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## Punitive Damages in Products Liability Litigation: Maxey v. Freightliner Corp.

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action would qualify for section 1031(a) only to the extent that the underlying assets would qualify for nonrecognition treatment if the assets themselves had been exchanged. Whereas the *Gulfstream* rationale would require gain recognition only in a limited number of instances where the substance of the transaction does not accurately reflect its form, the aggregate theory approach would be more consistent with congressional policy and would also limit the abuse of section 1031(a) when partnership interests are exchanged. Furthermore, the aggregate approach is consistent with the Service's current treatment of multiple asset exchanges outside the partnership context.<sup>71</sup> Thus, both consistency of results and adherence to the legislative purpose of section 1031(a) support the adoption of the aggregate theory approach to analyzing an exchange of partnership interests.

### III. CONCLUSION

In *Gulfstream* the Tax Court again rejected the argument that a general partnership interest is a type of property interest described by the parenthetical clause of section 1031(a). As a result, an exchange of general partnership interests may qualify for nonrecognition treatment. The Tax Court indicated, however, that it will scrutinize the underlying partnership assets to ensure that section 1031(a) is not abused when partnership interests are exchanged. A tax-free exchange of partnership interests will not be permitted if the underlying partnership assets are predominately stock in trade held primarily for sale. To implement the policy behind section 1031(a) consistently, however, the Tax Court should expand upon its rationale in *Gulfstream* by treating the exchange of partnership interests as if the underlying assets themselves are exchanged, thereby permitting an exchange of partnership interests to qualify for section 1031(a) only to the extent that an exchange of the underlying assets themselves would qualify.

*Nathan M. Rosen*

### Punitive Damages in Products Liability Litigation: *Maxey v. Freightliner Corp.*

Billy and Dee Maxey died of burns received when their truck overturned and caught fire.<sup>1</sup> Billy Maxey's parents, individually and as next

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71. 2 W. MCKEE, W. NELSON & R. WHITMIRE, *supra* note 27, ¶ 15.04[3], at 15-32; see Rev. Rul. 72-151, 1972-1 C.B. 225; Rev. Rul. 68-331, 1968-1 C.B. 352; Rev. Rul. 57-365, 1957-2 C.B. 521; *cf.* *Williams v. McGowan*, 152 F.2d 570 (2d Cir. 1945) (sale of a business as a going concern was not treated as a single piece of property representing a capital asset for income tax purposes); Rev. Rul. 55-79, 1955-1 C.B. 370 (the sale of a going business operated as a sole proprietorship constitutes the sale of individual assets for gain characterization purposes).

1. The Maxeys were riding in a large diesel-powered truck. The truck was involved in

friends of the decedent's surviving children, sued the manufacturer of the truck, Freightliner Corporation. The Maxeys brought an action in strict tort liability, contending that the placement of fuel tanks in close proximity to the cabin and ignition source, without a safety device designed to reduce the hazard of fire, constituted an unreasonably dangerous design defect.<sup>2</sup> The plaintiffs also contended that such a design amounted to gross indifference, justifying an award of punitive damages. The jury found that the design of the fuel system was unreasonably dangerous, but that Billy Maxey voluntarily assumed the risk of his injuries. The jury also found that the plaintiffs failed to prove that the fuel tank was unreasonably dangerous by reason of a lack of adequate warning. The surviving children received an award of \$150,000 actual damages and \$10,000,000 punitive damages based on the jury's finding that the defendant exhibited gross indifference in selling the truck as designed. On appeal to the United States District Court for the Northern District of Texas, Freightliner Corporation insisted that there was insufficient evidence to sustain the jury's finding that Freightliner acted with an intent that approximated a fixed purpose to injure. Freightliner also sought denial of any recovery to plaintiffs on the basis of the jury's finding of an assumption of risk. Freightliner also argued that in Texas punitive damages are not recoverable in a strict liability case. *Held, affirmed in part and reversed in part*: (1) the jury's finding of assumption of risk was unsupported by the evidence; (2) punitive damages are recoverable in a strict liability cause of action; (3) under the Texas standard for an award of punitive damages, Freightliner's adherence to a design common in the industry was a sufficient showing of care to prevent such an award; and, (4) if, on appeal, the evidence is found to support punitive damages, the amount awarded by the jury should be sustained. *Maxey v. Freightliner Corp.*, 450 F. Supp. 955 (N.D. Tex. 1978).

## I. PUNITIVE DAMAGES IN PRODUCTS LIABILITY LITIGATION

### A. *General Standards*

A defendant in a products liability case may be liable under any one or all of three theories of recovery: breach of warranty, negligence, or strict

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an accident that caused it to tilt on its side and slide approximately 300 feet. The fire erupted when the fuel from a ruptured diesel tank ignited after the truck had come to a stop.

2. To determine whether a product is unreasonably dangerous, it is necessary to weigh the risk of harm against the utility of the product, considering whether additional safety devices would unreasonably raise the cost or diminish the utility of the product. *Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell*, 511 S.W.2d 573 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.). A product can be unreasonably dangerous due to a failure to warn of defects or a lack of safety devices. *See Rourke v. Garza*, 530 S.W.2d 794, 800 (Tex. 1975); *Ethicon, Inc. v. Parten*, 520 S.W.2d 527 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); *Noel, Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256 (1969). The defective design of a product could be the result of inadequacies in the plans or specifications or of the choice of materials for the product's composition. Design defects are distinguished from defects in the product that result from careless production or manufacture. In other words, although the product may have been manufactured as specified and planned, the product is defective by reason of its design. *See W. PROSSER, HANDBOOK OF THE LAW OF TORTS* § 96, at 944-45 (4th ed. 1971).

tort liability.<sup>3</sup> In earlier cases plaintiffs sued on theories of warranty and negligence.<sup>4</sup> Since 1963,<sup>5</sup> however, strict liability in products cases has become the preferred theory as it requires only that the plaintiff prove that the product was defective.<sup>6</sup>

To date, only a handful of reported cases have considered the question of whether punitive damages may be awarded in a products liability action.<sup>7</sup> One of the earliest decisions permitting a punitive damage award in a products liability type of case was *Standard Oil Co. v. Gunn*,<sup>8</sup> decided by

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965) outlines the requirements for strict tort liability:

- (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.

The Texas Supreme Court adopted § 402A in *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex. 1967). See also *Rourke v. Garza*, 530 S.W.2d 794, 800 (Tex. 1975), in which the court emphasized that a finding of negligence is not required; the supplier may be liable even though he has exercised all possible care in the preparation and sale of his product. For a general discussion of strict tort liability, see D. NOEL & J. PHILLIPS, *PRODUCTS LIABILITY: CASES AND MATERIALS* (1976); W. PROSSER, *supra* note 2, §§ 96-99; Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEXAS L. REV. 1185 (1976); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963); Keeton, *Products Liability—The Nature and Extent of Strict Liability*, 1964 U. ILL. L.F. 693; Annot., 13 A.L.R.3d 1057 (1967).

4. W. PROSSER, *supra* note 2, § 97.

5. The first case to deal with the concept of strict tort liability in a products case was *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (en banc).

6. See note 3 *supra*.

7. The terms "exemplary," "punitive," and "vindictive" are used interchangeably in describing the same type of award for damages. 22 AM. JUR. 2d *Damages* § 236 (1965); see Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195 (1977-1978). Punitive damages were first awarded in instances in which the defendant's conduct was characterized by intent to inflict injury. W. PROSSER, *supra* note 2, § 2, at 10-11. The purpose of punitive damages is to punish the defendant, deter future tortfeasors, or compensate the plaintiff. See e.g., *Courtesy Pontiac, Inc. v. Ragsdale*, 532 S.W.2d 118 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); *Credit Plan Corp. v. Gentry*, 516 S.W.2d 471 (Tex. Civ. App.—Houston [14th Dist.] 1974, *rev'd on other grounds*, 528 S.W.2d 571 (Tex. 1975)); *Lack's Stores, Inc. v. Waisath*, 479 S.W.2d 406 (Tex. Civ. App.—Waco 1972, no writ); Belli, *Punitive Damages: An Historical Perspective*, 13 TRIAL, Dec. 1977, at 40; Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870 (1976). Awards of punitive damages have been extended from cases involving intentional injuries to cases in which the defendant's conduct demonstrated a conscious disregard for the safety or interests of others. *Sheffield Div., Armco Steel Corp. v. Jones*, 376 S.W.2d 825 (Tex. 1964). An example of such conscious disregard is the attitude of a manufacturer who knows that injuries will result from use of his product, but believes that compensating for those injuries would be more economical than producing a safer product. Comment, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA L. REV. 895, 909 (1976). Louisiana, Massachusetts, Nebraska, and Washington do not allow awards of punitive damages. Louisiana provides, however, for multiple damage awards. Long, *supra*, at 874.

8. 234 Ala. 598, 176 So. 332 (1937).

the Alabama Supreme Court in 1937. Although the cause of action was based on fraud and breach of contract, the litigation concerned the sale of a defective product. The plaintiff's automobile had been damaged by an inferior grade of motor oil, which the defendant had represented to be high grade oil. The court upheld a jury verdict for punitive damages based on the defendant's fraudulent misrepresentations. The case was subsequently ignored, however, and years passed before another court discussed punitive damages in products liability cases.

In 1967 a California court of appeals in *Toole v. Richardson-Merrell Inc.*<sup>9</sup> upheld a punitive damage award. The plaintiff had sued on theories of negligence and breach of warranty for injuries resulting from the use of MER/29, a defective drug manufactured by defendant. The evidence showed that despite the defendant's knowledge of the drug's potential harmful effects, the defendant had withheld that knowledge from the Federal Drug Administration, physicians, and the general public. The court found that this evidence was sufficient to support a jury finding of malice, which was one standard for awarding punitive damages under a California statute.<sup>10</sup>

In the same year, a Pennsylvania plaintiff also sued Richardson-Merrell, alleging negligence and fraud for injuries received through the use of MER/29.<sup>11</sup> In this case, however, the court reversed an award of punitive damages because of its concern over the potential for multiple punitive damage awards since the drug had been distributed to thousands of users.<sup>12</sup> The court reasoned that in this instance, the potential of multiple compensatory damage awards plus the payment of criminal penalties by the defendant would meet the objectives of deterrence and punishment that are used to justify awards of punitive damages.<sup>13</sup> Therefore, the court subjected the proof to particularly careful scrutiny in determining whether the New York standard for awarding punitive damages had been met<sup>14</sup> and concluded that the proof failed.<sup>15</sup>

There is significant authority for allowing punitive damages in products liability cases involving proof of wanton, willful, or reckless disregard of

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9. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

10. 60 Cal. Rptr. at 416. CAL. CIV. CODE § 3294 (West 1970) provides:

In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

11. *Roginsky v. Richardson-Merrell, Inc.*, 378 P.2d 832 (2d Cir. 1967).

12. Over 1000 personal injury claims were filed against the manufacturer of MER/29. Although many plaintiffs sought punitive damages, only *Toole* resulted in a punitive damage award. For economic reasons and expediency, Richardson-Merrell settled as many claims as possible out of court. Comment, *supra* note 7, at 921.

13. 378 F.2d at 841; *see* note 7 *supra*.

14. 378 F.2d at 842. The parties stipulated that New York law was to be applied. *Id.* at 834 n.1. Under New York law, the recklessness that will give rise to punitive damages must be close to criminality and, like criminal conduct, such recklessness must be clearly established. *Id.* at 843.

15. *Id.* at 850.

an individual's rights.<sup>16</sup> In *Drake v. Wham-O Manufacturing Co.*<sup>17</sup> the plaintiff brought suit in negligence, strict liability, and breach of warranty for fatal injuries received by plaintiff's husband while using a recreational product manufactured by the defendant. The defendant entered a motion to dismiss, arguing *inter alia* that punitive damages should not be allowed in products liability actions based primarily on strict liability in tort. Punitive damages, the defendant urged, are available only for torts based on intent. The court rejected this argument, noting that the plaintiff could simply make a supplemental showing of aggravated conduct to establish entitlement to punitive damages.<sup>18</sup> The court concluded that in Wisconsin the availability of punitive damages is tied to the facts proved rather than the formal theory of recovery alleged.<sup>19</sup> The court accordingly denied the motion to dismiss the claim for punitive damages.

In *Vollert v. Summa Corp.*<sup>20</sup> the plaintiff had commenced suit based on breach of warranty, negligence, and strict tort liability for personal injuries suffered in a helicopter accident. The defendant, citing *Roginsky v. Richardson-Merrell, Inc.*,<sup>21</sup> argued that punitive damages should not be allowed in a products liability case. The court disagreed, stating that nothing in Hawaii law prohibited an award of punitive damages in a products liability cause of action.<sup>22</sup> Moreover, the court distinguished *Roginsky* because the defendant in *Vollert* failed to identify any pending suits against it connected with the acts alleged by the plaintiff.<sup>23</sup> The court noted that "[i]t would require a substantial change in the law to hold that simply because there *might be* other suits filed against defendant, punitive damages should not be allowed."<sup>24</sup>

The reported cases dealing with the availability of punitive damages in products liability litigation uniformly hold that punitive damages are available, provided the plaintiff sustains the requisite standard of proof.<sup>25</sup>

16. See *Smith v. Little, Brown & Co.*, 273 F. Supp. 870 (S.D.N.Y. 1967); *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970); *Hafner v. Guerlain, Inc.*, 34 A.D.2d 162, 310 N.Y.S.2d 141 (1970).

17. 373 F. Supp. 608 (E.D. Wis. 1974).

18. *Id.* at 611.

19. *Id.*

20. 389 F. Supp. 1348 (D. Hawaii 1975).

21. 378 F.2d 832 (2d Cir. 1967); see notes 11-13 *supra* and accompanying text.

22. 389 F. Supp. at 1351.

23. See text accompanying notes 12-13 *supra*.

24. 389 F. Supp. at 1351 (emphasis in original).

25. The following cases uphold either the trial court's submission of a punitive damages issue to the jury or the jury's award of punitive damages. In some of the cases, however, appellate courts later found that the evidence was insufficient to support the punitive damage award. See *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975) (evidence permitted inference of malice; punitive damages award upheld); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 145-47 (3d Cir. 1973) (failure to submit issue of punitive damages to jury required new trial), *cert. denied*, 424 U.S. 913 (1976); *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp. 255, 267 (E.D. Pa. 1976) (evidence insufficient to support award of punitive damages); *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 462-63, 113 Cal. Rptr. 416, 424 (1974) (because of error in jury instruction, punitive damages not recoverable by representatives or heirs of deceased occupants of a plane that crashed); *Barth v. B.F.*

Although certain commentators have argued against recovery of punitive damages,<sup>26</sup> most commentators agree that there is no justification for the argument that a punitive damage claim is theoretically inconsistent with a strict liability cause of action.<sup>27</sup> Most commentators also disagree with the argument advanced by manufacturers that punitive damage recoveries should not be available when multiple plaintiffs are involved.<sup>28</sup>

In Texas, the availability of punitive damages in strict liability cases remains an open question.<sup>29</sup> In *Heil Co. v. Grant*,<sup>30</sup> however, the Tyler court of civil appeals recently noted in a dictum that, because of the mandate of the Texas Constitution,<sup>31</sup> exemplary damages may be recovered in a strict liability action if the injury attributable to the defective product results in the death of the user.<sup>32</sup> The court did not explain its reasoning beyond quoting the constitutional provision and noting that punitive damages have been allowed in products liability actions in other jurisdictions.<sup>33</sup>

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Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306, 313 (1968) (punitive damages amendment to plaintiffs' cause of action upheld); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636, 648 (1969) (evidence of willful and wanton conduct supported award of punitive damages), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 667 (Mo. App. 1978) (punitive damages award upheld in products liability case).

26. Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975); Coccia & Morrissey, *Punitive Damages in Products Liability Cases Should Not Be Allowed*, 1978 TRIAL LAW GUIDE 46; Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages—The Insurance Policy and the Public Policy*, 40 J. AIR L. & COM. 595 (1974); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (1972); Comment, *supra* note 7.

27. Abramson, *Punitive Damages in Aircraft Accident Cases—A Debate*, 11 FORUM 50 (1975); Igoe, *Punitive Damages—An Analytical Perspective*, 14 TRIAL, Nov. 1978, at 48; Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976); Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968); Robinson & Kane, *Punitive Damages in the Products Case*, 15 TRIAL, Jan. 1979, at 34; Comment, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1972). One commentator has pointed out that punitive damages have been awarded in the following cases involving strict liability concepts: nuisance, trespass to land, liability for ultrahazardous activities, negligence per se, defamation, and breach of an implied warranty. Owen, *supra*, at 1270.

28. See authorities cited in note 27 *supra*. But see Riley, *supra* note 7, at 252, in which the author argues in favor of limiting the availability of punitive damage awards in a situation where there are multiple plaintiffs.

29. *Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 961 (N.D. Tex. 1978).

30. 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). In *Heil* the decedent was killed when he was trapped on a dump truck due to the failure of an hydraulic hoist manufactured by the defendant. The plaintiff alleged strict liability, defective designs, and failure to warn. See also *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089 (5th Cir. 1973), in which the court affirmed the denial of a claim for punitive damages in an action alleging strict liability for design defects because there was insufficient evidence of defendant's conscious indifference to the public. The court thereby implied that punitive damages are recoverable in Texas in a strict liability action.

31. TEX. CONST. art. XVI, § 26 provides: "Every person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs . . . without regard to any criminal proceeding that may or may not be had in relation to the homicide."

32. 534 S.W.2d at 926.

33. *Id.*

### B. *The Texas Standard for Punitive Damages*

The general standard that a plaintiff must meet in order to recover punitive damages was announced by the Texas Supreme Court in *Sheffield Division, Armco Steel Corp. v. Jones*:<sup>34</sup>

"In order that a recovery of exemplary damages may be sustained, the plaintiff must show, not merely that the defendant could have or ought to have foreseen and prevented the loss . . . but that he acted intentionally or wilfully, or with a degree of 'gross negligence' which approximates a fixed purpose to bring about the injury of which the plaintiff complains."<sup>35</sup>

The court defined gross negligence as "that *entire want of care* which would raise the belief that the act or omission complained of was the result of a *conscious indifference* to the right or welfare of the person or persons to be affected by it."<sup>36</sup>

Although the Texas courts uniformly pay homage to the *Sheffield* test, quoting "conscious indifference," "fixed purpose," and "entire want of care" as the necessary elements for recovery of damages,<sup>37</sup> in practice the courts have not always accurately applied this test to the evidence presented.<sup>38</sup> Instead, they have allowed the question of punitive damages to reach the jury when the facts have presented a question as to whether

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34. 376 S.W.2d 825 (Tex. 1964). The test announced in *Sheffield* was first enunciated in *Missouri Pac. Ry. v. Shuford*, 72 Tex. 165, 10 S.W. 408 (1888). In *Missouri Pacific* the court defined gross negligence as a total want of ordinary care. Earlier, in *Southern Cotton Press & Mfg. Co. v. Bradley*, 52 Tex. 587, 600 (1880), the Court stated that gross negligence amounted to an entire want of care, raising a presumption of a conscious indifference to consequences. The court in *Hernandez v. Smith*, 552 F.2d 142, 145 (5th Cir. 1977), indicated that under Texas law conscious indifference to the welfare of others amounting to gross negligence does not exist if a defendant exercises even slight care.

35. 376 S.W.2d at 828.

36. *Id.* (emphasis in original) (quoting *Missouri Pac. Ry. v. Shuford*, 72 Tex. 165, 10 S.W. 408 (1888)).

37. *See, e.g., Helms v. Universal Atlas Cement Co.*, 202 F.2d 421, 423 (5th Cir. 1953) (mere indifference by the employer in providing safety devices is insufficient to show a conscious indifference to the rights of others); *Gaut v. Quast*, 510 S.W.2d 90 (Tex. 1974) (doctor's failure to obtain patient's informed consent was insufficient to justify punitive damages absent a finding of intentional misrepresentation); *Ogle v. Craig*, 464 S.W.2d 95 (Tex. 1971) (charge to the jury indicating that a requirement of bad faith or wilfulness was needed held to be reversible error); *Southwestern Inv. Co. v. Alvarez*, 453 S.W.2d 138 (Tex. 1970) (proof of unlawful or wilful act, absent a showing of malice, is insufficient to support punitive damages); *Clements v. Withers*, 437 S.W.2d 818 (Tex. 1969) (required a showing of actual malice, defined as ill will and intent to injure); *Christopher v. General Computer Sys., Inc.*, 560 S.W.2d 698 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (punitive damages allowed because evidence showed a deliberate diversion of funds); *Briscoe v. Laminack Tire Serv., Inc.*, 546 S.W.2d 695 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.) (punitive damages award reversed because there was no showing of wilfulness in the fraudulent misrepresentation); *Courtesy Pontiac, Inc. v. Ragsdale*, 532 S.W.2d 118 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (defined malice as knowingly converting another's property and intentional wrongdoing); *Roy Gladen Buick, Inc. v. Sterling*, 524 S.W.2d 590 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.) (fraud must be committed intentionally); *Stephens v. Dunn*, 417 S.W.2d 608 (Tex. Civ. App.—Tyler 1967, no writ) (employer's exercise of some care will prevent a finding of gross negligence).

38. *See Harbin v. Seale*, 461 S.W.2d 591 (Tex. 1970). Following evidence showing that the defendant was speeding at 80 miles per hour, the court did not require a showing of conscious intent but only of a reckless disregard of others.



the defendant had shown care in his actions. For example, in *Hood v. Phillips*<sup>39</sup> the court allowed a special issue on punitive damages although the defendant doctor exercised considerable care in employing a highly controversial medical procedure. In *Atlas Chemical Industries, Inc. v. Anderson*<sup>40</sup> the jury's award of exemplary damages was upheld where evidence was introduced showing that defendant had failed to exercise reasonable care in reducing the level of pollution causing damage to plaintiff's property.

## II. MAXEY V. FREIGHTLINER CORP.

The district court in *Maxey v. Freightliner Corp.* addressed the questions of whether exemplary damages are available in a strict liability cause of action<sup>41</sup> and, if so, what the Texas standard is for awarding exemplary damages.<sup>42</sup> The court noted that the availability of exemplary damages in a strict liability cause of action is an open question in Texas.<sup>43</sup> Since the dictum in *Heil Co. v. Grant*<sup>44</sup> is not binding, the court proceeded under the *Erie* doctrine<sup>45</sup> to predict the future course of Texas decisions.<sup>46</sup> Freightliner's argument that a no-fault strict liability claim is conceptually incompatible with a fault-based claim for exemplary damages was unpersuasive to the court. The court reasoned that the concepts underlying the

39. 554 S.W.2d 160 (Tex. 1977).

40. 524 S.W.2d 681 (Tex. 1975).

41. 450 F. Supp. at 961. The court also considered and set aside the jury's finding that Billy Maxey voluntarily assumed the risk of his injuries. The court found insufficient evidence to establish that Billy Maxey had the requisite knowledge of the specific defect and the subjective appreciation of the risk of danger created by the defect. Furthermore, even if Billy had possessed such knowledge, it could not be imputed to his wife because the test requires a subjective voluntary assumption of a known risk. *Id.* at 960 (citing *Massman-Johnson v. Gundolf*, 484 S.W.2d 555, 557 (Tex. 1972)). *See also* *Rourke v. Garza*, 530 S.W.2d 794, 800 (Tex. 1975); *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 91 (Tex. 1974); *Rabb v. Coleman*, 469 S.W.2d 384, 387 (Tex. 1971); *Ellis v. Moore*, 401 S.W.2d 789, 793 (Tex. 1966); *Heil Co. v. Grant*, 534 S.W.2d 916, 920 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

42. 450 F. Supp. at 963. The court also discussed whether the exemplary damage award was excessive. Stating that it was not bound by Texas law in passing on this question, the court nevertheless looked to previous Texas decisions for guidance. It concluded that Texas juries have never been required to adhere to a strict ratio between actual and exemplary damages. Rather, a jury must look at a variety of factors, including the degree of outrage produced by the evil, the frequency of the evil, and what amount of recovery would deter similar evil in the future. Choosing not to substitute its judgment for that of the jury, the court found that the amount of the award was not excessive since it was within the range allowed by substantive law and was not the product of passion or prejudice. *Id.* at 964-66. *See also* *Gibson Discount Center, Inc. v. Cruz*, 562 S.W.2d 511 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

43. 450 F. Supp. at 961.

44. 534 S.W.2d 916, 926 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); *see text accompanying notes 31-32 supra.*

45. The *Erie* doctrine, enunciated in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requires that, except in matters governed by the Federal Constitution or by acts of Congress, federal courts in diversity of citizenship actions should apply state law regardless of whether such law is embodied in a statute or promulgated in a state court decision. If the state laws are silent on the legal question at issue in the federal court, the court's duty is to predict how the state courts will hold when faced with the issue.

46. 450 F. Supp. at 961.

two claims are independent, with the purpose of the former to compensate and the latter to deter. The issue therefore was whether two theories of recovery can be joined in a single suit.<sup>47</sup> The court noted that the risk of infecting a no-fault concept by simultaneous pursuit of a fault-based claim was exaggerated; the language of strict liability is itself pregnant with fault connotations.<sup>48</sup> The court concluded that "simultaneous pursuit of actual damages bottomed on principles of strict liability and exemplary damages bottomed on fault concepts are essentially matters of trial efficiency and presents no true substantive issues."<sup>49</sup>

The court was also unpersuaded that potential financial devastation resulting from multiple punitive damage awards constituted sufficient grounds to deny punitive damages.<sup>50</sup> Instead, the court stated that the hazard of "deterrence slipping into destruction" could be prevented by a strict application of Texas requirements of proof.<sup>51</sup> Of course, if the manufacturer's conduct had indeed been callous, there might be a more lax application of the Texas requirements of proof.<sup>52</sup>

In concluding that punitive damages could be allowed in a strict liability cause of action, the court was influenced by article XVI, section 26 of the Texas Constitution.<sup>53</sup> The court stated, without further explanation, that it was unsure how Texas courts could bar recovery of punitive damages despite actual damages being based on a strict liability theory.<sup>54</sup> Evidently, the district court interpreted the provision as requiring punitive damages regardless of the underlying theory of recovery provided a homicide had been caused by the defendant's "wilful act, or omission, or gross neglect."<sup>55</sup>

To determine the Texas standard for an award of exemplary damages, the district court looked to the Texas Supreme Court's decision in *Sheffield Division, Armco Steel Corp. v. Jones*.<sup>56</sup> This standard contemplates either

47. *Id.* An affirmative answer seemed self-evident to the court. Certainly the presentation of a single claim based on different theories was not novel. The federal rules of civil procedure, for example, allow such a procedure. *Id.*; see FED. R. CIV. P. 18.

48. 450 F. Supp. at 962.

49. *Id.*

50. *Id.*; see notes 11-15 *supra* and accompanying text.

51. 450 F. Supp. at 963.

52. For a list of factors that should be considered by the court in awarding punitive damages in order to exercise judicial control over excessive awards, see Owen, *supra* note 27, at 1319-25.

53. See notes 30-33 *supra* and accompanying text.

54. 450 F. Supp. at 963.

55. TEX. CONST. art. XVI, § 26; see TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967), which states that the workers' compensation statute does not prevent recovery of exemplary damages. See also Nations, *Recovery of Exemplary Damages Under the Texas Workers' Compensation Act*, 19 S. TEX. L.J. 431 (1978). But see Jones v. Ross, 141 Tex. 415, 419, 173 S.W.2d 1022, 1024 (1943), in which the court, in interpreting the constitutional provision, held that exemplary damages are only available in those classes of exemplary damage cases that were in existence at the time the constitutional provision was adopted.

56. 376 S.W.2d 825 (Tex. 1964). Plaintiffs argued that something less than a showing of intent to injure is required. In support of the trial court's requirement of strict proof as a safety measure to prevent the defendant's financial destruction as a result of multiple exposure, however, one could argue that requiring proof of intent to injure provides a reliable

an intentional act or an act with a degree of gross negligence that approximated a fixed purpose to bring about an injury.<sup>57</sup> The plaintiffs argued that they had presented sufficient evidence to support a finding of conscious indifference or a complete absence of care on the part of the defendant.<sup>58</sup> Plaintiffs' evidence purported to show that Freightliner had never tested the fuel system in a crash environment before marketing it, had never crash tested even one of its trucks nor considered doing so, and had not kept records on the incidents of fire or injury involving their trucks.<sup>59</sup> Notwithstanding the above evidence, the court concluded that the defendant had shown a sufficient concern for safety by adopting a design "common to all manufacturers and millions of vehicles for over thirty years."<sup>60</sup> The court conceded that an entire industry can be inattentive and at fault. The critical question was, however, whether the entire industry was acting intentionally or was so grossly negligent as to approximate a fixed purpose to bring about an injury.<sup>61</sup> With the question thus stated, the court held that Freightliner's conduct did not meet the requirements for an award of punitive damages under the *Sheffield* standard.<sup>62</sup>

The court suggested that adopting a design common to the industry might not shield a defendant in subsequent cases from liability for punitive damages, depending on the industry's response to any accumulated evidence of defects.<sup>63</sup> Waiting for evidence of defects to accumulate before a defendant can be disciplined by punitive damages, however, is to allow unnecessary injuries to occur. Instead, sufficient evidence of a flagrant disregard for the public safety may be shown by the failure of a manufacturer to test the safety of the adopted design, or at least verify that other manufacturers have done so.<sup>64</sup>

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standard by which to judge whether punitive damages are deserved. Comment, *supra* note 7, at 908.

57. 376 S.W.2d at 828.

58. 450 F. Supp. at 963.

59. *Id.*

60. *Id.* at 964.

61. *Id.*

62. *Id.* at 963.

63. *Id.* at 966.

64. See *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636, 649 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970); *Owen*, *supra* note 27, at 1342.

The plaintiffs in *Maxey v. Freightliner Corp.* have appealed to the Fifth Circuit Court of Appeals alleging *inter alia* that the trial court incorrectly interpreted the Texas standard for awarding punitive damages. When previously faced with cases involving an award of punitive damages, the Fifth Circuit has looked to *Sheffield* as the applicable Texas standard.

See, e.g., *Ballenger v. Mobil Oil Corp.*, 488 F.2d 707, 710 (5th Cir.), *cert. denied*, 416 U.S. 986 (1974); *Woolard v. Mobil Pipe Line Co.*, 479 F.2d 557 (5th Cir. 1973); *Wooley v. Southwestern Portland Cement Co.*, 272 F.2d 906 (5th Cir. 1959). Most jurisdictions have adopted a strict requirement of intent to injure analogous to the Texas standard. For comparisons, see *Boehm v. Fox*, 473 F.2d 445 (10th Cir. 1973); *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp. 255 (E.D. Pa. 1976); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. App. 1978). *But see d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977) (reckless indifference sufficient to award punitive damages); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975) (no intent necessary, only a reckless disregard for the rights of others), *cert. denied*, 424 U.S. 913 (1976); *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (deliberate intent not necessary).

## III. CONCLUSION

In *Maxey v. Freightliner Corp.* the district court determined that punitive damages, which are based on fault concepts, are recoverable in Texas in a suit in which the actual damages are based on no-fault strict liability. The court denied a recovery of punitive damages, however, based on its finding that the defendant had exhibited sufficient care by adopting a design utilized by all truck manufacturers for over thirty years. The court relied on the standard for exemplary damages set forth in *Sheffield Division, Armco Steel Corp. v. Jones*, interpreting *Sheffield* as meaning that the slightest showing of care precludes a jury question on exemplary damages. If this strict interpretation is correct, then the issue to be resolved is whether the defendant's compliance with industry custom amounted to some evidence of care. The adoption of a design common to the industry should not be sufficient in itself to preclude an award of exemplary damages. Failure to test a potentially hazardous product or to verify such testing may constitute conscious indifference to the welfare of consumers and should be sufficient evidence to send the question of punitive damages to the jury.

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