words or it may be implied from the circumstances of a sale.[142]

Express warranty

An express warranty can be oral or written. It is not necessary that the warranty be expressed in a particular form with formal words such as "warrant" or "guarantee". However, an affirmation of the value of the goods or the seller's opinion cannot be construed as a warranty.[143]

Implied warranties

An implied warranty of fitness for a particular purpose exists if a seller has a reason to know that the product is required for a particular purpose and that the buyer relies on the seller's knowledge in the matter.[144] For every sale of good, an implied warranty of merchantability signifies that the good is at least fit for the ordinary purpose for which such good are used.[145] An implied warranty of fitness of food states that when food is purchased, it is reasonably fit for human consumption.[146]

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was not in privity with the defendant and a disclaimer in the contract stated that the there was no express or implied warranties regarding the car. The court stated that even though one who chooses not to read a contract before signing cannot later relieve himself of its burdens, the modern commercial life demands another view of the freedom to contract. New interests had arisen and the conflicting interests of the buyer and seller must be evaluated realistically and justly. Even in this case the court considered the advent of mass marketing that had made the consumer of a product more remote from the manufacturer. Intermediaries were accomplishing sales and two party relationships between the buyer and the manufacturer of the product were becoming more rare. The consumer of the product was the person that was expected to use the product and therefore needed protection. The requirement of privity would put the consumer without remedy as soon as the user was not the buyer of the product. The court declared the disclaimer to be invalid simply because it was against public policy; the gross equality of bargaining position between the parties and that warranties was purposed to safeguard the buyer and not to limit the liability of the seller or manufacturer. The plaintiff had the right to rely on the implied warranty that the good was fit for the ordinary purposes for which such goods are used.

[142] Baji 9.44.

[143] Baji 9.50, 9.51: "In determining whether a particular statement was a statement of fact or merely an expression of opinion, you may consider the surrounding circumstances under which it was made, the manner in which the statement was made and the ordinary effect of the words used. You may also consider the relationship of the parties and the subject matter with which the statement was concerned."

[144] Baji 9.55.

[145] Baji 9.60.

[146] Baji 9.55. Food is not reasonably fit for human consumption if it contains a foreign substance that likely will cause injury to the consumer. A foreign substance is not a bone or other natural substance that could be anticipated by the consumer. If the food contains a foreign substance, there is a breach of the implied warranty of fitness of food and strict liability applies. If a natural substance causes injury to a plaintiff, the plaintiff has the burden of proving that the defendant was negligent, *Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617, 633, 4 Cal.Rptr.2d 145, 156, 822 P.2d 1292, 1303.

Express and implied warranty is found in the Uniform Commercial Code (UCC)[147] that imposes several warranties as a matter of law in contracts. The most important is UCC § 2-314 (1) that provides that "…a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." For a good to be merchantable it must be fit for the ordinary purposes for which such goods are used. A consumer should therefore expect a car to have a proper steering mechanism that makes the car safe for driving, otherwise it would not be fit for its ordinary purpose, driving.

UCC's implied warranty of merchantability does only arise if the seller is a merchant with respect to the type of goods in question. This requirement constitutes two limitations. The merchant or seller must be a businessperson and he or she must regularly sell the kind of goods in question. A retailer is also held to have impliedly warranted a good's merchantability, the fitness for ordinary purpose.

[147] The statute was drafted, formulated and approved by the Commissioners on Uniform State Laws. The statute sets forth the rules that control commercial transactions and contracts and has been enacted by all states except Louisiana. Gilbert Law Dictionary.

4. Punitive Damages in Products Liability Litigation

4.1 General comment

The purpose and goal with this chapter is to give the reader a view of what punitive damages are, in what extent, amount and circumstances punitive damages are awarded and to describe cases where punitive damages have been awarded.

4.2 The concept of punitive damages

Punitive damages are sometimes called exemplary or vindicative damages. The purpose is to punish and warn the defendant and to deter others from following the defendant's example.[148] It consists of an additional sum over and above the compensation that the plaintiff already has received equivalent with the harm suffered: economically, mentally and physically.[149]

Punitive damages are not compensation for the suffering of the individual plaintiff but are a type of measure of the gravity of the defendant's offence.[150] However, the defendant is entitled to request that the jury is instructed that the punitive damage award bears a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff, notwithstanding that the plaintiff cannot recover any compensatory damages.[151]

4.3 When are punitive damages awarded?

4.3.1 Intentional torts

Punitive damages are generally permitted when the defendant has committed an intentional tort such as assault, battery, false imprisonment, conversion,

[148] Punitive damages originated in England in the days of George III in cases of outrageous abuses of authority by government officers and were then adopted in the United States. Schwartz et al., p. 549.
[149] See supra sections 2.3.6 Contributory and Comparative negligence. Compare to compensatory damages that have the purpose of making the plaintiff whole again.
[150] *Molzof v. United States*, 502 U.S. 301, 306, (1992).
[151] Baji 14.72.2, note and comment.

trespass or intentional infliction of emotional distress. The requirement is further that the defendant's conduct is particular outrageous, e.g. when the tort is aggravated by evil motives, actual malice, deliberate violence, oppression or is grossly unreasonable.[152] Proof of actual malice does not require actual intent to harm. The conscious disregard for safety of another may be sufficient when the defendant was aware of the probable dangerous consequences of the conduct and deliberately failed to avoid the consequences.[153] The conduct needs not to be motivated by personal hatred but it is sufficient if it has the character of outrage.[154]

A claim for punitive damages will be barred when intentional torts are committed without illwill or malice, e.g. when the defendant innocently buys a stolen article or falsely imprisons a person whom he reasonable believes to have stolen his property.

4.3.2 Unintentional torts

Most jurisdictions justify punitive damages in unintentional torts such as negligence but it requires more than just *ordinary negligence*.[155] The defendant must have been culpable negligent which is more than ordinary negligence in that it is a conscious and wanton disregard of one's legal duty or of the rights and safety of others.[156] The negligent conduct that is required is sometimes also explained as when the defendant has acted wanton, willful or with reckless disregard of the plaintiff's rights.[157] Mere negligence is therefore not sufficient even if it causes severe damage.[158]

In products liability litigation
In a product liability suit the plaintiff can recover on the theories of negligence, warranty and strict liability. Warranty and strict liability imputes liability on the defendant regardless of his or her conduct. Liability is imputed because of the character of the product and the potential harm it may cause. To have a cause of action for punitive damages in product liability litigation the plaintiff must therefore succeed on a theory of negligence.[159]

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[152] *Jones v. Fischer,* 42 Wis. 2d 209, 166 N.W. 2d 175 (1969).
[153] *Taylor v. Superior Court* 24 Cal.3d 890, 894-5, 157 Cal.Rptr 693 (1978).
[154] *Jones v. Fischer,* 42 Wis. 2d 209, 166 N.W. 2d 175 (1969).
Outrage: 1. extreme violation of other's rights, sentiments, etc. 2. gross offence or indignity. 3. fierce resentment. Outrageous: 1. Immoderate. 2. Shocking. 3. Immoral, offensive. Oxford Dictionary.
[155] Massachusetts and New Hampshire do not allow common law punitive damages actions. Rustad, p. 25.
[156] Gilbert Law Dictionary.
[157] *Jones v. Fischer,* 42 Wis. 2d 209, 166 N.W. 2d 175 (1969).
[158] Schwartz et al., p. 553, note 2.
[159] See supra section 2.3.4 Negligence.

In product liability suits, the plaintiff will not be awarded punitive damages if the claim is based on strict liability and the plaintiff only has showed that the product was defective. But if the theory of recovery is negligence and the plaintiff can show that the defendant manufacturer knew about the defect and manufactured it anyway, an award of punitive damages is likely to be made and sustained.[160]

4.3.3 Applicability in practice

In California, as in most courts, punitive damages are allowed in a negligent cause of action if the conduct fulfils the criteria in the different formulas that are used to define the requirements of the defendant's conduct. The California jury instructions require that the defendant, by clear and convincing evidence, must be found guilty of oppression, fraud or malice.[161]

- ***Malice*** is explained as a conduct intended to cause injury to the plaintiff or the despicable conduct that is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. A person acts with conscious disregard of the rights or safety of others when he or she is aware of the probable dangerous consequences of the conduct and willfully and deliberately fails to avoid the consequences.

- ***Oppression*** is the despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. Despicable conduct is explained as a conduct that is vile, base, contemptible, miserable, wretched or loathsome and would be looked down upon and despised by ordinary decent people.

- ***Fraud*** is the intentional misrepresentation, deceit or concealment of a material fact known to the defendant with the intention of depriving a person of property or legal rights or otherwise cause injury.[162]

[160] See e.g. *Fischer v. Johns-Manville Corp.*, 512 A.2d 466 (N.J. 1986).
[161] Baji 14.71.
[162] It is important to notice that fraudulent conduct for purposes of punitive damages is not the same as a cause of action for fraud. Punitive damages are merely a remedy incident to a cause of action. *Hilliard v. A.H. Robins* (1983) 148 Cal.App.3d 374, 391. A cause of action for fraud requires intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. Gilbert Law Dictionary.

The Supreme Court in California[163] has used two cases for guidance when punitive damages may be awarded in products liability litigation on a theory of negligence.

Knowing of the probability of the danger and inexpensive changes

The plaintiff suffered burn injuries when his vehicle burst into flames during a rear-end collision.[164] At trial the evidence showed that the automobile manufacturer defendant had known of the probability of such fires from its own previous testing. Even though there could have been inexpensive design changes to prevent the fuel tank from catching fire in the event of a rear-end collision, the defendant postponed to take corrective actions.[165] The Appellate Court held that the evidence supported a finding of malice that justified an award of punitive damages.[166]

Failed to correct when available safer design

An automobile manufacturer had failed to correct a defective design with an available safer design.[167] The plaintiff was injured when the brakes failed on his vehicle. The manufacturer could have alleviated the danger by warning dealers and consumers to periodically replace brake fluid or by installing a safer alternative design. Since the testimony at trial showed that the manufacturer knew of the problem but failed to alleviate the danger the California Supreme Court held that it was sufficient evidence to support the jury's punitive damages award.[168]

Failure to adequately test a product

Failure to adequately test a product could also be a ground for punitive damages in a cause of action for negligence. In most cases this is a design defect; the manufacturer has not tested any of the product in one whole product line. In one case, adequate testing of the product would have revealed an association between use of the product and the severe health problems that occurred.[169] Even though the manufacturer received consumer

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[163] *Potter v. Firestone and Rubber Company* 6 Cal.4th 965, 1004, 25 Cal.Rptr.2d 550 (1993).

[164] *Grimshaw v. Ford Motor Company* 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981).

[165] Supra. According to the Court of Appeal, the defendant knew that the car's fuel tank and rear structure would expose consumers to serious injury or death in a low speed collision, and that defendant could have corrected the design defects at minimal cost but deferred corrections by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. A total cost of $15.30 per car would have made the fuel tank safe in the accident. The driver of the stalled car suffered fatal burns and the passenger suffered severe and permanently disfiguring burns on his face and entire body. The passenger was awarded over $2 million compensatory damages and $125 million punitive damages, while the heirs were awarded over $550,000 in compensatory damages. The amount of punitive damages was later reduced to $3.5 million.

[166] Supra.

[167] *Hasson v. Ford Motor Company* (1982) 32 Cal.3d 388, 138 Cal.Rptr. 705.

[168] Ibid at 400-403.

[169] *West v. Johnson & Johnson Products,* Inc. (1985) 174 Cal.App.3d at 831.

complaints it did not take measures to any further tests on the product. The appellate court affirmed the award of punitive damages and held that the evidence had demonstrated that the manufacturer had acted in conscious disregard of the safety of others.[170]

4.4 Admissible evidence

4.4.1 Degree of proof

The issue regarding punitive damages must be tried and proved as well as the cause of action for liability due to a defective product. In California the plaintiff must prove, with clear and convincing evidence, that the defendant is guilty of the required acts for awarding punitive damages. In regard to prove liability for a defective product that entitles the plaintiff to compensatory damages, the degree of proof is by a preponderance of the evidence, a lower standard of proof than clear and convincing evidence.[171] In most civil cases the degree of proof is by a preponderance of the evidence that is when all the evidence more clearly and more probable favors one side than the other, it is more likely to be true than not.[172]

4.4.2 Direct and circumstantial evidence

The elements of a claim for punitive damages may be established through a broad spectrum of direct and circumstantial evidence. Evidence means testimony, writings, material objects or other things presented to prove the existence or non-existence of a fact.[173]

Direct evidence proves conclusively the establishment of a fact. Circumstantial or indirect evidence proves a fact from which an inference of the existence of another fact may be drawn or logically inferred. The evidence is gained not from direct observation of facts or personal knowledge but from deductions made from related facts and circumstances. If such evidence consistently and reasonably points to one conclusion it is capable of supporting a decision in a case.[174]

Usually the court has the discretion to exclude cumulative or repetitive evidence that is additional evidence. The purpose with this type of evidence is to prove a fact already proven by other evidence and documented by the court. When punitive damages are an issue, evidence of a defendant's conduct that otherwise would be considered cumulative evidence is admissible. When evidence of repeated wrongdoing establishes the

[170] Ibid at 869.
[171] Baji 2.60 Burden of proof and preponderance of evidence.
[172] There are three degrees of proof: preponderance of the evidence, clear and convincing evidence and in criminal proceedings; beyond reasonable doubt. Gilbert Law Dictionary.
[173] Baji 2.00 Direct and circumstantial evidence – inferences.
[174] Baji 2.00 and Gilbert Law Dictionary.

tortfeasor's awareness of the probable dangerous consequences of his conduct it is permissible to demonstrate the evidence of a punitive damages claim.[175]

4.4.3 The range of relevance and admissibility on issues relating to punitive damages

There is a wide range of relevance and admissibility on issues regarding the evidence of punitive damages.[176]

Corporate knowledge
Probably the most important issue in a claim for punitive damages is corporate knowledge about potential injury or death resulting from a particular course of action or inaction. In products liability litigation, one of the most common sources of evidence of corporate knowledge is testing performed by the manufacturer.[177] In Grimshaw v. Ford Motor Company[178] the plaintiff, a passenger, was burned when the car he was a passenger in burst into flames when it was struck from behind. The evidence of the manufacturer's knowledge of the potential injury came from the results of crash tests; the defendant manufacturer knew that the placement of the fuel tank would expose consumers to serious injury or death in a 20-30 mile-per-hour collision.

Consumer complaints are another source of evidence of corporate knowledge. Such information has been held to be relevant and admissible on the issue of conscious disregard of others that in turn could be proof of malice.[179]

Injury to or disregard for safety of others
Evidence of injuries to others caused by using the same product as the plaintiff is admissible and deemed relevant as having a tendency to prove that the defendant was aware or had knowledge of the probable consequences of its product.[180] The conscious disregard concept of malice is directed at and concerned with the defendant's conduct affecting the safety of others. Any evidence is relevant that directly or indirectly shows or permits an inference that the defendant acted with a conscious disregard of the safety and rights of others. It is also permissible to show that the defendant was aware of the probable dangerous outcome of his or her

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[175] *Hilliard v. A.H. Robins Co*. (1983) 148 Cal.App 3d. 374, 400, 196 Cal.Rptr. 117, 134. Robinson and Calcagnie, "Punitive Damages in Products Liability Cases", article available at http://www.robinsonpilaw.com/rcrlaw/docs/ (visited 2002-05-21).
[176] Supra.
[177] Supra.
[178] *Grimshaw v. Ford Motor Company* 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981).
[179] *West v. Johnson & Johnson Products*, Inc. (1985) 174 Cal.App.3d at 831.
[180] *Hilliard v. A.H. Robins Co*. (1983) 148 Cal.App 3d. at 399.

conduct and the willful or deliberate failure to avoid those consequences.[181] Evidence of incidents that have not resulted in injury may also be admissible.

Conduct subsequent to plaintiff's injury

Evidence that deals with events that have occurred after the plaintiff has used the product is generally not admissible. But in a product liability case the plaintiff is not limited to show evidence of the defendant's conduct prior to the injury on the issue of malice and punitive damages.[182] The plaintiff may present any evidence that would tend to prove the essential factors of the conscious disregard concept of malice: evidence of the failure to make changes in a defective product or the failure to withdraw a dangerous product from the market.[183]

Government action

A government agency's investigation regarding a defendant's products is relevant to the issues of knowledge and conscious disregard for the safety of others. In one case the defendant had failed to remove the product from the market until it was pressured to do so by the Food and Drug Administration. This was evidence of the defendant's awareness of the probable dangerous consequences of the product and its deliberate failure to avoid these consequences.[184]

In another case a government agency had found a relationship between the use of the product and injuries. The manufacturer had done a similar analysis without withdrawing the product from the market. The government agency's determination and the manufacturer's passivity were held to be evidence of inadequate testing and supported the finding of a conscious disregard for the safety of others.[185]

False representations and concealment

Evidence that a manufacturer has concealed or withheld material information or falsified test data is relevant and admissible on the issue of malice.[186] Also admissible is evidence that the defendant has made false representations regarding the safety of the product.[187]

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[181] Supra at 374, 401.
[182] Supra at 374.
[183] Supra. "Such conduct is contrary to any policy aimed at promoting or encouraging product safety. Such conduct is admissible evidence on the punitive damages issue in order to provide meaningful consumer protection against the manufacture and distribution of dangerous, defective products." Supra at 401-2.
[184] Supra at 399.
[185] *West v. Johnson & Johnson Products, Inc*. (1985) 174 Cal.App.3d at 869.
[186] *Toole v. Richardson Merrell* (1967) 251 Cal. App.2d at 714. Robinson and Calcagnie "Punitive Damages in Products Liability Cases", available at http://www.robinsonpilaw.com/rcrlaw/docs/ (visited 2002-05-21).
[187] *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App 3d. at 410-411.

Testimony of defendant's former or current employees
Testimony of defendant's former or current employees that relates to actions and inactions by the defendant is relevant and admissible on the issues of conscious disregard for safety. In Hasson v. Ford Motor Company[188] a teenager was disabled for life due to brake failure. A former employee who had held numerous high level engineering and managing positions testified that Ford knew of the defective braking system but had deliberately failed to take action to prevent accidents.[189]

Expert testimony
Expert testimony is important, expensive and time-consuming but nevertheless frequently used to prove punitive damages. It has been admitted to show that if the defendant had performed adequate testing of the product, the potential for injury could have been recognized earlier.[190]

In West v. Johnson & Johnson Products experts testified that the defendant's non-performance of particular tests on its products prior to marketing was "an act of unbelievable irresponsibility" and in total disregard of the public safety and welfare.[191]

Business promotion and marketing
If a defective product subjects the public to potential danger and the defendant manufacturer continues to promote the product despite such knowledge, evidence of this behavior could support an action for punitive damages. In Hilliard v. A.H. Robins Co.[192] the Court concluded that evidence that the defendant continued to manufacture its products when there was knowledge of the potential dangerous consequences could lead to prove that the defendant willfully and deliberately failed to avoid the consequences. In Toole v. Richardson Merrell[193], the fact that the product was on the market when the defendant knew of the product's toxic effects amounted to a reckless and wanton disregard and justified an award of punitive damages.

Profit motive or cost savings
Another factor in demonstrating a conscious and willful disregard for safety is profit motive and cost savings that results in a course of conduct that includes a known and substantial risk of harm. In Grimshaw v. Ford Motor Co.[194] internal documents showed that the dangerous condition would have

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[188] *Hasson v. Ford Motor Company* (1982) 32 Cal.3d 388, 138 Cal.Rptr. 705.
[189] The defendant had tried to protect the reputation of the car make in question among consumers.
[190] *West v. Johnson & Johnson Products, Inc*. (1985) 174 Cal.App.3d at 851.
[191] Supra at 852 and 869.
[192] *Hilliard v. A.H. Robins Co*. (1983) 148 Cal.App 3d at 399.
[193] *Toole v. Richardson Merrell* (1967) 251 Cal. App.2d 689, 715, 60 Cal.Rptr. 398.
[194] *Grimshaw v. Ford Motor Company* 119 Cal.App.3d at 776-7 (1981).

been eliminated at very low costs per car[195]. The defendant had decided to defer these changes due to cost savings. The Appellate Court noted:

> "There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost benefit analysis balancing human lives and limbs over corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted a conscious disregard of the probability of injury to the members of the consuming public."[196]

Evidence of corporate authorization or ratification

In some cases an employee at a lower level allegedly makes the approved wrongful conduct. The Californian jury instructions provide that if a principal or employer is a corporation, the act of oppression, fraud or malice, advance knowledge and conscious disregard, authorization or ratification must be on the behalf of an officer, director, or managing agent of the corporation.[197] The defendant corporation could claim that the employee does not fall within this definition, thereby preventing liability.

The jury instructions provide the following definition of officer, director or managing agent:

> "An agent-employee acts in a managerial capacity where the degree of discretion permitted the agent-employee in making decisions is such that the agent's employee's decisions will ultimately determine the business policy of the principal employer."[198]

However, a defendant cannot exclude itself from liability by giving an employee a non-managerial title and transfer crucial policy decisions since the title is not decisive when determining the scope of managerial capacity.[199] When employees personally manage important aspects of the employer's business with little if any supervision, there is sufficient discretion for the law to impute their actions to the corporation.[200]

In Grimshaw v. Ford Motor Co. the defendant argued that the employees who were aware of the results of the crash test and the defects did not have managerial positions. The Court rejected this argument since it could be inferred from the testimony either that the employees had approached the

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[195] $9.95 and $15.30 in 1981.
[196] *Grimshaw v. Ford Motor Company* 119 Cal.App.3d at 813.
[197] Baji 14.73.1.
[198] Baji 14.74, Robinson and Calcagnie, "Punitive Damages in Products Liability Cases", available at http://www.robinsonpilaw.com/rcrlaw/docs/ (visited at 2001-05-21).
[199] *Egan v. Mutual of Omaha Insurance Co*. (1979) 24 Cal.3d 809, 823, 157 Cal. Rptr. 482).
[200] Supra at p. 823.

management of the defect or that the employees were aware of the management's attitude and decided to do nothing. When the top management had insulated itself from the decision process with the result that lower level employees did not have the power to correct wrongful conduct, those persons were acting in a managerial position.[201] The decision not to take corrective measures was therefore made by persons exercising managerial authority.

4.5 Rules concerning the awarded amount

4.5.1 Jury instructions

The law provides no fixed standards as to the amount of punitive damages but leaves the amount to the jury's sound discretion. However, the jury must exercise the discretion without passion or prejudice and only award punitive damages for the sake of example and by way of punishment.[202] The jury should consider the reprehensibility of the conduct of the defendant and the amount of punitive damages that will have a deterrent effect on the defendant in the light of the defendant's financial condition.

The jury should not let themselves be influenced by the plaintiff's injury or situation in life after the injury happened. It is compensatory damages that are supposed to make the plaintiff whole again. Even if punitive damages are not connected to the harm, injury or damages suffered by the plaintiff, they should still bear a reasonable relation to those. The jury should take into consideration the amount of compensatory damages that has been awarded but exclude own personal feelings about the plaintiff's pain and suffering. In practice this means that an award of punitive damage will be compared to the amount of compensatory damages.[203] The relation between the amounts is in California a factor to consider for the jury but some jurisdictions have set firmer guidelines by statute, e.g. that the amount of punitive damages is limited to one time the compensatory damages.[204]

4.5.2 Constitutional limits

The U.S. Constitution place limits on the amount of punitive damages. The Eighth Amendment prohibits excessive fines but the Supreme Court has

[201] *Grimshaw v. Ford Motor Company* 119 Cal.App.3d at 814.
[202] Baji 14.72.2.
[203] Baji 14.72.2. Paragraph 3 in the instructions as follow: "(3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff." The last paragraph is in brackets and must be given if the defendant requests so. *Gagnon v. Continental Casualty Co*. (6th Dist. 1989) 211 Cal.App.3d 1598, 1605, 200 Cal. Rptr. 305, 309. This means that when the plaintiff has not suffered any injury that would justify compensatory damages, this affects the amount of punitive damages.
[204] Schwartz et al., p. 561, note 2.

held this clause applicable only in criminal proceedings and not in civil litigation between private parties.[205]

It has also been argued that excessive amounts or the manner in which they have been decided violated the Fourteenth Amendment rights of due process.[206] The Supreme Court has indicated that if the jury were given unlimited discretion regarding the amount of punitive damages this might violate the clause of due process.[207] In the relevant case a due process violation could only be found in rare cases. The plaintiff had suffered a total of $4,000 in out- of- pocket expenses and was awarded $840,000 in punitive damages. In an 8-1 vote, the Supreme Court held that there was no violation of the defendant's rights of due process. The majority of the Court did not focus on the amount of the award but instead relied on the on the fact the jury was given adequate guidance in reaching the verdict. Punishment and deterrence was the purpose of punitive damages, not compensating the plaintiff and the imposition of punitive damages was not compulsory. The trial judge and the Appellate court was also required to review the punitive damages for excessiveness. Together these standards imposed a sufficiently definite and meaningful constraint on the discretion of the jury.[208] Even though the Court's majority acknowledged that the punitive damages were more than four times the amount of compensatory damages and more than 200 times the out-of-pocket expenses of the plaintiff the presence of procedural safeguards was enough to prevent a due process violation.

A well-known case regarding excessive awards of punitive damages is BMW of North America, Inc. v. Gore[209]. Although not a products liability case, it is significant concerning the circumstances of the case that the court took into consideration. The plaintiff was awarded $4,000 in compensatory damage and assessed $4 million in punitive damages by a jury in Alabama. Eventually the Supreme Court of the United States reversed the judgment and remanded the case to the Alabama Supreme Court where the award was reduced to $50,000. The United States Supreme Court was convinced that the award was grossly excessive and had transcended the constitutional limit. The court also considered the particular circumstances of the case, i.e.

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[205] *Browning- Ferries Industries v. Kelco Disposal, Inc*., 492 U.S. 257 (1989).

[206] Due process of law: A flexible term for the fair and orderly administration of justice in the courts. Essential to the concept is the right a person has to be notified of legal proceedings against him, the opportunity to be heard and to defend himself in an orderly proceeding, and the right to have counsel represent him. It is basically the fundamental fairness principle at the core of the Anglo- American system of jurisprudence. Due process also refers to the actual legal proceedings that serve to protect and enforce individual rights and liberties. The phrase is expressed in the Fifth Amendment to the U.S. Constitution: "…nor [shall any person] be deprived of life, liberty, or property, without due process of law," and also in the Fourteenth Amendment which applied it to the states. From Gilbert Law Dictionary.

[207] *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991).

[208] Supra.

[209] *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed. 2d 809 (1996).

the relatively innocent misconduct by the defendant and that even though there was a material fact, there was no evidence that the defendant had acted in bad faith. The harm inflicted on the plaintiff was purely economic in nature and there was no risk of future harm because of the defendant's conduct.[210]

4.5.3 Insurability

Many liability insurance policies explicitly exclude punitive damages. When the policy does cover such damages the courts are split whether to allow it or not. About half of the jurisdictions disallow such coverage on the grounds that it is against public policy to obtain insurance. It defeats the whole idea with punitive damages as punishing the defendant and to deter future wrongdoers. One argument for allowing the coverage was that the insurance company should honor its obligation when it took premium for covering all liability for damages.[211] The raised premiums and cancelled coverage would then punish the defendant.

4.5.4 Legislative reform

Since the late 1980s at least 15 states have attempted to put statutory controls on punitive damages to avoid excessive verdicts.[212] One approach has been to put a cap on the amount that may be awarded.[213] Payment of some of the award could also be made to the state to reduce the incentives of seeking such rewards.[214] Tightening of the standard of proof beyond the usual preponderance of the evidence to clear and convincing evidence as in California[215] or beyond reasonable doubt is another way of limiting the possibility of excessive verdicts[216].

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[210] In BMW of North America, Inc. v. Gore, the plaintiff had bought a new black BMW for $40,750. When the plaintiff took the car to a detailer to get a more stylish appearance, it was found that the car had been repainted before the plaintiff got the car in his possession and without his knowledge when he purchased the car. While the car was in transit in Germany, it had been repainted to repair damage done by acid rain. BMW explained their policy concerning cars that had been damaged in the course of manufacture or transportation. If the repair cost did not exceed 3 percent of the cars suggested retail price, the car was sold as new without advising the dealer that any repairs had been made. Because the cost of repainting the car was only $601.37, 1.5 % of the suggested retail price, BMW did not disclose the damage or repair to the dealer.

[211] *Price v. Hartford Accident and Indemnity Co.*, 108 Ariz. 485, 502 P.2d 522 (1972).

[212] Schwartz et al., p. 799, note 5.

[213] Schwartz et al., p. 561, note 2: Tex. Civ. Prac. & Rem. Code §§41.001-009; four times the actual damage or $200,000 whichever is greater) unless the tort is intentional and N.J. Stat.§ 2A:15-5.14 (1999 Supp.) greater of five times the compensatory damage or $350,000.

[214] E.g. 75% of a punitive damages award in product liability suits is paid to the state, adjusted for litigation expenses, Ga. Off. Code Ann. §§51-12-5.1(e).

[215] California Jury instructions: Baji 14.71.

[216] Schwartz et al., p. 562, note 7.

4.6 Statistics and surveys

4.6.1 General comment

An overview of two surveys will follow with the purpose of giving a picture of what the situation is like in America and California regarding the methods and amounts of punitive damages. The two studies are focusing on different time intervals and on different geographical scope. However, they both aim to give an idea of how often and in what amounts punitive damages are awarded.

4.6.2. "Demystifying Punitive Damages in Products Liability Litigation: A survey of a quarter century of trial verdicts"

As one of the first studies of its type, it has been widely commented since it was performed in 1992.[217] It pertained to analyze and challenge presumptions and myths that was said to exist in the American legal system. The study provides a comprehensive statistical database of punitive damages in product liability cases to give an overall picture of how the remedy of punitive damages has functioned from 1965 to 1990 in America. The survey was performed with support from the Roscoe Pound Foundation, closely linked to the plaintiff bar.[218]

The study analyzed both state and federal products liability cases and obtained a sample of 355 punitive damages awards to plaintiffs who had suffered personal injuries. The study was developed to answer the most basic questions; how often are punitive damages awarded and in what amounts? How many of these awards are reversed or reduced by post-trial action?

The actual number of punitive damages awards in products liability was unknown and possibly unknowable because there existed no comprehensive reporting system. The research team instead had to search all published opinions where there had been an actual trial verdict awarding punitive damages in products liability cases involving personal injury.

The most notable finding in the study was the likelihood that a U.S. manufacturer would have to pay a punitive damages award in full was less

[217] Demystifying Punitive Damages In Products Liability Cases: A Survey Of A Quarter Century Of Trial Verdicts. A research mongraph by Professor Michael Rustad. Papers of the Roscoe Pound Foundation 1991.

[218] The Roscoe Pound Foundation sponsors programs and publications on issues of social importance. It should be noted that the Foundation is closely linked to the plaintiff bar. It was the hope of the Roscoe Pound Foundation that the findings of the study would clarify the debate over punitive damages.

than one in 1,000. Because of asbestos litigation, punitive damages awards had become more frequent in the 1980s but the increase was from an extremely small base and when the asbestos cases was excluded, the frequency of punitive damages instead had decreased from 1986 to 1990.

The study found that the median punitive damage award for all cases was $625,000. When the asbestos cases were excluded from the group, the median was a bit higher, $750,000. The full award was collected in less than half of the cases and in nearly 40 percent of the cases the punitive damages was not collected.

The author took those finding as a confirmation that during the years of 1965 to 1990, punitive damages awards were neither frequent nor crushing in their impact.

The study revealed that punitive damages were not being awarded unless there was a finding of aggravated misconduct such as 1) fraudulent- type affirmative misconduct; 2) knowing violation of safety standard; 3) inadequate testing and quality control during manufacturing; 4) failure to warn of known danger; and 5) post-marketing failures to remedy known danger.

The plaintiff's attorneys argued that their clients were richly deserved to collect an award when they did considering the risk, the expense and the low rate of return in punitive damages cases. But the defense attorneys claimed that it is the corporations that are victimized by blameworthy plaintiffs and that the juries award punitive damages because they sympathize with the plaintiff. The juries would often ignore legal instructions in order to provide the plaintiff with a windfall from the deep-pocketed but innocent corporation according to this view.

The empirical findings in the study showed that consumer products were involved in an estimated 29,000 deaths and 33 million injuries annually.[219] The study found it notable that punitive damages were awarded only 355 times during this period of 25 years. Even though the number of punitive damages had constantly risen, the rate of the increase had dropped the last five years of the period (1986 – 1990). This depended on the fact that once the asbestos cases were accounted for, the rate had actually decreased the last five years (1986 – 1990). The asbestos cases were almost 50 percent of the total cases during the years of 1986 to 1990.[220]

The states were categorized into four regions: North, South, East and West.[221] Almost 50 percent of both the asbestos and the non-asbestos cases

[219] Rustad, p.23.
[220] Supra p. 25.
[221] The northern states were: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin. The southern states were: Alabama, Arkansas, the District of Columbia, Florida, Georgia, Kentucky, Louisiana,

were accounted for in the Southern states.[222] 20 percent of the cases were in the Western states. The Northern states awarded 16 percent of the verdicts in the study. The lowest percentage of cases occurred in the Eastern states; 14 percent and had also the lowest percentage of non –asbestos cases, only 9 percent. The few awards of punitive damages in the Eastern states were partly due to laws restricting the remedy.[223] When it came to separate states, Texas led the nation with 51 (of 355) verdicts followed by California with 35. Florida had 34, Missouri 22 and Illinois 21. Six states had no verdicts at all during the time period covered.[224]

The 355 awards were coded into one of nine different product categories. The leading categories were asbestos products: 27 percent of the verdicts, vehicles: 20 percent and medical products: 15 percent.[225] The other categories accounted each for 10 percent or less.

The debate about punitive damages has also involved the post-trial histories of the cases; whether or not excessive awards are being reduced on the appellate level. Of the 355 cases 36 percent were settled and collected while appeal was still pending, meaning that the plaintiff never collected the verdict awarded by the jury. In 25 percent of the cases a portion of the award was reversed or remitted and 22 percent was affirmed in whole on appeal. 10 percent of the awards stayed in bankruptcy.

The study found that punitive damages awards exceeded compensatory damages in 59 percent of the 355 cases. According to the study, the juries

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Maryland, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, Virginia and West Virginia. The eastern states were: Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont and the Virgin Islands. The western states were: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington and Wyoming.

[222] Rustad, p. 25.

[223] Several of the Eastern states do not permit punitive damages or at least restrict it severely. Rustad, p. 25.

[224] Supra. Louisiana, Michigan, Nebraska, New Hampshire, North Dakota and South Dakota. The fact that Texas led the league is interesting since a paper from 1996 had shown that in the Dallas area (together with Atlanta) punitive damages were awarded to one of five plaintiffs. Nationally, punitive damages were awarded in 6 percent of the cases. Andrew Blum, *Study Finds Punitives Are Small, Rare - State courts center finds punies in 6 percent of cases*, The National Law Journal (1996). Available at www.productslaw.com/punies (visited at 2002-05-21). The study also concluded that awards vary greatly throughout the nation as can be seen even in the study covering the years 1965 to 1990. The study by Cornell Law School Prof. Theodore Eisenberg, analysed a year's worth of statistics from the National Center for State Courts, gathered under a grant from the Justice Department's Bureau of Justice Statistics. His paper, that was presented at a tort conference at the University of Chicago on June 14, also concluded that awards vary greatly throughout the nation as can be seen even in the study covering the years 1965 to 1990.

[225] The other categories were machinery, household and consumer products, recreational products, chemicals, containers and miscellaneous products. For a full explanation of each category see Rustad, p. 26.

awarded million dollar verdicts in only 36 percent of the cases. In the study's sample the amounts varied from $1 to $150 million.[226]

The amount of the awards varied by region. The Northern states did most frequently award high amounts, 38 percent. This is interesting since the same states awarded only 16 percent of the verdicts in the study. Also the Southern states that accounted for almost 50 percent of the cases had the lowest percentage of awarding the highest amounts of punitive damages.

Finally, death occurred as a result of a serious injury by the product in almost 30 percent of the 355 cases. In 33 percent of the cases the plaintiff got to be permanently and totally disabled. The study also reported that only 7 percent of the plaintiffs had been found by a court to act contributory negligent.[227] The author of the study concluded that it was extremely difficult to convince a jury to award punitive damages if the plaintiff's fault played any significant role in the accident or injury.

4.6.3 "An analysis of Punitive Damages in Californian Courts, 1991-2000"

The second study covers the time period 1991 to 2000.[228] The survey covers the situation of the Californian Courts contrary to the previous study that had a national scope. The scope was all claims where punitive damages were awarded during the time period and not only products liability litigation.[229]

This study was performed to address the issues whether there has been an increase in punitive damages awards, whether there has been a rise in the amount of punitive damages awarded and a rise in the number of cases where punitive damages are claimed.

The survey was performed with the support of The Civil Justice Association of California (CJAC), a coalition of citizens, taxpayers, businesses, local governments, professionals, manufacturers, financial institutions, insurers and medical organizations. The goal is to improve the civil liability system

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[226] The study is somewhat unclear regarding several statistics. Consequently, inference from it has its limitations.

[227] See supra section 2.3.6 Contributory and Comparative negligence.

[228] An analysis of Punitive Damages in Californian Courts, 1991-2000 by J. Clark Kelso and Kari C. Kelso, Capital Center for Government Law & Policy, University of the Pacific, McGeorge School of Law. Available at http://12.2.169.205/ government_law_and_policy/publications/ccglp_pubs_punitive_damages_report.PDF.(visited 2002-05-21).

[229] The different claims were divided into the following subject matter categories; fraud, wrongful termination, insurance bad faith, product liability, unfair competition, intentional torts, malicious prosecution, landlord/ tenant, civil rights, trespass/ nuisance and "other" including e.g. professional malpractice, breach of fiduciary duty etc. The types of claims included in the study were separated for purposes of the study. See infra section Punitive damages verdicts by type of case.

in California by limiting punitive damages and to reduce the possibilities to win frivolous suits.[230]

Even though the study was supported by a grant from CJAC, the authors reassured their independence and integrity of their results. They did not consult with CJAC regarding the methodology for the study. It was also argued that in the end, the study reported a similar statistical analysis to other scholars' and researchers' who have studied verdicts and punitive damages.

Sources of information

As in the previous study, the authors of this study had to turn to private sources of information[231] since there was no official, governmental source of information about all punitive awards in California.

Descriptive Statistics on Sample of Punitive Damage Verdicts

The sample for this study consisted of 489 cases in which Californian courts between January 1, 1991 and December 31, 2000 had awarded punitive damages. The figures in the study did not reflect post-verdict motions, appeals or settlements as opposed to the previous study. The authors argued that this exclusion would not affect the median in the study but only the mean of the figures. For example, the single largest punitive award made by a jury in the sample was a $4.2 billion punitive award that involved serious injuries suffered in an automobile accident where the fuel tank burst into flames severely injuring the plaintiff.[232] The trial court reduced the $4.2 billion award to $1.2 billion. This single case would affect the mean of the total amount of punitive damages by almost 50%.[233] The study did consider the few extreme high and low amounts awarded by using a trimmed mean that discarded the highest and lowest 5% of the sample.

There was a great variation in the sample of punitive damages awards when the median was $0.2 million and the mean $13.1 million, an effect again because of the few number of extremely large punitive damages awards. The top five punitive awards were (in millions) $4200, $386, $173, $100 and $99. The sum of the punitive damages in all cases was 88.4% of the total verdict amount that included punitive and compensatory damages.[234]

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[230] CJAC supports contrary interests to those of the plaintiff bar. Information about the Civil Justice Association of California is available at http://www.cjac.org/ (visited 2002-07-20).

[231] Such as the database Westlaw for the California Jury Verdict Reporter. See Kelso and Kelso, Chapter 1, Executive Summary.

[232] *Anderson v. General Motors Corp*. B135147 (Cal.Ct.App.) (pending).

[233] From $13.1 million to $6.9 million.

[234] The trimmed mean figures are calculated after discarding the highest and lowest 5% of the sample. According to the study, the trimmed mean better reflect the central tendency of the data and were appropriate to use when the data contained some extremely large or low figures in the sample and the sample therefore were highly skewed and non-normal. Substituting $1.2 billion for the $4.2 billion punitive award made in Anderson v. General Motors Corp. reduced the 88.4% figure to 80%.

Punitive damages verdicts by type of case
The study investigated if there were any substantial difference in the assessment of punitive damages regarding different types of claim. Products liability cases had the highest amount of the total verdicts of the eleven types of claims.[235] Products liability cases had punitive damages awards that were substantially higher than compensatory damages compared to other types of claims.[236]

Examination of Punitive Damage Verdicts by Year
One of the main goals with the study was to find out whether punitive damages verdicts had been dramatically increasing over time. No clear pattern of an increase appears from the year-to-year comparison when the high punitive damage case types were compared. The authors divided the decade into two halves (to reduce the impact of yearly fluctuation), and used the sample of cases with high punitive damages. The conclusion was that there had been an increase the last five years compared to the first part of the decade. In the high punitive damage case types there was also indications that the spread between compensatory and punitive damages in many cases had substantially increased.

When the entire sample of punitive cases was examined, an increase during the last half of the decade was shown but the spread between compensatory and punitive damages were much less pronounced than in comparison to the high punitive damage case types.

The last table separated the non-high punitive damages case types from both the entire sample and the high punitive damages case types. The authors found that over the course of the 1990s, punitive damages had been rising more quickly in high punitive damages case types than in non-high punitive damages case types. Also there had been a greater proportional increase in punitive damages in the high punitive damages case types than compensatory damages for the same type of cases.

4.6.4 Survey summary
The two surveys are not comparable in all aspects. Their respective scopes are different from each other both in time and place. While the first study concentrates only on awards of punitive damages in products liability litigation, the other studies all different types of cases where punitive damages are awarded. Above all, the surveys were supported by different groups of interest on the issue of punitive damages that were contrary to each other. Both studies came to the conclusions that favored their

[235] See supra footnote 225 for the different types of claims. Products liability: 11 cases. Mean: $399,940,798 where the mean for punitive damages was $387,460,500.
Trespass/ Nuisance cases had the next highest mean of the total verdict: $26,347,859 where the mean for punitive damages was $20,545,404.
[236] Mean: punitive: $387,460,500 and compensatory: $12,480,298.

respective opinions regarding punitive damages. The first study concluded that punitive damages were rarely awarded and were often reduced or eliminated through appeals or settlements. When punitive damages actually were paid it involved catastrophic injury or death that were caused by egregious corporate behavior. These conclusions support the standpoint that punitive damages are a useful and powerful tool in protecting consumers against defective products. This is an opinion supported by the plaintiff bar and consumer groups.

The second survey was supported by a grant from the Civil Justice Association of California, CJAC, one of the leading proponents of civil justice reform in California that includes advocating on behalf of measures "to bring punitive damages under control".[237] This study came to the opposite conclusion; namely that there has been an increase in punitive awards during the 1990s. The amount of punitive damages had been rising more quickly in cases of high punitive awards than in cases of low amounts. There had also been an increase in the ratios of punitive to compensatory awards in the cases of high punitive damages awards. Thus, one could argue that there has been a trend towards more excessive verdicts. Those standpoints favor opponents of punitive damages and proponents of a civil justice reform.

The fact that the surveys have examined different time periods is of course an important aspect that matters for the credibility of their respective results. The objectivity issue also contributes to the degree of credibility. Statistics can be used in several ways depending on the desired results and the fact that sponsors have supported these two surveys with conflicting interests indicates that the field of punitive damages is a dynamic and controversial field of law. So-called sample selection bias might have influenced the results of the respective surveys. Because of this, it is difficult to generate conclusions from the two surveys.

Another recent study of courts in America's 75 largest counties showed that of 762,000 cases, only 364 or 0.047 percent ended up in punitive damages.[238] Another study of 16 states conducted by the same center, showed that the number of liability suits has declined by 9 percent since

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[237] Information about the Civil Justice Association of California is available at http://www.cjac.org/ (visited at 2002-07-20).

[238] The study was conducted by the National Centre for State Courts in 1999. *"The National Center for State Courts (NCSC) is an independent, non-profit organization dedicated to the improvement of justice. NCSC accomplishes its mission by providing leadership and service to the state courts. The Court Research division of the NCSC promotes public confidence in the courts by helping state courts respond to policy issues of concern, anticipate societal problems that will affect courts, and develop the leadership necessary to provide fair and equitable administration of justice. Research topics include court administration and performance, state court caseload trends and resources, tort litigation, jury procedures and innovations, court interpretation, community-focused courts, alternative dispute resolution, and domestic relations."* Information is available at http://www.ncsconline.org/ (visited 2002-07-20).

1986 regarding the issue about whether there also has been an increase in the number of liability claims that are filed every year.[239] Since this study had a national scope and since California could differ from the rest of the country, a comparison has certain limits but apart from that the two surveys shows two different pictures of the situation in recent years.[240] This signifies the difficulties of finding statistics that gives an objective and accurate picture of the award of punitive damages.

4.7 Misinformation

Statistics can be disorienting according to the truth. Rather than the statistics in itself, misinformation could also be an explanation for existing myths, presumptions and prejudices. A well-known case and a myth regarding excessive awards is the case of Liebeck v. McDonald's Restaurants[241]. A 79 year-old woman recovered $2.7 million in punitive damages for burns she received when she spilled a cup of coffee in her lap at the defendant's drive-in restaurant. What probably is unknown for most people is that the plaintiff received third degree burns that required skin grafts. The coffee was heated to almost 80 degrees Celsius (190 degrees Fahrenheit) and was scalding. The defendant had received at least 700 complaints of coffee burns prior to this event. Above all, the trial court reduced the award of punitive damages to $480,000.[242] It was found that the large McDonald's verdict got extensive front-page coverage in 1994 but that only about half the newspapers reported when the verdict later was reduced.[243]

The average verdict that was reported by a leading newspaper (The New York Times) in 1989 was $20.5 million. However, a much larger number of cases involved an average verdict of $1.1 million but those cases did not attract the similar media attention.

[239] Glaberson, *When the Verdict Is Just a Fantasy*, The New York Times, (1999). Available at http://www.productslaw.com (visited 2002-05-21).
[240] The time period should also be considered. The California survey (Kelso and Kelso) covered 1991 to 2000 but in the last survey the time period was unknown.
[241] *Liebeck v. McDonald's Restaurants*, P.T.S., Inc. (N.M. Dist. 1994).
[242] Phillips, p. 74.
[243] Glaberson, *When the Verdict Is Just a Fantasy*, The New York Times, (1999). Available at http://www.productslaw.com (visited 2002-05-21). The study was conducted by Michael McCann, at the University of Washington and William Haltom of the University of Puget Sound in Tacoma, Washington.

5. Analysis and Conclusion

5.1 Analysis

5.1.1 General comment

Concerns have been raised that there have been a rise in the number of cases where punitive damages are claimed and in the awarded amounts.[244] The issue regarding the American tort system in general and punitive damages in particular is an issue involving many conflicting interest. On the one hand, representatives for the business community with business lobbyists and scholars claim that an increase of punitive damages awards results in unfavorable impacts on the economy. The American legal system generates excessive punitive damages awards that weaken the competitiveness of American industry in world market, or so the reasoning goes. America's corporate liability regime has at its worst failed to stimulate good conduct but instead only transferred wealth from taxpayers and consumers to attorneys and at the same time ruined many businesses.[245]

On the other hand there are trial attorneys, consumer groups and other scholars arguing that there has not been a substantial increase but that a distorted picture is given of the legal system. The tort system is functioning as it should and the punitive damages are only awarded in the appropriate situations. "…[L]arge punitive damages awards have come to symbolize the problems perceived in the current system [246] " and "legal legends", cases such as the coffee burns at a McDonald's restaurant, have been created as a result of the media coverage of a few extreme and unusual cases.[247]

Whatever the situation is like in America and California with increasing excessive verdicts or not, it is of interest to analyze punitive damages from different aspects in the society such as a judicial, a moral and ethical and a economic aspect.

5.1.2 A judicial aspect

The lack of fixed standards for the jury who decides the amount has been the target for criticism. Since punitive damages have the purpose of deterrence

[244] According to Kelso and Kelso.
[245] *Tort on stilts*, The Economist, March 22nd 2001: "When it works, America's corporate-liability regime encourages companies to serve the public better. As its best, it beats the alternative – namely, overweening regulation."
[246] Daniels and Martin, *Myth and Reality in Punitive Damages*, 75 Minn. Law Rev. (1990).
[247] Glaberson, *When the Verdict Is Just a Fantasy*, The New York Times, June 6th 1999. Available at http://www.productslaw.com (visited 2002-05-21).

and to constitute an example, the award is a punishment for the defendant. It is therefore of utmost importance that predictability exists, both for the defendant in particular but also in general. The judgment is otherwise in the risk of being arbitrary and could be subject to the jury's opinions about the defendant. Absence of fixed standards can therefore lead to unpredictability regarding damages. That punitive damage should bear a reasonable relationship to the amount of awarded compensatory damages is probably not a sufficient safeguard. When the applicability of a constitutional limit was tried in the U.S. Supreme Court the focus was not so much on the amount but instead that the jury was instructed correctly in reaching the amount.[248]

Instead, different standards of punitive damages should be fixed. The relevant amount is determined according to the conduct that the defendant has been found guilty of. The conduct should be categorized in different levels of severity. The task of the jury would be to decide how severe the defendant's conduct was and to place it in a level with an already fixed standard of punitive damages attached.[249] Fixed standards would enhance the predictability and increase the credibility of the system.

Since the American legal system harbors the balancing of many interests: "[o]ne consequence is that the rules by which it operates continually evolve, and in the process frequently move too far in one direction or another."[250] Those interests could influence the jury in both directions. There have been allegations that the jury more easily sympathizes with the plaintiff and thereby supports a high punitive damages award against a corporation even when the corporation has not conducted in a way justifying punitive damages. Trends in the society could influence a jury with the assistance from the media. Fixed standards for the jury to follow would at least decrease the risk for arbitrary judgments because of undue influence from the media and society. If there were predictability in the system, the media would not have the opportunity to report about rare and extreme cases in the same extent as today.

Another issue particularly relevant in products liability concerns the several areas of new unbroken law such as tobacco, silicon and now even fast food. Clear rules and principles have not yet emerged and become fully accepted. In those new areas of law there is a great need for predictability and limitations on the amounts awarded. Especially considering the risk or possibility of mass tort litigation with an unknown number of possible plaintiffs. It is both an ethical and a judicial aspect that in a legal system all plaintiffs have the same opportunities to recover compensatory damages.

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[248] See supra section 4.5.2 Constitutional limits. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991).

[249] Of course, the jury system could be discussed in this context as well. I deem it beyond the scope of this thesis; for a thorough discussion, see e.g. Sunstein, Hastie, Payne, Schkade and Viscusi (2002).

[250] *Wholesale attack*, The Economist, May 3rd 2001.

When high amounts of punitive damages put a corporation in bankruptcy, there is a risk that not all plaintiffs will be compensated.

There are not any of the usual safeguards guaranteed in criminal procedure such as the proof of guilt beyond reasonable doubt, the privilege against self-incrimination and even the rule against double jeopardy when in most places the defendant may still be punished for the crime after he or she has been mulcted in a tort action.

5.1.3 An ethical aspect

Due to the recent events of fraudulent accounting behavior, corporate ethics has been questioned even in America. Punitive damages could be seen as a way of externally imposing ethics on corporations.

It seems fair and reasonable that a corporation profiting from the sale of its products also is liable when a product has injured a user. But critics are questioning the fairness of the system when plaintiffs recover hundreds of thousands, millions or billions of dollars in punitive damages. The case with the 79 year-old woman who spilled coffee in her own lap after visiting the defendant's fast food restaurant has generated a lot of criticism.[251] She eventually received $480,000 in punitive damages besides compensatory damages. It may seem like an extreme amount of money for getting burned by coffee but the amount should be compared with the defendant's wealth and the conduct. The defendant, McDonald's Restaurants, a multi billion dollar corporation", had at least experienced 700 complaints regarding the scalding coffee. The jury must consider what amount that would be sufficient to punish the defendant and to deter other from ignoring important consumer complaints.

Another example is the recent award of $1.2 *billion* dollar in punitive damages in the case of Anderson v. General Motors Corp.[252] The plaintiff was severely injured in an automobile accident when the fuel tank burst into flames. The defendant was General Motors Corporation. The amount of $1.2 billion dollars is extreme but probably necessary to make a lasting impression as a punishment with the defendant corporation. It is also important to prevent possible defendants from calculating the risk of being sued vs. the cost of manufacturing a non-defective product as worth taking.

But is it fair that the attorney becomes wealthy as a result? With the conditions of the contingent fee it is easy to calculate that some people could get fairly rich when the amount of damages is in the range of $5 million to $10 million dollars or even as in the last case; $1.2 billion dollars. But the system also allows poor persons to get good legal advice when they are injured.

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[251] *Liebeck v. McDonald's Restaurants,* P.T.S., Inc. (N.M. Dist. 1994).
[252] *Anderson v. General Motors Corp*. B135147 (Cal.Ct.App.) (pending).

A common contingent fee is 30% to 40% of the amount recovered. If the plaintiff recovers nothing, the attorney receives no compensation.[253] Some argue that even the slightest chance of a punitive damages award could be sufficient motivation and thereby stimulates attorneys to take chances. This could not only be questioned from an ethical standpoint but could also lead to ineffective judicial economics when the resources in the courts are not used in the intended way.

It could also be argued that because of the risks of taking a case with no good prospective, attorneys and plaintiffs will not trouble the courts if the chances of getting paid are small. There will be natural choice of claims that are worth trying although this requires that the courts are doing a high quality job. In products liability cases the costs are particularly high due to expert testimony, i.e. an attorney will probably make a careful calculation before accepting to render professional service.

In most cases, the behavior that gave rise to the punitive damages affected more than the injured party. Some people have argued that the amount of punitive damages should be transferred to purposes that benefit the society as a whole. But there is a risk that the incentives for attorneys to take a case with an injured plaintiff could disappear if the award of punitive damages did not benefit the individual plaintiff and the attorney. The society still benefits when a product has been deemed defective and the defendant has to remove the product from the market. The risk that other persons will get injured from the same product is thereby limited. The possible award of punitive damages is perhaps needed in a system where the costs for litigation are so high. The motivation for the attorneys could also work as a safeguard of keeping dangerous products out of the market.[254]

5.1.4 An economic aspect

Of the different ways in which companies can end up owing money in litigation, product liability cases are the single most common area.[255] Whether there has been an increase in the amount and frequency of punitive damages or not, some business lobbyists argue that it is not the increase but the punitive damages in itself that is a problem. The verdicts are large enough to intimidate corporations into large settlements. This in turn inhibits innovation because of the fear of bringing out new products that might attract lawsuits. Useful and valuable products are not brought to market due to the possibility of a jury awarding huge verdicts of punitive

[253] Jurors are not informed about the contingent fee and they are not to add the fee to their verdict. For a discussion about the contingent fee see Schwartz et al., p. 543 footnote 8.
[254] This should be considered in the absence of a "Konsumentombudsman" and the like.
[255] Followed by suits concerning antitrust, intellectual property, employee conduct, contractual failure and shareholder actions. *The people v America Inc*, The Economist, March 22nd 2001.

damages or at least the expenses of battling suits. It has been claimed that in the end it is America's position on the world market that is negatively affected. Those arguments assume that products liability litigation is arbitrary and unpredictable regarding why and when a product is deemed defective and when the conduct justifies punitive damages.

But there is no need for products that are not safe for their intended purpose or products that are not developed or manufactured according to their full potential. If the disutility of consumers suffering injuries because of the product exceeds the utility of those who do not, the general public's utility from the product is negative. Of course, this brings about difficult balancing questions. How should one weigh the happiness of a large group vis-à-vis the unhappiness of a few? In a competitive market however, substitutes abound, and balancing questions may not be so hard. For example, the extra happiness for 99 consumers to buy one special brand of vehicle *compared to if they bought another brand*, is the relevant weight to balance with the unhappiness of the 100th customer who might have paid the ultimate price because of defectiveness of that kind of vehicle.

One issue remains though; the risk and unpredictability might deter companies from manufacturing potentially (for the society as a whole) important product. One solution to the risk management problem could be if corporations obtained extensive insurances coverage to protect themselves against possible lawsuits. Premiums should be paid according to the possibility of a prospective lawsuit, settlement or even just a possible investigation regarding a products safety that might injure the reputation of the product and/or the corporation.

Insurance companies could be the objective actors in the society with no partial interests whether the amount and frequency of punitive damages have increased. An insurance company in this situation would be concerned to find out whether a certain product could be deemed effective or not to predict the possibility of a lawsuit. They would also have an interest in finding the right statistics of punitive damages awards since this would be a tool in determining the premiums and calculating the risk for their clients getting sued. But the insurance company would not be favored by finding either that there has been an increase or a decrease regarding punitive damages. They would only be favored by finding the true statistics.

There would be a risk that the punishing and deterrent elements of punitive damages would be forfeited with this alternative. But the policies could be construed as refusing to cover for certain types of behavior. For example, in situations where test results have shown the product not to be as safe as it should be expected, the insurance policy will not cover a punitive damages award. The insurance company would have a considerable interest in investigating the safety of products and even trying to predict what type of products that are in the risk of a lawsuit or that have injured consumers. The premiums should be raised if there were knowledge of potentially dangerous

products and the company wanted to manufacture without any improvements. The premiums would be raised in an amount sufficient to stop the manufacturing of the particular product.

In such a system, companies would also benefit from risk-pooling their idiosyncratic risk. Negligence is a human feat, but if the costs for it are spread evenly through an industry it will not distort competition. The criticism that punitive damages are too random, and might bankrupt an otherwise fully healthy company with no more degree of risk-taking behavior than others, would thus be countered.

Because litigation risk is difficult to analyze, the result in the financial markets often is panicking with higher financing charges for the corporation if there is a potential lawsuit. The costs of finances can be as devastating as any potential verdict or settlement. Through studies of the stock market it has been found out that when companies are hit with a lawsuit seeking punitive damages, it could cause a loss in market capitalization that, on average, exceeds the eventual settlement. Losses are attributed to attorneys' fees and lasting damage to corporate reputations.[256] These are important aspects that the company should calculate regarding what standard that is held for the products. With independent actors such as insurance companies, there will be a development of policies regarding what types of products that are considered safe and what types of products that is not acceptable for the insurance company to cover. The financial market would then react already when the insurance companies' forecasts are put forward. Since the corporations do not want to risk their sources of financing or reputation, they will a have a strong incentive to follow those forecasts and, not least, to conduct extensive product safety investigations to prove that their products are safe.[257]

5.2 Conclusion

In this thesis the law of products liability and punitive damages have been described and commented. It has been difficult to generate any conclusions from the statistical basis. Instead the thesis has emphasized the contrary standpoints concerning punitive damages. Due to the overview of the law of torts generally and products liability and punitive damages in particularly, my conclusion is that there is a complicated system of theories, rules and principles far away from the seemingly *ad hoc* system pictured by many. However, there are elements that could be the target of criticism: e.g. the concepts of causation and the jury system. According to my opinion, the individual responsibility is sometimes placed on someone else and the group of possible defendants is surprisingly wide in some cases. Considering the

[256] *The people v America Inc*, The Economist, March 22nd 2001. (The article refers to a paper published in 1998 by Jonathan Karpoff and John Lott Jr).
[257] One might predict the rise of product portfolio rating agencies, comparable to agencies such as Moody's that today rate the financial risk of a company.

American society with its emphasis on individualism this is an interesting combination. Perhaps the criticism concerning punitive damages should focus on other elements in the legal system such as the jury. The jury's role could be questioned in the process of determining the amount of punitive damages, at least as long as there are no fixed standards to follow.

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