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Oliver v. Raymark: Holding the Line on Punitive Damages

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NOTE

*Oliver v. Raymark*: Holding the Line on Punitive Damages

In *Oliver v. Raymark Indus.*,¹ the United States Court of Appeals for the Third Circuit refused to uphold an award of punitive damages in a strict products liability case in which the jury had not found compensatory damages to be appropriate.² In reversing the district court, the appellate court rejected the lower court’s public policy goals and legal rationales for permitting punitive damages and held that a finding of compensatory damages is essential before punitive damages can be awarded in a strict products liability action under New Jersey law.³ This reversal is consistent with the current concern that punitive damage awards have become excessive in frequency and size.⁴

Part I of this note examines punitive damages and their role in strict products liability law. Part II looks at the reasoning of both the district and circuit courts in the *Oliver* case. This section considers the district court’s arguments for allowing the award of punitive damages without a corresponding award of compensatory damages in a strict products liability action, and also investigates the appellate court’s narrower focus on the legal relationship between negligence and strict products liability causes of action. Part III explores the policy considerations favoring each of the conflicting views of the district and circuit courts in *Oliver* and considers an American Bar Association proposal and three state statutes which could act as a compromise between the two positions. This section also considers a hypothetical statute that New Jersey could adopt to deal with the punitive damage problem in general, and the *Oliver* case in particular.

² 799 F.2d at 97.
³ Id. at 98.
⁴ See infra notes 69-76 and accompanying text. See also *Tort Policy Working Group, An Update on the Liability Crisis* (1987). The Tort Policy Working Group consists of senior officials from eleven federal agencies. Seven of these officials serve as the chief legal officers in their agency. The report reviews the recent increase in tort liability and the resulting difficulty that individuals and institutions have experienced in obtaining liability insurance. In the punitive damages area the report documents the increase in the frequency and size of punitive damage awards and suggests some possible reform measures. It cites a study of Cook County damage awards which reveals an increase from $68,000 in 1970-74 to $489,000 in 1980-84 in the average punitive damage award and an increase from $40,000 to $1,152,174 in personal injury punitive damage awards during the same period. The report also points out that the number of punitive damage awards in Cook County grew from three in 1960-64 to seventy-five in 1980-84 and also cites a study of San Francisco damage awards which reveals an increase in the number of punitive damage awards from 14 in 1960-64 to 51 in 1980-84. Id. at 47-48.
I. Punitive Damages and Strict Liability

Punitive damages were first awarded almost 4,000 years ago under the Code of Hammurabi. The American concept of punitive damages developed under the common law of England. These “exemplary” damages inject the concepts of deterrence and punishment into tort law. These damages, which exceed compensation for the plaintiff’s injuries, are granted to punish the defendant, to teach him not to do it again, and to deter others from following his conduct.

Negligent action alone will not support an award of punitive damages; the defendant’s actions must exhibit a conscious and deliberate disregard for the interests of others which will characterize his conduct as willful or wanton. When granting punitive damages, courts and juries focus on the defendant’s actions and motives in committing the tort and not on the particular tort involved.

In the field of products liability, courts and juries have awarded punitive damages in actions brought under theories of negligence, fraud or deceit. However, initially some controversy existed over whether punitive damages could be awarded in a strict products liability cause of action for a defective product. This question became extremely important as strict liability became a preferred theory of recovery in products liability litigation.

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5 Robinson & Kane, Punitive Damages in Products Liability Cases, 6 Peppernine L. Rev. 139, 147 (1978).
6 Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel, 14 S. Mary’s L.J. 351, 353-355 (1983). The article explains that three theories have developed concerning the emergence of punitive damages under the common law. The first notes that a litigant who had an excessive award of damages assessed against him could not have the appellate court review the jury award. However, under the Writ of Attaint the litigant could proceed directly against the jury; if liability was wrongly decided or the damage award was deemed excessive the members of the jury could be punished. Damages to specifically punish outrageous conduct allowed appellate courts to accord jury awards a presumption of correctness. This development removed jurors’ concerns for their personal liability and promoted the growth of the jury system.
7 W. Prosser, Law of Torts 9 (1971). See also Haugen & Tarkow, Punitive Damages in Minnesota: The Common Law and Developments Under Section 549.20 of the Minnesota Statutes, 11 Wm. Mitchell L. Rev. 353, 356 (1985) (examining the development of punitive damages under Minnesota law); Robinson & Kane, supra note 5, at 142 (citing punishment and deterrence as the primary functions of punitive damages).
8 W. Prosser, supra note 7, at 9.
9 Id. at 10.
10 Id. See also Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problem of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 43 (1983-84) (explaining the conduct necessary for punitive damages and listing some actions in which they are usually prohibited).
11 W. Prosser, supra note 7, at 11.
12 Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1268 (1976). Note that “negligence” in this sense means negligence per se, negligence and res ipsa loquitur, or negligence rising to the level of “willful and wanton” conduct. Id.
13 Id.
14 The widespread acceptance of Section 402A of the Restatement (Second) of Torts spurred the increase in popularity of strict liability. Section 402A states:
In his classic article on the subject, Professor David Owen demonstrates that strict liability principles are compatible with punitive damages. First, Professor Owen points out that strict tort liability theory does not preclude the trier of fact from assessing fault. Strict liability, according to Professor Owen, actually extends fault to a faultless manufacturer of defective products in a manner similar to negligence per se. Strict liability was intended to compensate victims, not to limit their remedies.

Second, the facts that establish the basis for an award of punitive damages may differ from the facts that create liability for compensatory damages. Professor Owen notes that punitive damage claims have long been permitted in negligence actions despite the fact that establishing "willful" and "wanton" or "malicious" conduct requires more, and occasionally different proof than is required to establish mere negligence.

Finally, Professor Owen reasons that awarding punitive damages in strict products liability actions is proper because such damages have been held appropriate in a number of cases involving several other strict liability actions including nuisance, trespass to land, and liability for ultra-hazardous activities, negligence per se, defamation, and implied warranty in the sale of drugs.

1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  a) the seller is engaged in the business of selling such a product, and
  b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
2) The rule stated in Subsection (1) applies although
  a) the seller has exercised all possible care in the preparation and sale of his product, and
  b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.


16 Owen, supra note 12, at 1269.
17 Id.
18 Id.
19 Id.
20 Id. at 1270.
21 Id. at 1270-71.
A number of state courts have embraced Professor Owen's reasoning and have allowed the award of punitive damages in strict products liability actions in order to effectuate the important policy goals of protecting consumers and promoting responsibility among manufacturers. New Jersey joined these states in *Fischer v. Johns-Manville Corporation.* In *Oliver v. GAF Corporation,* the United States District Court for the Eastern District of Pennsylvania correctly predicted that the New Jersey

22 In *Fischer v. Johns-Manville Corp.*, 193 N.J. Super. 113, 472 A.2d 577 (1984), Judge Pressler listed the following citations from jurisdictions that have allowed punitive damages in strict products liability actions:


193 N.J. Super. at 122-23, 472 A.2d at 582-83. On appeal, Judge Clifford added the following cases and jurisdictions:


Fischer v. Johns-Manville Corp., 103 N.J. 643, 660, 512 A.2d 466, 475 (1986). The citation of the final Oklahoma case and the information in parenthesis may indicate that if actually faced with the situation in *Oliver v. Raymark,* the New Jersey Supreme Court would adopt the appeals court's position. See also *infra* notes 51-57 and accompanying text.

23 103 N.J. 643, 512 A.2d 466 (1986). In *Fischer,* the New Jersey Supreme Court upheld an award of $86,000 in compensatory damages and $300,000 in punitive damages to a plaintiff injured by exposure to asbestos. *Id.* at 647-48.

Supreme Court would adopt this position. However, the district court's extension of the punitive damages doctrine to a strict products liability action in which compensatory damages were not awarded represented a unique stance that no other court in the nation had adopted.

II. The Court Opinions: Divergent Views of Punitive Damages in Strict Products Liability

A. The District Court

In *Oliver v. GAF Corporation*, Everett and Mildred Oliver brought a personal injury action in the United States District Court for the Eastern District of Pennsylvania against a group of asbestos manufacturers, alleging that Everett Oliver contracted asbestosis after being exposed to the defendants' product. The jury was given a set of special interrogatories and found that the defendants had been negligent and had manufactured a defective product. Although the jury found that the asbestos had proximately caused Everett Oliver's injuries, it did not award him comp-

25 Id. at 16-17.
26 The court of appeals pointed out that the Kansas Supreme Court was the only court in the country that had faced this question. It had decided that an award of actual damages was necessary in order to receive punitive damages in a strict products liability action. See *Lindquist v. Ayerst Laboratories, Inc.*, 227 Kan. 308, 607 P.2d 1330 (1980).
27 Asbestosis has been described as:

the earliest known and most common asbestos-related disease . . . a latent disease that manifests itself 10 to 40 years after exposure to significant quantities of asbestos. Inhalation of asbestos fibers initiates a scarring process that destroys air sacs in healthy lung tissue. The result is a decrease in pulmonary function and lung volume. Symptoms associated with asbestosis include shortness of breath, coughing, chest pains, and clubbing of the fingers. Although the disease is not always fatal, it is progressive and incurable.

29 The special interrogatory responses that clearly exhibited the jury's finding that the defendants injured Everett Oliver read as follows:

1. Was Everett Oliver, during the course of his employment, exposed to asbestos products supplied by GAF Corporation or the Rubberoid Company? YES
2. If No. 1 is "yes" were such asbestos products defective (unsafe) as of the time they were supplied by GAF Corporation and the Rubberoid Company? YES
3. Does Everett Oliver have an asbestos-related disease or injury resulting from his occupational exposure to asbestos products? YES
   (a) If "yes" did Everett Oliver know, or have reason to know, before April 6, 1981, that he had an asbestos-related disease or injury resulting from his occupational exposure to asbestos products? NO
4. If 1, 2, and 3 are answered "yes" and 3(a) is answered "no," was a substantial contributing factor in bringing about Everett Oliver's asbestos-related disease or injury the supplying of defective (unsafe) asbestos products by GAF Corporation or the Rubberoid Company? YES
5. If No. 4 is answered "yes," at the time that Everett Oliver was exposed to defective asbestos products supplied by GAF Corporation or the Rubberoid Company, did he actually know of the danger to which he was exposed and nevertheless voluntarily assume the risk of disease and injury? NO
6. Was GAF Corporation or the Rubberoid Company negligent as to Everett Oliver by supplying asbestos products to his place of employment without providing adequate warnings of the dangers of exposure to such products? YES
   (a) If "yes," was such negligence a proximate cause of injury or disease to Everett Oliver? YES
7. If No. 6 and 6(a) are answered "yes," was Everett Oliver himself negligent, which negligence also was a proximate cause of such disease or injury? NO
The jury awarded Mildred Oliver $18,234 for loss of consortium and awarded Everett Oliver $500,000 in punitive damages. The defendants filed a post-trial motion claiming the award of punitive damages could not stand without an award of compensatory damages to Everett Oliver.

Because the New Jersey Supreme Court had never addressed the issue of whether a jury could award punitive damages in a strict products liability action without awarding compensatory damages, the federal district court was forced to decide this question without specific guidance from New Jersey case law precedent. Judge Van Artsdalen relied on social policy grounds and legal theory and concluded that a showing of compensatory damages was not necessary for a jury to award punitive damages under New Jersey law. On a social policy level, the court relied on New Jersey's commitment to the protection of its consumers. On a legal level, the court maintained that this policy of protecting consumers was furthered if a strict products liability action was treated as an intentional, rather than a negligent tort for the purpose of awarding punitive damages.

The court noted New Jersey's leading role in the development of products liability law beginning with the case of *Henningsen v. Bloomfield Motors, Inc.*, in which the New Jersey Supreme Court eliminated the common law requirement of privity of contract in implied warranty actions for allegedly defective products. Judge Van Artsdalen believed that eliminating the requirement of actual damages in a strict products

(a) If "yes," state in percentage the amount of Everett Oliver's causal negligence compared to the causal negligence, if any, of GAF Corporation and the Ruberoid Company.

GAF Corporation and the Ruberoid Company

Everett Oliver


8. In what amount, if any do you award damages to Everett Oliver? $0

9. In what amounts, if any, do you award damages to Mildred Oliver for loss of consortium? $18,234

10. Do you award any punitive damages? YES
   (a) If "yes," in what amount, if any, do you award punitive damages to Everett Oliver? $500,000

11. Which, if any, of the following listed corporations were also substantial contributing factors in bringing about Everett Oliver's asbestos-related disease or injury from his occupational exposure to asbestos products, by reason of such corporations also supplying defective (unsafe) asbestos products to the place of employment of Everett Oliver: (The answer to this question merely listed fifteen other corporations the jury believed were responsible for Everett Oliver's illness or injury).

Id.

30 Id. at 5.
31 Id. at 6.
32 Id. at 2.

34 Oliver, No. 85-4208, slip op. at 12.
35 Id. at 8. See infra notes 37-41 and accompanying text.
36 Id. at 9. See infra notes 42-50 and accompanying text.
38 Oliver, No. 85-4208, slip op. at 8.
liability action reinforced this long-standing commitment to the consumer. He pointed out that:

If, as the court had stated many times, the focus of strict liability is on the product that is placed into the stream of commerce, defendants should not be relieved of liability by the fortuitous happenstance that a plaintiff who suffered some loss, detriment or injury is unable to prove that he is entitled to compensatory damages. The requirement of actual damage to sustain a cause of action for strict products liability does not serve a useful purpose in light of these concerns.

The district court also determined that the New Jersey Supreme Court, if presented with the issue, would consider a strict products liability action as being more akin to an intentional tort than to a negligent tort. This determination was important because of the New Jersey Supreme Court’s decision in *Nappe v. Anschelewitz, Barr, Annsell & Bonella*. In *Nappe*, New Jersey’s high court held that an award of compensatory damages was not an essential element of an action for legal fraud, an intentional tort, and an award of nominal damages would support an award of punitive damages. Therefore, the district court in *Oliver* ruled that a finding of compensatory damages was not necessary to uphold a punitive damages award in a strict products liability action because the concerns involved were closely related to those in an intentional tort action.

Judge Van Artsdalen believed that the principle underlying strict products liability doctrine supported the rejection of a requirement of compensatory damages. The judge reasoned that in a strict products liability action, as in an intentional tort, a plaintiff had had a right violated and this right should be vindicated through an award of nominal damages. The judge further stated:

If as the [New Jersey Supreme] Court stated in *Nappe*, “it is difficult to justify permitting nominal damages in a trespass action and not in a

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39 *Id.* at 13.
41 *Oliver*, No. 83-4208, slip op. at 13-14.
42 *Id.* at 12.
44 *Id.*
45 *Oliver*, No. 83-4208, slip op. at 13-14.
46 *Id.* at 13.
47 *Id.*. Judge Van Artsdalen avoided the lack of an award of nominal damages in *Oliver* by reasoning that where interrogatories showed injury caused by the defendant, the court would infer nominal damages as a matter of law. *Id.* at 15.
case of a willful and malicious intentional tort," then it is even more
difficult to justify not permitting them when the defendant's conduct,
negligent or intentional, is not even at issue in determining liability.
Strict liability attaches irrespective of fault or intent if a defendant
manufactures a defective product that causes injury.48

Judge Van Artsdalen concluded that if special interrogatories estab-
lished that the plaintiff suffered injury due to the defendant's conduct,
the New Jersey Supreme Court would allow an award of nominal dam-
ages if the plaintiff was unable to prove a specific amount of compensa-
tory damages.49 This award of nominal damages would then be sufficient
in a strict products liability case to support an award of punitive
damages.50

B. The Third Circuit

In reversing Judge Van Artsdalen's holding, the United States Court
of Appeals for the Third Circuit directly challenged his interpretation of
the significance of the Nappe case for strict products liability law in New
Jersey.51 Judge Hunter, writing for the court, noted that "New Jersey's
adoption of strict products liability eliminated the element of fault
(breach of duty) from a course of action against the manufacturer of a
defective product; it did not eliminate the element of damages."52 The
court quoted from the Restatement (Second) of Torts 402A: "one who
sells any product in a defective condition . . . is subject to liability for
physical harm thereby caused."53 According to Judge Hunter, this passage
meant that before punitive damages could be awarded in a strict prod-
ucts liability action, an award of compensatory damages was necessary.54
Because there was no award of compensatory damages in the Oliver
case, an award of punitive damages was not possible; "[t]here is no separate
tort of 'punitive damages' nor can a plaintiff seek recovery of an exem-
plary award without basing such claim upon an underlying legal theory
or recovery which involved some actual damages."55

In the absence of any clear guidance from the New Jersey Supreme
Court, the federal appellate court refused to extend the Nappe holding to
a strict products liability action.56 The court believed that the effect of
adopting the lower court's position would extend the law beyond the
point reached by any other court in the nation.57 This cautious ruling
may appear sensible under the circumstances; however, the circuit
court's failure to address the policy concerns raised by the district court
is troubling. The circuit court narrowly considered the resemblance of

48 Id. at 13.
49 Id. at 14.
50 Id. See also supra note 47 and accompanying text.
LEXIS Genfed library, Dist. file).
52 Id. at 97.
53 Id. (emphasis added).
54 Id. at 98.
55 Id. (quoting J. GHIRARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE 6.16 (1984)).
56 Id.
57 Id. (quoting W.A. Wright Inc. v. KDI Sylvan Pools, Inc., 746 F.2d 215, 218 (3d Cir. 1984)).
strict liability to negligence and used that resemblance to decide the case.\textsuperscript{58} The appellate court could have used several policy considerations to support an alternative holding.

III. Policy Considerations Supporting Both Views

There are two major criticisms of awarding punitive damages in a strict products liability action that the Third Circuit could have used as grounds for overturning the district court decision in \textit{Oliver}. The first criticism centers on the "windfall" theory of punitive damages, while the second stems from what has been termed the "overkill" doctrine. The windfall theory suggests that compensatory damages have evolved into a system of total vindication for injured plaintiffs, covering all the injuries that punitive damages were meant to address.\textsuperscript{59} According to the windfall theory, punitive damages have become a source of unjust enrichment for the plaintiff and his lawyer.\textsuperscript{60} This theory applies directly to the situation in \textit{Oliver}. Everett Oliver failed to prove he suffered discernible compensable injury, yet he received an award of $500,000 in punitive damages.\textsuperscript{61} This award certainly appears to constitute a windfall for Mr. Oliver.\textsuperscript{62}

However, a recent proposal adopted at the American Bar Association Convention in New Orleans could alleviate the windfall problem.\textsuperscript{63} This proposal suggests that in tort cases involving multiple judgments against the same defendant, judges should apportion the punitive damage awards, compensating the plaintiff and his lawyer for bringing the action and giving the remainder to some "public purpose."\textsuperscript{64}

\textsuperscript{58} See infra notes 59-68 and accompanying text. Professor Sales advances both the windfall and overkill theories as reasons for banning the use of punitive damages altogether. See Sales, \textit{supra} note 6. The emphasis on economic issues make them especially useful in analyzing the \textit{Oliver} case because accepting the district court’s opinion would entitle a large, new class of plaintiffs, those failing to show compensatory damages, to punitive damages awards.

\textsuperscript{59} See Sales, \textit{supra} note 6, at 388. See also K. LEDDEN, PUNITIVE DAMAGES, § 7.5(E) (1980) (award of punitive damages leads to overcompensation of the plaintiff); Ausness, \textit{Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation}, 74 Ky. L.J. 1, 69 (1985-86). This aspect of the windfall theory appears to be closely tied to the second theory on the development of punitive damages (punitive damages were meant to compensate for unrecoverable insults to personal dignity and mental harm) contained \textit{supra} note 6. If punitive damages were created to compensate for the unrecoverable mental anguish and offense to personal dignity aspects of civil cases, then the modern recognition of recovery of these aspects would make punitive damages obsolete. However, this theory ignores the deterrent and retributive rationales for punitive damages.

\textsuperscript{60} See Sales, \textit{supra} note 6, at 388. This theory has a stronger foundation. A punitive damage award is meant to deter and punish the defendant and express society’s outrage at the defendant’s act. The plaintiff is not being compensated for any loss and the award constitutes an unearned accession of wealth. A solution to this problem is discussed infra notes 64-67 & 81-92 and accompanying text.

\textsuperscript{61} See \textit{supra} notes 27-32 and accompanying text.

\textsuperscript{62} While acknowledging that judges normally do not like to speculate about the jury’s reasoning in reaching a decision, Judge Van Artsdalen guessed that the jury had denied compensatory damages because of testimony that Everett Oliver's forty-year habit of smoking one to two packs of cigarettes per day aggravated his asbestosis. Oliver v. GAF Corp., No. 83-4208, slip op. at 19 n. 8 (E.D. Pa. July 17, 1985).


\textsuperscript{64} Id. The "public purpose" awards mentioned in this report create a method of dealing with multiple tort claims such as consolidated claims or class actions.
Under this proposal the plaintiff would receive reimbursement for bringing the action while society would receive fair compensation for its injury.\(^6\) In Oliver, the ABA proposal would have allowed Judge Van Artsdalen to apportion the damages so that Everett Oliver was compensated for bringing his claim and society was assisted in dealing with the massive amount of asbestos litigation presently occurring throughout the country.\(^6\)

Unfortunately, while the ABA approach creates a compromise between Judge Van Artsdalen’s concern for the consumer and critics’ fears of punitive damages being a windfall to fortunate plaintiffs,\(^6\) it does not address the second major criticism of awarding punitive damages in a strict products liability action. This criticism, known as the overkill doctrine,\(^6\) is inherent in the theory of products liability law. In normal tort cases, the defendant’s allegedly tortious action was directed at a specific individual and that individual alone may bring the tort claim. However, in a products liability tort case, the defendant manufacturer’s allegedly defective product may have injured a large, unrelated group of individuals, any of whom may bring a claim.\(^6\) Each of these individuals may win a separate judgment against the manufacturer, and the jury may award each punitive damages. Proponents of the overkill doctrine believe these multiple punitive damage awards can financially destabilize even the largest product manufacturers. When these damage awards result in bankruptcy, a form of corporate capital punishment has been exacted which may not be socially desirable or justifiable from a retributive standpoint and may be totally disproportionate to the degree of corporate wrongdoing.\(^7\)

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\(^6\) See supra note 64 and accompanying text.

\(^6\) The New Jersey Supreme Court recently commented on the magnitude of this litigation:

More than 30,000 lawsuits have been filed already for damages caused by that exposure [to asbestos], with no indication that there are no more victims who will seek redress. Of the multitude of lawsuits that are faced by asbestos defendants as a group, Johns-Manville alone has been named in more than 11,000 cases. New claims are stayed because Johns-Manville is attempting reorganization under federal bankruptcy law.

*Fischer*, 103 N.J. at 663-64.

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*Fischer*, 103 N.J. at 663-64.

\(^6\) This doctrine was first advocated in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967). *Roginsky* involved a negligence action brought by Sydney Roginsky who had developed cataracts after taking a cholesterol medicine. At trial, the jury awarded Roginsky $100,000 in punitive damages. The appeals court overturned the award because the plaintiff had not shown recklessness, which is required for an award of punitive damages under New York law.

\(^6\) Id. at 838-39.

\(^7\) This doctrine was first advocated in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967). *Roginsky* involved a negligence action brought by Sydney Roginsky who had developed cataracts after taking a cholesterol medicine. At trial, the jury awarded Roginsky $100,000 in punitive damages. The appeals court overturned the award because the plaintiff had not shown recklessness, which is required for an award of punitive damages under New York law.

\(^6\) Id. at 838-39.

Consequently, under the overkill doctrine, the problem is not to whom the damages are being paid, but is that they are being paid at all. This problem has become the rallying point for the opponents of punitive damages in products liability cases. Even proponents of punitive damages in products liability cases have acknowledged the serious problem that multiple judgments and excessive punitive damages awards in such cases have created. Professor Owen has stated that, "[l]arge assessments of punitive damages may not yet be a major threat to the continued viability of most manufacturing concerns, but the increasing number and size of such may fairly raise concern for the future stability of American industry." Professor Owen believes that the problems associated with awarding punitive damages in strict products liability cases can be reduced by raising the standard for liability and instituting some new procedural safeguards. Other opponents of punitive damages believe that they should be completely eradicated from the law of products liability in order to protect the continued viability of American industry.

While the overkill doctrine raises legitimate concerns, it is important to note the approval of the deterrence element of punitive damages implicit in the Oliver jury's decision. Despite its failure to award compensatory damages, the jury still saw fit to grant punitive damages because of the wrongful conduct of the asbestos manufacturers. The importance of punitive damages as a deterrent must be weighed against the overkill concerns outlined above, but in the mass tort area this deterrence message carries a great deal of weight. The best way to deliver this message in the mass tort area would be to implement a plan that would go beyond the plan proposed by the ABA and directly approach the problems created by these types of awards.

Three states have taken more direct approaches to dealing with punitive damage awards. Colorado, Florida and Iowa have each passed laws requiring that portions of punitive damage awards be paid directly to the state.

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71 See supra notes 68-70 and accompanying text.
72 Note, supra note 15, at 784.
74 Id. at 20-59. Professor Owen has suggested that the standard of proof be raised, that the use of remittitur be increased, that more judgments be decided on the merits, that trials be bifurcated (jury decides liability and the amount of compensatory damages while the judge decides the amount of punitive damages), that the plaintiff make a prima facie showing of a manufacturer's liability for punitive damages before discovery of wealth, and that inflammatory evidence with little probative value be excluded from trial. Id.
76 See supra note 30 and accompanying text.
77 See supra note 31 and accompanying text.
78 Special Project, supra note 27, at 697-99.
79 See supra notes 65-66 and accompanying text.
The Iowa statute creates a two-step process when a punitive damage claim is asserted in a lawsuit. The jury will receive special interrogatories which will first ask them to determine whether the defendant’s conduct constituted willful and wanton disregard for the rights or safety of others. If this question is answered in the affirmative, the jury may award punitive damages.

The second question determines who will receive the punitive damages and clearly is meant to apply to the mass tort situation. This question asks the jury to consider whether the defendant’s conduct was directed specifically toward the plaintiff. If so, the plaintiff will receive the full amount of the punitive damage award. If the conduct was not specifically directed toward the plaintiff, as would be the case in most mass tort situations, then the plaintiff may only receive his litigation costs and fees; this amount is limited to twenty-five percent of the punitive damage award. The remainder of the award is paid into a civil reparations trust administered by the state court administrator. Money paid into this fund will be supervised by the executive council and will be disbursed to fund indigent civil litigation or insurance assistance programs.

The Florida statute first sets a threshold barrier; the punitive damage award may not exceed three times the amount of the compensatory damage award for claims based on negligence, strict liability, products liability, professional liability, or breach of warranty involving willful, wanton or gross misconduct. The statute stipulates that plaintiffs will receive only forty percent of the amount of punitive damages awarded. If the punitive damages were awarded in a wrongful death action then the remaining sixty percent will be payable to the Public Medical Assistance Trust Fund which funds health care programs for indigents. If the cause of action is based on another theory of recovery then the sixty percent will be paid into the General Revenue Fund.

The Colorado statute allows a jury to award exemplary damages if fraud, malice, or willful and wanton conduct are involved in causing injury. However, the statute limits the exemplary award to an amount

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81 Id. § 668A.1(1)(a).
82 Id. § 668A.1(2).
83 Id. § 668A.1(1)(b).
84 Id. § 668A.1(2)(a).
85 Id. § 668A.1(2)(b).
86 Id.
87 Id. The Executive Council of Iowa consists of the Governor, the Secretary of State, the Auditor of the State, and the Secretary of Agriculture. The council oversees and distributes funds for certain state activities. Id. § 19.1-19.23.
88 FLA. STAT. ANN. § 768(1)(a) (West Supp. 1987). This statute appears to exclude a plaintiff who fails to receive compensatory damages and, therefore, exclude Everett Oliver. However, it is still useful for exploring the concept that punitive damages are meant to reimburse society for the harm it has suffered and should not be used to compensate plaintiffs.
89 Id. § 768.73(2)(a).
90 Id. § 768.73(2)(b). The Public Medical Assistance Trust Fund was established by Fla. Stat. Ann. § 409.2662.
91 FLA. STAT. ANN. § 768.73(2)(b).
equal to the actual damages. The statute further provides that one-third of the exemplary damages will be paid into the state general fund, while the remaining two-thirds will be paid to the plaintiff.

With these three statutes serving as legislative precedents, New Jersey could most efficiently handle the Oliver situation by enacting a statute similar to one of the three discussed above. Iowa's statute would probably be the best model because it limits the plaintiff's share of the award to his costs and fees. This limitation explicitly recognizes that

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93 The limitation is mitigated by the fact that the court is empowered to increase the exemplary award up to three times the amount of the actual damages award. This increase is permitted if the defendant continued the behavior or repeated the action, against the plaintiff or others, that created the cause of action or if the defendant's willful and wanton behavior during the pendency of the action caused further damage to the plaintiff. Id. § 13-21-102(3).

94 Id.

95 In Fischer, Judge Pressler well summarized the case for imposing punitive damages on asbestos manufacturers:

Johns-Manville, in its answers to interrogatories, which were read to the jury, admitted that [t]he corporation became aware of the relationship between asbestos and the disease known as asbestosis among workers involved in mining, milling and manufacturing operations and exposed to high levels of virtually 100% raw asbestos fibers over long periods of time by the early 1930's. The corporation has followed and become aware of the general state of the medical art relative to asbestos and its relationship to disease processes, if any.

In response to plaintiffs' requests for admissions, also read to the jury, it admitted that in the early 1940's it knew that asbestos "was dangerous to the health" of those industrial workers who were exposed to excessive amounts of the material. Plaintiffs, moreover, produced as a witness Dr. Daniel C. Braun, president of the Industrial Health Foundation, a research organization which develops, accumulates and disseminates information about occupational diseases. Dr. Braun testified that Johns-Manville has been a member of the Foundation since 1936. He also testified that since 1937 the Foundation has sent to its members a monthly digest of articles appearing in scientific journals which relate to occupational disease. Relevant portions of the digest, which were admitted into evidence, included references to eleven scientific articles published between 1936 and 1941 documenting the grave pulmonary hazards of exposure to asbestos and discussing measures which could be taken to protect workers. Plaintiffs also proved that as early as 1933 claims were being made against Johns-Manville by asbestos workers, and in November of that year the Executive Committee of its Board of Directors passed a resolution authorizing the president of the corporation to enter into negotiations for the settlement of any actions now pending or which may be hereafter brought against the Corporation by former employees founded upon alleged injury or disease resulting from their employment by the Corporation and, in his discretion, to settle any such cases upon such terms as he shall, in his uncontrolled discretion, deem advisable and for the best interest of the Corporation.

In December of that year high-level representatives of Johns-Manville met with officials of Raybestos-Manhattan, another major asbestos supplier, to discuss steps which the industry as a whole might take to reduce employee risk. It appears, however, that Johns-Manville never did arrange for or participate in any industry-wide meetings on the subject. The minutes of that 1933 meeting also confirm the participants' view that at least for the time being "our past policy of keeping this matter confidential is to be pursued." Perhaps most damning of all is the so-called Sumner Simpson correspondence of 1935 and 1941. Simpson was president of Raybestos. In October 1935, he received a letter from a Miss Rossiter, editor of the trade periodical Asbestos suggesting that despite Simpson's earlier requests, made "for certain obvious reasons," that articles relating to asbestosis not be published, perhaps the time had come to print a positive article about industry efforts to reduce the risk in order "to combat some of the rather undesirable publicity given to it (asbestosis) in current newspapers." Simpson thereupon sent a copy of the letter to Johns-Manville's secretary, Vandiver Brown, expressing his opinion that "the less said about asbestos, the better off we are." Brown's reply stated in part:

I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity. Even if we should eventually decide to raise no
punitive damages are a form of punishment exacted by society since the state receives the bulk of the award.

However, New Jersey should be more precise than Iowa in determining the final destination of the punitive damage awards in the mass tort area. The law should be drafted so that the punitive damage award would be used to deal with the harm caused by the defective product that served as the basis for the underlying action. For instance, in the asbestos area the money could be used to aid those who already suffer from asbestosis and could also be used to prevent further exposure to asbestos.

Recent medical literature estimates that almost 265,000 will die from asbestos-related diseases in the years between 1980 and 2015. Unfortunately, more individuals may be added to this number because of the large number of buildings which were built containing asbestos. The most tragic victims of the failure to heed the warning concerning the dangers of asbestos in the 1930's and 1940's are millions of unsuspecting people who attended the thousands of schools built between 1959 and 1972 that contained asbestos. It will cost billions of dollars to decontaminate these schools, but the cost of the distress, anxiety, and physical suffering caused by years of unsuspecting exposure is incalculable.

These two problems could best be addressed by requiring all punitive damage awards in asbestos litigation to be paid to an Asbestos Commission, created by the legislature as a branch of the New Jersey Health Department. The Commission would dispense funds in two ways. First, it would direct funds to hospitals in the same fashion as does New Jersey’s Uncompensated Care Trust Fund. This fund requires certain objection to the publication of an article on asbestosis in the magazine in question, I think we should warn the editors to use American data on the subject rather than English. Dr. Lanza has frequently remarked, to me personally and in some of his papers, that the clinical picture presented in North American localities where there is an asbestos dust hazard is considerably milder than that reported in England and South Africa.

Some seven years later, in 1941, Brown wrote to Simpson regarding Miss Rossiter's proposal to include in a forthcoming issue of Asbestos a review of a book apparently linking asbestos exposure with pneumoconiosis. Noting that "a number of her subscribers would dislike an article on this subject in the trade magazine of the Asbestos Industry," Brown expressed the view that as a result of his communications with Miss Rossiter, "I am inclined to believe she will omit any review of the book in question." Finally, plaintiffs' attorney read into evidence excerpts of the deposition testimony of Kenneth W. Smith, a physician who started to work for Johns-Manville in 1944 and eventually became Medical Director of its Canadian corporation. Dr. Smith testified that from the beginning of his employment he saw persons with asbestosis "on a regular and frequent basis" and frequently made recommendations that such employees receive job reclassifications which would remove them from continued exposure to asbestos dust.


98 Practicing Law Institute, supra note 97, at 117.

99 Id.
New Jersey hospitals to pay into a common fund. Hospitals are then reimbursed out of the fund for treating uninsured individuals who cannot adequately pay their medical bills. This fund helps hospitals located in less fortunate areas continue to treat the poor in the community.

In a similar fashion, the Asbestos Commission would reimburse hospitals for treating uninsured and underinsured victims of asbestosis and for participation in research on asbestosis.

The commission could also supply funds to the New Jersey Asbestos Control Program which oversees asbestos removal, sets standards for training asbestos workers, performs hazard assessments, and makes recommendations as to responses to these hazards. The extra funds received by the Asbestos Control Program could also be used to research safer methods of asbestos removal, safer working conditions for asbestos workers, and proper clean up of work areas.

With its stated purpose of helping society deal with problems created by mass tort situations, this statute would also contain a subsection granting standing to plaintiffs like Everett Oliver. In situations like the one in Oliver where causation problems prevent a plaintiff from showing compensatory damages, but the jury still awards punitive damages, this statute would offer a fair compromise. Everett Oliver would only receive his litigation costs so there is no windfall problem. This statute would encourage the award of more punitive damages and so would not solve the overkill problem. However, this statute would be a direct benefit to society. It would punish the asbestos manufacturers for their behavior while at the same time helping society care for injured citizens like Everett Oliver.

IV. Conclusion

In Oliver v. Raymark, the Court of Appeals for the Third Circuit upheld the prevailing view that punitive damages may only be awarded in a strict products liability case after the plaintiff has been awarded compensatory damages. While this decision appears to be legally sound and has sufficient social policy arguments to support it, the jury’s decision at the district court level cannot be ignored. Mr. Oliver may have failed to show injury that could be legally attributed to the asbestos manufacturers, but the jury still found the manufacturers’ conduct blameworthy and punished them through the $500,000 award of punitive damages. It

100 The Uncompensated Care Trust Fund is indirectly funded by third-party purchasers of hospital care (mainly insurance companies). These third party payors are required to pay ten-percent more than the normal rate for hospital services. After the money is paid to a hospital, the further distribution is determined by the number of uninsured individuals the hospital deals with. If the hospital has a low number of uninsured patients, it will send money to the Trust Fund. If a hospital has a high number of uninsured patients, then it will receive money from the fund to eliminate the excess that the ten-percent charge did not cover. Telephone interview with Scott Crawford, Director of Health Care for the Uninsured, New Jersey Department of Health (Aug. 3, 1987).

101 Telephone interview with Michael F. Lakat, Assistant Coordinator, Asbestos Control Program, New Jersey Department of Health (July 31, 1987).

102 For a statute granting standing for private plaintiffs to bring a suit on behalf of "society" and receive attorneys’ fees, see the Air Pollution Prevention Act, 42 U.S.C. § 7604 (1982).

103 See supra notes 59-62 and accompanying text.

104 See supra note 95.
would be wise for New Jersey’s legislature to pass a law requiring punitive damages to be paid to the state with only a portion going to the plaintiffs in a mass tort situation. However, the statute should go beyond the statutes enacted in Colorado, Iowa, and Florida and allow an award of punitive damages to stand without an award of compensatory damages when special interrogatories show the manufacturers caused injury to the plaintiff. Juries should be able to punish blameworthy manufacturers when wrongful action is brought to their attention, even in a civil trial where the plaintiff has failed to show compensatory damages. These special mass tort punitive damage awards would combine with regular mass tort punitive damage awards to help compensate both society and the plaintiff for injury to one of its citizens. Everett Oliver would receive his litigation expenses and the remainder of his punitive damage award would go into the Asbestos Commission. The Commission could see that awards are used by hospitals to care for future victims or by the Asbestos Control Program to insure that as few people as possible will suffer Everett Oliver’s fate in the future.

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