A MEANING OF CORPORATE SOCIAL RESPONSIBILITY—
The Jury is In

By Michael A. Schmitt*

I. Introduction

Ford Motor Company, American Motors Corporation, Honda
Motor Company, Ltd., and International Harvester Company have
recently been subjected to million dollar punitive damages assessments
for marketing unsafe vehicles.1 These decisions confirm the trend
predicted by Professor David Owen of the University of South Carolina
in 1976 that the assimilation of the punitive damages remedy into the
field of products liability had just begun.2 Because the award against
Ford in Grimshaw v. Ford Motor Co. represents the largest punitive
damages award ever awarded in a products liability case, examination
of the trend toward higher punitive damage awards3 is an appropriate
topic for this journal.

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(1981), upheld an Orange County Superior Court punitive damage award of $3.5
million against the auto manufacturer. The jury in Grimshaw actually awarded $125
million to Mr. Grimshaw, which was reduced by the trial court to the $3.5 million
figure. Three months later the Ohio Supreme Court upheld a $1.1 million punitive
damage award against American Motors in Leichtamer v. American Motors Corp.,
67 Ohio St. 2d 456, 424 N.E.2d 568 (1981). The Court of Appeals for the Fifth
Circuit recently reinstated a $5 million punitive damages award in a crashworthiness
case for injuries to the driver of a “diminutive” Honda automobile. Dorsey v. Honda
Motor Co., 655 F.2d 650 (5th Cir. 1981). In April of this year, an Illinois appellate
court upheld an award of punitive damages against International Harvester Com-
pany. Stambaugh v. International Harvester Co., 106 Ill. App. 3d 1, 435 N.E.2d
729 (1982). Initially the jury awarded to the plaintiff $15 million in punitive damages;
however, this amount was halved by the trial court and finally reduced by the ap-
pellate court to equal the compensatory award of $650,000.

2. Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. REV.
1258, 1371 (1976) [hereinafter cited as Owen]. This article provides the most exten-
sive treatment of the application of punitive damages to products liability litigation.
Professor Owen’s most recent article on the subject also asserts that the Grimshaw
verdict demonstrates that the assimilation of punitive damages into the field of prod-
ucts liability is now in “full swing.” Owen, Problems in Assessing Punitive Damages Against
Owen 1982]. See also Schmitt & May, Beyond Products Liability: The Legal, Social, and
Ethical Problems Facing the Automobile Industry in Producing Safe Products, 56 U. DET. J.
URB. L. 1021 (1979) [hereinafter cited as Schmitt & May].

3. Although prior to Grimshaw there were no reported cases involving punitive

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This article will analyze the development of increased awards against manufacturers, examining the evolving standards of the punitive damages doctrine as applied to industry in general, and to the conduct of Ford Motor Company, American Motors Corporation, Honda Motor Company, Ltd., and International Harvester Company in particular. It will analyze the appropriateness of a corporation’s use of cost-benefit analyses in the design of its products, and it will suggest ways in which the automobile industry might protect itself from the devastating effects of such awards in a time when the industry as a whole faces a severe economic crisis.  

II. THE DEVELOPMENT TREND

The year 1967 probably marks the beginning of the use of the doctrine of punitive damages against manufacturers in a products liability context. That year, in Roginsky v. Richardson-Merrell, Inc., the Second Circuit reversed a $100,000 punitive damages award against a drug manufacturer. In two companion cases, however, Toole v.  

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Richardson-Merrell, Inc.\(^7\) and Ostopowitz v. Williams S. Merrell Co.,\(^6\) courts permitted punitive damages awards in the amounts of $250,000 and $100,000, respectively. Since these decisions, juries have assessed increasingly higher punitive damages against manufacturers: $5 million in 1972;\(^9\) $10.5 million in 1974;\(^10\) $17.25 million in 1975;\(^11\) and the record $125 million Grimshaw award in 1978.\(^12\) A review of the kinds of corporate misconduct which can result in punitive damages may provide a starting point for understanding the development of this trend.

The application of punitive damages to Ford's conduct in the design of the Pinto automobile was based on the California Civil Code section 3294 originally enacted in 1972.\(^13\) In Taylor v. Superior

\[\text{References:}\]
12. Grimshaw v. Ford Motor Co., No. 197,761 (Super. Ct. Orange Cty., Cal. Feb. 6, 1978). For a complete list of all cases in which punitive damages have been assessed in the product liability cases, see Owen, supra note 2, at 1326 n.333.
13. At the time of the Grimshaw trial, California Civil Code § 3294 read:

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.

CA. CIVIL CODE § 3294 (West 1970).

Section 3294 was amended in 1980 to read:

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

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge, ratification, or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.
Court, the California Supreme Court interpreted this section to include "conscious disregard of the safety of others," adding that "to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." The California Court of Appeals in Grimshaw affirmed this view, stating that "conduct evincing callous and conscious disregard of public safety by those who manufacture and market mass-produced articles is consonant with and supports the objectives of punitive damages."

When punitive damages have been assessed against manufacturers for producing unsafe products, it has usually been in situations which reveal an intentional or reckless disregard for consumer safety. Professor Owen has categorized five types of manufacturer misbehavior which have occurred in the past that have been deemed appropriate for an award of punitive damages. These include:

1. fraudulent-type misconduct,
2. knowing violation of safety standards,
3. inadequate testing or quality control,
4. failure to warn of known dangers,
5. post-marketing failure to remedy known dangers.

Conduct of the types represented by Owen's categories has been tested in the courts in the past fifteen years, and the mechanism of

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(2) 'Oppression' means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) 'Fraud' means an 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.

15. Id. at 895-96, 596 P.2d at 856, 157 Cal. Rptr. at 696.
17. Owen, supra note 2, at 1329-61. See also Schmitt & May, supra note 2, at 1028-35. Professor Owen recently focused the framework provided by his five categories in the following statement:

Although a manufacturer's culpability can be measured against the framework of these factors, an affirmative definition of the basis for liability should be provided to guide judge and jury. . . . [P]unitive damages generally are appropriate in only two types of cases—those involving behavior of a fraudulent character, where the manufacturer purposefully created the danger in an effort to trick consumers into buying a product, and those in which the manufacturer chose to profit from exposing consumers to a high risk of serious injury that it knew could easily be avoided through feasible and economical curative measures.

Owen 1982, supra note 2, at 27.
the punitive damages award has been invoked both to punish and deter such conduct. The development of the doctrine of products liability over the past twenty years has provided a starting point for identifying undesirable manufacturer conduct.\textsuperscript{18} This alone, however, does not explain the growing use of punitive damages to address conduct which goes beyond negligence and unsafe design.

The court of appeals in Grimshaw provided insight into the rationale for its award of punitive damages by stating that ""[g]overnment safety standards and the criminal law have failed to provide adequate protection against the manufacture and distribution of defective products."\textsuperscript{19} The idea of using criminal sanctions to deter corporate misconduct has received extensive scholarly analyses.\textsuperscript{20} Several factors have been suggested for the ineffectiveness of criminal sanctions in deterring criminal misconduct: the use of fines has been considered as little more than imposing fees for licenses to engage in illegal activities, individual responsibility is difficult to pinpoint,\textsuperscript{21} and juries have been unwilling to convict individuals for corporate misconduct. Courts prior to Grimshaw recognized the ineffectiveness of criminal sanctions.\textsuperscript{22}

In addition, governmental regulation in the area of product safety has been found wanting.\textsuperscript{23} Ford was able to market the 1972 Pinto


\textsuperscript{19} \textit{Grimshaw}, 119 Cal. App. 3d at 810, 174 Cal. Rptr. at 382.


\textsuperscript{23} See generally \textit{Corporate Crime}, supra note 20.
Despite its poor design because proposed federal regulations requiring all automobiles to be able to withstand a 20-mile-per-hour fixed barrier impact without significant fuel spillage was not to take effect until 1973.24

The attorneys for Ford in the Grimshaw case argued on appeal that California Civil Code section 329425 requires a showing of animus malus (evil motive) and that the term is therefore conceptually incompatible with an unintentional tort such as manufacturing and marketing a defectively designed product.26 They further argued that the Legislature of 1872 could not have intended the statute to be applied to a products liability case arising out of a design defect in a mass-produced automobile because neither products liability nor mass-produced automobiles were known in 1872.27

The court’s response to this argument posits a very interesting view of the role of courts in interpreting common law statutes and the role of judicial interpretation with regard to law reform. The court noted that the concept of punitive damages is rooted in English common law as well as the law of this country,28 and was part of the common law of California long before enactment of Civil Code section 3294.29 Furthermore, the California Court of Appeal found that the Legislature did not intend to prevent judicial development of common law concepts, noting that the ‘‘code itself provides that insofar as its provisions are substantially the same as the common law, they should be construed as continuations thereof and not as new enactments.’’30 The court thus found that the code has been imbued ‘‘with admirable flexibility from the standpoint of adaptation to changing circumstances and conditions.’’31

The court of appeals in Grimshaw is not the only court which recognizes this particular means of law reform. Justice Brown, concurring in the recent Ohio Supreme Court decision affirming a $1.1 million punitive damages assessment against American Motors Corporation, wrote: ‘‘The decision and majority opinion of this court today

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25. See supra note 13.
27. Id. at 809, 174 Cal. Rptr. at 382.
28. Id. at 807, 174 Cal. Rptr. at 380 (citing Owen, supra note 2, at 1262-63, and Mallor & Roberts, Punitive Damages, Towards a Principles Approach, 31 Hastings L.J. 639, 642-43 (1979)).
30. Id. at 809, 174 Cal. Rptr. at 382 (citing Civ. Code, §§ 4, 5).
31. Id. See also Li v. Yellow Cab Co., 13 Cal. 3d 804, 816, 532 P.2d 1226, 1234, 119 Cal. Rptr. 858, 866 (1975).
in this case demonstrates a commendable progressive judicial thrust forward in the field of tort law, joining perspicacious thought in opinions in . . . recent cases . . . ."\(^\text{32}\)

What can be seen from this trend is that both juries and courts have become increasingly willing to use the punitive damages award to deal with the problem of reckless or conscious corporate decision-making in the marketing of consumer products. The automobile industry as a whole seems particularly susceptible to the use of this doctrine because of an apparent perception that other control mechanisms such as criminal sanctions and governmental regulations are not effective. Following is an intensified examination of the evolving standards for awarding punitive damages and the intracorporate adjustments which could be developed to decrease the chance of punitive damages liability.

III. THE EVOLVING STANDARDS OF THE PUNITIVE DAMAGES DOCTRINE

The somewhat vague terms of "reckless disregard," "wanton negligence," "callousness," and "conscious disregard of the safety of others" take on a much more definite form when applied to concrete fact situations. Before discussion can be focused on the types of conduct by the automobile industry which could generally fall into such categories, it may be helpful to consider the specific instances in which these terms were applied in the design and marketing of the automobiles and tractor which have been the subject of punitive damages awards. Following is a "Fact Sheet"\(^\text{33}\) taken from the actual court findings of fact which summarize the corporate conduct found subject to punitive damages awards.

A. Fact Sheet—Ford Motor Co.\(^\text{34}\)

1. Design of the Pinto Fuel System

In 1968, Ford began designing a new subcompact automobile which ultimately became the Pinto. Its objective was to build a car weighing 2,000 pounds or less to sell for no more than $2,000. The manufacture of the Pinto was a rush project, so that styling preceded


\(^{33}\) A "Pinto Fact Sheet" was originally developed on the basis of the pleadings in the Orange County Superior Court case of Grimshaw v. Ford Motor Co. See Schmitt \& May, supra note 2, at 1022-25.

\(^{34}\) All the statements made in part III, section A of this article are taken directly from the court of appeals' findings of fact in Grimshaw v. Ford Motor Co., 119
engineering and dictated engineering design to a greater degree than usual. Among the engineering decisions dictated by styling was the placement of the fuel tank. The Pinto’s styling required the tank to be placed behind the rear axle leaving only nine to ten inches of "crush space"—far less than in any other American automobile or Ford overseas subcompact. In addition, the Pinto was designed so that its bumper was little more than a chrome strip, less substantial than the bumper of any other American car produced then or later, thus rendering the Pinto less crush resistant than other vehicles. Finally, the differential housing selected for the Pinto had an exposed flange and a line of exposed bolt heads which protruded sufficiently to puncture a gas tank if the car were struck from behind.

2. Crash Tests

During the development of the Pinto, prototypes and two production Pintos were crash tested by Ford to determine the integrity of the fuel system in rear-end accidents. The crash tests revealed that the Pinto’s fuel system, as designed, could not withstand a 20-mile-per-hour proposed federal standard. When these mechanical prototypes were struck from the rear, the fuel tank was driven forward and punctured, causing fuel leakage in excess of the proposed standards. In one crash test of a Pinto, the fuel neck was torn from the gas tank and the tank punctured by a protruding bolthead. In another test, spilled fuel entered the driver’s compartment through gaps in seams joining the rear wheel wells to the floor pan.

3. The Cost to Remedy Design Deficiencies

Normally, when a prototype fails the fuel system integrity test, the standard of care for engineers in the industry is to redesign and

Cal. App. 3d at 772-79, 174 Cal. Rptr. at 358-62. The court prefaced its findings of fact as follows:

FACTS

Since sufficiency of the evidence is in issue only regarding the punitive damage award, we make no attempt to review the evidence bearing on all of the litigated issues. Subject to amplification when we deal with specific issues, we shall set out the basic facts pertinent to these appeals in accordance with established principles of appellate review: We will view the evidence in the light most favorable to the parties prevailing below, resolving all conflicts in their favor, and indulging all reasonable inferences favorable to them. (Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 507, 595 P.2d 619, 156 Cal. Rptr. 41; Nestle v. City of Santa Monica, 6 Cal. 3d 920, 925, 496 P.2d 480, 101 Cal. Rptr. 568.)

Id. at 772, 174 Cal. Rptr. at 359.
retest it. In the Pinto case, design changes that could have remedied the vulnerability of its fuel tank system at an approximate cost of $35 per car were not incorporated by Ford.

4. Management’s Decision to Go Forward With Knowledge of Defects

During the course of planning and designing the Pinto, regular product review meetings were held. As the project approached actual production, a chain of command was established for reporting test results and for project approval. The crash test results were reported to this chain of command.

Harley Copp, a former Ford engineer and executive in charge of the crash testing program, testified that the highest level of Ford’s management made the decision to go forward with the production of the Pinto following the crash tests. It made this decision with full knowledge of the weakness of the gas tank system and the significant risk of death or injury from fire. It was also aware of the nominal cost of design changes which would eliminate the dangers of a rear-end crash. Copp testified that management’s decision was based on the cost savings which would inure from omitting or delaying of those changes. His testimony concerning management’s awareness of the crash tests results and the vulnerability of the Pinto fuel system was corroborated by other evidence. Mr. Copp also testified to conversations with the chief assistant research engineer and the chief chassis engineer in which they expressed concern about the integrity of the Pinto’s fuel system and management’s unwillingness to deviate from the design if the change would cost money.

B. Fact Sheet—American Motors Corporation

American Motors Corporation, through its engineering department, had actual knowledge that no provision for safety in the event of forward pitch-overs of its Jeep CJ-7 had been designed, despite advertisements by American Motor Sales Corporation encouraging the general public to use the vehicle in such a way as to create a substantial risk of a forward pitch-over. The configuration of the Jeep CJ-7 factory-installed roll bar would lead a reasonable member of the public to believe that it had been designed and constructed to provide safety in the event of a forward pitch-over.

35. All the statements made in part III, section B are taken directly from the court of appeals for Stark County’s findings as a matter of law reported and accepted by the Ohio Supreme Court in Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 459-62, 424 N.E.2d 568, 573-74 (1981).
The intentional, deliberate merchandising of a product by a corporation that knew the product would not provide safety in the event of forward pitch-overs, constituted a heedless disregard and reckless indifference to the safety of the general public as well as willful misconduct and gross negligence. The absence of any attempt to give warning of that known defect constituted negligence and breach of warranty.

Such conduct amounted to false representations by the corporation with respect to the safety of the vehicle when used in the manner advertised. This conduct rendered the defendant American Motors Corporation liable in damages to the plaintiffs to the extent that the collapse of the roll bar was a proximate cause of their injuries.

C. Fact Sheet—Honda Motor Company, Ltd.36

In the mid-1960s Honda developed a small, lightweight automobile with high gas mileage. It exported the vehicle to the United States and Europe to meet the demand for a low-price, economical car. The AN 600 model, sold in the United States, was the first automobile sold by Honda in this country.

Before Honda began exporting the AN 600 to the United States, employees of its wholly owned subsidiary, Honda Research and Development (Honda R&D), conducted crash tests on prototype vehicles in Japan. These tests revealed that a dummy the size of an average adult male, restrained with lap and shoulder belts, would strike the interior front part of the passenger compartment in a 30 m.p.h. barrier crash test. In both a barrier crash test and a test collision against an average size American vehicle, the dummy's head struck the A pillar (the post at the left of the windshield, between the windshield and the window), which had deformed inward on impact. Despite the results of these tests and a recommendation by an employee of Honda R&D to enlarge the vehicle to improve safety, Honda exported the AN 600 to the United States without increasing the vehicle's size or body strength or warning purchasers of its crash characteristics.

At trial, experts testified to a number of measures that would have improved the AN 600's safety in collisions. These included lengthening the hood, enlarging the passenger compartment, installing a heavier engine, using heavier metals in construction, reforc-

36. All statements made in part III, section C of this article are taken directly from the decision of the United States Court of Appeals for the Fifth Circuit in Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981). Those facts well presented by the opinion are quoted here for clarity.
ing the structure by using metal "bones" to fortify the passenger compartment and the A pillars, using a full frame out to the front bumper, redesigning the shoulder belt to reduce the likelihood of "submarining" the passenger, and making seat belts of a fabric with less elasticity. The Court of Appeals for the Fifth Circuit held that this evidence was sufficient to support the jury's finding of wanton, willful, or reckless disregard of the rights of others.

D. Fact Sheet—International Harvester Company

1. Conscious Indifference for Users of Tractors

From 1939 until the phaseout of gasoline powered tractors in the early 1970s, International Harvester produced approximately 1.6 million gasoline engine tractors. This figure included over 23,000 model 706 tractors, the model which was the subject of Stambaugh v. International Harvester Company.

During the 1950s, it was discovered that the effervescence of gaseous vapors contained in gasoline could, under certain conditions, cause fuel to be forced out of the gasoline filler spout, a condition known as "geysering." These problems were experienced not only in International Harvester products, but in equipment manufactured by the John Deere Company as well. A 1958 internal report of International Harvester reported the conditions under which geysering was most likely to occur, conditions which were common in the actual use of tractors by consumers.

International Harvester instituted design changes in the late 1950s and early 1960s aimed at eliminating geysering problems. The exposure of the fuel tank to engine heat was reduced by placing a heat shield between the engine and fuel tank. John Deere corrected geysering problems in its tractors in the early 1950s by repositioning the fuel tank and by utilizing a fuel tank cap with a large vent-hole.

The model 706 tractor was a completely new design, not merely an update or modification of earlier models. Because the model 706 was designed to utilize existing implements, the fuel tank was positioned as on earlier models, but without the heat shield to eliminate geysering. Model 706 was tested under factory conditions and then

37. All statements made in part III, section D of this article are taken directly from the decision of the Appellate Court of Illinois for the Fifth District in Stambaugh v. International Harvester Co., 106 Ill. App. 3d 1, 435 N.E.2d 729 (1982).
field tested by farmers for two years. No geysering incidents occurred during this period.

During 1963 a report was prepared for International Harvester by an independent consultant which recounted tests in which geysering had occurred, although not specifically with model 706, and pronounced the condition dangerous and the fuel cap design defective. At about the same time, internal reports questioned the fuel pressure buildup in models similar to model 706 and recommended larger vent-holes in gasoline tank caps and repositioning of fuel tanks in models older than model 706. Despite these recommendations, a small vent-hole was retained on gas caps for the model 706, a condition corrected only after the Stambaugh incident, and no changes were made in that model to reduce fuel tank heat.

Later model 200 and 300 tractors were equipped with heat shields. In 1975 International Harvester introduced warning decals to inform consumers about the possibility of fuel geysering. Yet only 13,000 of the 1.6 million gasoline powered tractors produced by International Harvester were provided with heat shields between the engine and fuel tank, and owners of tractors produced before 1975 were not warned of the possibility of fuel geysering.

2. Discovery Fraud

During the discovery process, International Harvester, through its attorneys and employees, failed to reveal information relating to other geysering incidents, fuel fires, and fuel tank tests. Attorneys for International Harvester failed to reveal information about geysering incidents which was contained in the files of its Chicago counsel and failed to supplement discovery documents when such requested information came to their attention.

Engineers employed by International Harvester failed to reveal geysering problems experienced with other models of tractors. International Harvester’s corporate vice-president admitted knowing of at least ten cases of fuel fires which he had not revealed during a deposition taken before trial. Tests performed by International Harvester engineers at the request of counsel for International Harvester suggested geysering problems, but they were not reported to the plaintiff’s counsel and no records of these tests were kept.

This course of conduct rendered International Harvester liable for both compensatory and punitive damages to a plaintiff who had been burned in a fire resulting from a geysering incident with a model 706 tractor.
E. Standards Used in Finding Punitive

Damages Appropriate Against Ford Motor Company,
American Motors Corporation, Honda Motor Company, Ltd.
and International Harvester Company

Both the court of appeals in California and the Ohio Supreme Court begin their analysis of the appropriateness of the punitive damages mechanism with the concept of malice. Following the California Supreme Court ruling in Taylor v. Superior Court,30 the court of appeals noted that the availability of punitive damages had not been limited in California to cases in which there is an actual intent to harm plaintiff or others.39 The Taylor court held: "In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct and that he willfully and deliberately failed to avoid those consequences."

The facts described above establish that Ford's conduct clearly fell within this rule. By means of its own testing, Ford personnel discovered that the Pinto was extremely susceptible to fuel spillage on rear-end impact. This information was passed up the corporate chain of command, and a final decision was made to produce the Pinto as designed without employing any of the relatively inexpensive modifications that were available. These facts, combined with the evolving concept of malice, led the Grimshaw court to conclude: "Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass-produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and not otherwise recoverable."

The Ohio Supreme Court also based their approval of the application of punitive damages against American Motors on the concept of malice. They were not faced, however, with the interpretation of a statute, but rather with the application of common law tort doctrines to a products liability situation. As early as 1859 an Ohio court had established that punitive damages may be awarded in tort cases involving fraud, malice, or insult.42 Intentional, reckless, wanton,

39. Grimshaw, 119 Cal. App. 3d at 808-09, 174 Cal. Rptr. at 381.
40. Taylor, 24 Cal. 3d at 895-96, 598 P.2d at 856, 157 Cal. Rptr. at 696.
42. Roberts v. Mason, 10 Ohio St. 277 (1859).
willful, and gross acts which cause injury to persons or property were held to be sufficient to evidence the requisite degree of malice to support an award of punitive damages in tort actions.\textsuperscript{43} The court in \textit{Leichtamer v. American Motors Corp.} took a giant step forward in defining malice to include situations where the manufacturer’s testing and examination procedures are so inadequate as to manifest a flagrant indifference to the possibility that the product might expose consumers to unreasonable risks of harm.\textsuperscript{44} The most interesting aspect of this pronouncement is that the court cited no previous Ohio cases or statutes; rather, the court cited Professor Owen’s 1976 Michigan Law Review article.\textsuperscript{45}

The appellate court in \textit{Stambaugh} and the court of appeals in \textit{Dorsey v. Honda Motor Co.} based approval of the application of punitive damages on an examination of the nature of willful and wanton conduct instead of considering malice.\textsuperscript{46} The origin of this standard in Illinois and Florida common law dates back to the late 1800s.\textsuperscript{47} Although this starting point differs from that of the courts in \textit{Grimshaw} and \textit{Leichtamer}, the \textit{Stambaugh} and \textit{Dorsey} courts’ conclusions as to the character of conduct which constitutes willful and wanton conduct is remarkably similar to the conclusions reached in \textit{Grimshaw} and \textit{Leichtamer} as to the nature of conduct exhibiting malice. The Illinois appellate court held that willful and wanton conduct “occurs when a person with a known duty to ensure the safety of another exhibits a conscious indifference to that duty.”\textsuperscript{48} The Florida rule states that “punitive damages may be

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\item \textsuperscript{43} Columbus Fin. v. Howard, 42 Ohio St. 2d 178, 184, 327 N.E.2d 654, 658 (1975).
\item \textsuperscript{44} \textit{Leichtamer}, 67 Ohio St. 2d at 472, 424 N.E.2d at 580.
\item \textsuperscript{45} \textit{Id.} (citing Owen, supra note 2). It is interesting to note the influence Professor Owen’s article had on both the California and Ohio courts in developing their respective state law in the punitive damages area. Law reform in the area of punitive damages appears to be moving faster more through a combination of judicial and scholarly incisiveness than through the mechanism of legislative fiat. For example, the Department of Commerce published a Model Uniform Product Liability Act in 1979 for voluntary use by the states. 44 Fed. Reg. 212, at 62,715 (1979). Section 120 of this model act includes a provision on punitive damages. No state, as yet however, has adopted this act.
\item \textsuperscript{46} \textit{Stambaugh}, 106 Ill. App. 3d at 24, 435 N.E.2d at 747; \textit{Dorsey}, 555 F.2d at 657.
\item \textsuperscript{47} Consolidated Coal Co. v. Haenni, 146 Ill. 614, 35 N.E. 162 (1893); Florida S. Ry. v. Hirst, 30 Fla. 1, 11 So. 506 (1892).
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awarded when, *inter alia*, the defendant's conduct shows wantonness or recklessness or reckless indifference to the rights of others." In re International Harvester's conduct was ruled to have met the Illinois standard by its "conscious indifference to its duty toward users of its tractors." Evidence that the company knew of potential problems and disregarded them, coupled with its discovery fraud, warranted an award of punitive damages to the victims.

Likewise, Honda's conduct was ruled to have justified the punitive damages award because Honda did not follow through on recommendations to minimize risks involved in use of its product. The jury returned verdicts against Honda on theories of strict liability, implied warranty, negligent design, and failure to warn, finding the company guilty of "wantonness, willfullness or reckless indifference to the rights of others." The appellate court opinions in *Stambaugh* and *Dorsey* confirm the increasing willingness of courts to accept a jury's determination of the existence of manufacturer conduct sufficient to merit punitive damages.

Recognizing that the doctrines of malice and of willful and wanton conduct now include callous disregard for consumer safety, it becomes necessary to analyze how this concept is presented to juries. In its instructions to the jury, the *Grimshaw* trial court defined malice as follows: "'Malice' means a motive and willingness to vex, harass, annoy or injure another person. Malice may be inferred from acts and conduct, such as by showing that the defendant's conduct was willful, intentional, and done in conscious disregard of its possible results." The court instructed the jury that the burden of proving

be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness.

49. *Dorsey*, 655 F.2d at 658.
51. *Dorsey*, 655 F.2d at 657.
52. The appellate court's trust in the jury's findings is tainted by its reduction of the punitive damage award. Although both the punitive and compensatory awards finally received by the plaintiff far exceeded his economic damages, *Stambaugh*, 106 Ill. App. 3d at 24, 435 N.E.2d at 747, as the dissenting opinion in *Stambaugh* points out, the court reduced the award without establishing guidelines to govern the amount of punitive damage awards. *Id.* at 26, 435 N.E.2d at 747-48 (Welch, J., concurring in part and dissenting in part).
malicious conduct "in conscious disregard of its possible result" fell on the plaintiff Grimshaw.\textsuperscript{54}

On appeal, Ford argued that the trial court's instruction was erroneous in using the phrase "in conscious disregard of its possible result[s]."\textsuperscript{55} Ford's position was that the instruction should have read "conscious disregard of the probability or high probability of injury to others."\textsuperscript{56} Its argument was essentially based on the reasoning that "conscious disregard of its possible result[s]" would permit a plaintiff to impugn almost every design decision as made in conscious disregard of some perceivable risk because safer alternative designs are almost always a possibility.\textsuperscript{57} Ford's position is supported in part by \textit{Dawes v. Superior Court}\textsuperscript{58} in which it was stated: "[S]ince 1974 at the latest, and probably since a much earlier date, the term 'malice' as used in Civil Code section 3294 has been interpreted as including a conscious disregard of the probability that the actor's conduct will result in injury to others."\textsuperscript{59} The court of appeals agreed with Ford on this matter, but found that the instruction given by the trial court using possibility did not result in a miscarriage of justice.\textsuperscript{60}

The trial court instructions to the jury in the \textit{American Motors} case indicated that punitive damages may be awarded where there is intentional injury and actual malice toward the other party. The court instructed the jury to find those elements in American Motors' failure to redesign the roll bar on its Jeep CJ-7.\textsuperscript{61} If the jury decided to award punitive damages, it would have to specify the facts on which it believed the defendant to have acted.\textsuperscript{62}

The Ohio Supreme Court affirmed both the jury instructions and the punitive damages award, noting that roll-overs and pitch-overs of 1976 Jeep CJ-7 vehicles were clearly foreseeable and that American Motors totally failed to do any testing to determine whether the roll bar "added protection."\textsuperscript{63} They concluded that the combination of promoting the jeep as a rugged, off-road vehicle, without any testing

\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} (emphasis added).
\textsuperscript{56} \textit{Id.} (emphasis added).
\textsuperscript{57} For support of this reasoning, see generally Calabresi & Melamed, \textit{Property Rules, Liability Rules, and Inalienability: One View of the Cathedral}, 85 \textit{Harv. L. Rev.} 1089 (1972).
\textsuperscript{58} 111 Cal. App. 3d 82, 168 Cal. Rptr. 319 (1980).
\textsuperscript{59} \textit{Id.} at 88, 168 Cal. Rptr. at 322 (emphasis added). Professor Owen provides an extensive look at the error in the trial court's instruction. Owen 1982, \textit{supra} note 2, at 21-23.
\textsuperscript{60} \textit{Grimshaw}, 119 Cal. App. 3d at 816-17, 174 Cal. Rptr. at 386.
\textsuperscript{61} \textit{Leichtamer}, 67 Ohio St. 2d at 469-70, 424 N.E.2d at 578-79.
\textsuperscript{62} \textit{Id.} at 470, 424 N.E.2d at 579.
\textsuperscript{63} \textit{Id.} at 471, 424 N.E.2d at 580.
of the integrity of the roll bar system, represented "a flagrant indifference to the probability that a user might be exposed to an unreasonable risk of harm." 64

The Dorsey court refers to the Florida federal district court's instructions in that case as "unexceptionable instructions governing willful and wanton conduct." 65 In Stambaugh, the jury was instructed simply that "in addition to compensatory damages the jury could award the plaintiff punitive damages if willful and wanton conduct by the defendant warranted punishment." 66 The appellate court held that this instruction was an "entirely proper statement of the law." 67

The standards of liability and the permissible instructions to the jury represented by the Grimshaw, Leichtamer, Dorsey, and Stambaugh decisions evince a remarkable consistency, even though the factual bases for the punitive damages claims are quite dissimilar. Ford and Honda, on the one hand, were charged with marketing vehicles that were known to be unsafe in light of their own testing programs. Relatively inexpensive alternatives were also known to be available, but a conscious decision by high executives was made not to incorporate these alternatives. American Motors was also charged with marketing an unsafe vehicle, but without proper testing for safety. International Harvester failed to warn consumers or to correct defects in its model 706 tractors after its personnel became aware of geysering problems and engaged in discovery fraud in order to conceal its liability. Yet, all four decisions recognized that ascertaining whether or not necessary elements to a punitive damages award are present may be inferred from conduct and surrounding circumstances. 68 Each decision focuses on the probability of harm to the consumer due to the corporate conduct. 69 These cases demonstrate the ability of courts to mold and shape existing common law and statutory doctrines to protect consumer expectations when purchasing a technologically complex product. 70

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64. Id.
65. Dorsey, 655 F.2d at 656.
67. Id.
68. Leichtamer, 67 Ohio St. 2d at 471, 424 N.E. 2d at 579; Grimshaw, 119 Cal. App. 3d at 814-15, 174 Cal. Rptr. at 385; Dorsey, 655 F.2d at 658; Stambaugh, 106 Ill. App. 3d at 1, 435 N.E.2d at 729 (citing Bartolucci v. Falleti, 382 Ill. 168, 174, 46 N.E.2d 980, 983 (1943) and Johnson v. Amerco, Inc., 87 Ill. App. 3d 827, 845, 409 N.E.2d 299, 313 (1980)).
69. Leichtamer, 67 Ohio St. 2d at 472-73, 424 N.E.2d at 580; Grimshaw, 119 Cal. App. 3d at 815-16, 174 Cal. Rptr. at 386.
70. Leichtamer, 67 Ohio St. 2d at 465-67, 424 N.E.2d at 577; Grimshaw, 119 Cal. App. 3d at 803, 174 Cal. Rptr. at 378; Dorsey, 655 F.2d at 658; Stambaugh, 106 Ill. App. 3d at 23, 435 N.E.2d at 746.
Grimshaw and Leichtamer courts explicitly acknowledge the importance of Professor Owen's article on the applicability of punitive damages to products liability cases, and the concurring opinion in Stambaugh looks to a 1981 Illinois decision which relied extensively on Professor Owen's works. To avoid similar litigation in the future and the in calculable adverse effects of the attendant publicity attached to million-dollar punitive damages verdicts, industry must reassess its testing procedures and decision-making processes in light of Owen's five categories of misbehavior.

IV. The Role of Cost-Benefit Analysis

The focus of this article has been the increasing use of the doctrine of punitive damages in products liability litigation. The entire discussion presumes liability on the manufacturer's part founded on judicial and legislative adoption of section 402A of the Restatement (Second) of Torts. Section 402A provides a cause of action in strict liability for injury from a product, and the vast weight of authority supports allowing an action in strict tort liability as well as negligence. In 1972 the California Supreme Court first applied section 402A to design defects, holding that "[a] defect may emerge from the mind of the designer as well as from the hand of the workman." Ohio recognized its applicability to design defect cases in Leichtamer. The

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71. Owen, supra note 2.
74. See supra text accompanying notes 2-6.
75. Restatement (Second) of Torts § 402A (1965) provides:
   (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 brought the product from or entered into any contractual relation with the seller.
78. Leichtamer, 67 Ohio St. 2d at 464, 424 N.E.2d at 575.
importance of this development to the use of the cost-benefit analysis was addressed recently by Professor James Henderson, Jr., of Boston University, who argued that a consensus has gradually developed regarding the appropriate conceptual basis of liability in design defect cases.79 The issue of defective product design is to be resolved by means of cost-benefit analysis, with the injured plaintiff bearing the burden of persuading the tribunal that the costs associated with the defendant’s design choices, including accident costs, exceeded the benefits of the design.80 In an influential article in 1973, Professor John W. Wade of Vanderbilt University developed several factors that should be considered in determining whether the plaintiff has carried his burden of proof.81

A new twist to the use of cost-benefit analysis, however, was posited by the California Supreme Court in the 1978 case of Barker v. Lull Engineering Co.82 in which the burden of proof was shifted to the defendant, and cost-benefit analysis was required by the manufacturer. The Barker court formulated a two-prong definition of “design defect”, embodying a “consumer expectation standard” and “risk-benefit” test:

First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product’s design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.83

The relevant factors which a jury may consider in applying the Barker “risk-benefit” standard include

the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical

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80. Id. at 775.
81. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 837-38 (1973). These factors include: (1) the utility of the product to its user and to the public as a whole; (2) the likelihood that it will cause injury; (3) the probable seriousness of injury; and (4) the manufacturer’s ability to eliminate the unsafe character of the products without impairing its utility or making it too expensive.
83. Id. at 432, 573 P.2d at 455, 143 Cal. Rptr. at 237.
feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.84

This "risk-benefit" test established the appropriateness of cost-benefit analysis in determining the defectiveness of product designs. Once the plaintiff establishes that it was a defective design which proximately caused the injury sustained, the burden shifts to the defendant to prove that the benefits of the defendant's design choices outweighed their associated risks.85 The Barker court added that the alternative risk-benefit prong of the Barker test was designed to aid the injured party in establishing design defects because "in many situations . . . the consumer would not know what to expect, because he would have no idea how safe a product could be made."86 The importance of this new twist on defective design cases and punitive damages can be seen by comparing the factors considered by the Barker court with the "conscious disregard for the safety of others" standard approved in Grimshaw.87

A. The Gravity of the Danger Posed by the Challenged Design

Ford tests showed that upon any rear-end collision approaching twenty miles per hour, not only would fuel leakage occur, but there was a strong likelihood that gasoline would actually enter the passenger compartment. Any spark incident to such a rear-end collision would ignite the gasoline, inevitably causing serious injury or death. Ford had estimates of fatalities which could be associated with fuel leakage and fire ranging from 600 to 3,500 total lives.88 The problems associated with the Pinto fuel tank design clearly were grave.

B. The Likelihood That Such Danger Would Occur

Ford's prior testing showed that fuel spillage would likely occur in most rear-end collisions or roll-overs.89 The estimates of the annual

84. Id. at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
85. For a negative assessment of this development, see Henderson, supra note 79, at 784-91.
86. Barker, 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.
87. See supra note 39.
88. See supra text accompanying note 34. See also Leichtamer, 67 Ohio St. 2d at 476, 424 N.E.2d at 582.
89. See Schmitt & May, supra note 2, at 1023 n.12.
number of rear-end collisions were also available to Ford from both the National Safety Council and the National Highway Transportation and Safety Administration. There was no doubt that accidents would occur and that the consequences could be avoided. One Ford report recommended deferral from 1974 to 1976 of the addition of "flak suits" to protect the tank in all Ford cars, including the Pinto, thereby realizing a savings to Ford of $20.9 million.

C. The Mechanical Feasibility of a Safer Alternative Design

Ford not only had alternative designs, but knew of their cost, ranging from a minimum of $1.80 to a maximum of $9.95. One can presume the jury in Grimshaw found these figures significant in their examination of Ford's decision not to modify the Pinto design.

D. The Financial Cost of an Improved Design

The financial cost of an improved design has been noted above, but Exhibit No. 82 in the Grimshaw case reveals additional interesting cost figures. This exhibit was a Ford engineering study showing that the cost of placing the gas tank over the axle with a protective shield was about $10 and that a tank within a tank with polyurethane foam between tanks would have cost about $5.

E. The Adverse Consequences to the Product and the Consumer That Would Result From an Alternative Design

The facts establish that an alternative design could have cost up to $10 per vehicle. Nothing in the Grimshaw case reveals how much weight would be added to the car by the use of any of the known alternatives. Probably the worst that could have happened to the consumer from such alternative design was that the Pinto might have weighed a little more than 2,000 pounds and cost a few dollars over the $2,000 figure.

Having established liability for compensatory damages because

90. Id.
91. See supra text accompanying note 34. Ford actually used an $11 per car figure in the Grush-Saunby memorandum described in Schmitt & May, supra note 2, at 1023 n.12.
92. Exhibit No. 82 is known as the "Chiara Memorandum" and is discussed in Grimshaw, 119 Cal. App. 3d at 791-92, 174 Cal. Rptr. at 370-71.
93. Id. at 774, 174 Cal. Rptr. at 360.
of a manufacturer's failure to justify the design defect, using the risk-
benefit factors test set forth in Barker, a question immediately arises
regarding the relation of this finding to the "conscious disregard of
the probability of harm" standard used in the punitive damages
mechanism. Will it not always follow that a manufacturer, who is found
liable because (1) the danger of harm was grave and likely, (2) safer
alternative designs were available, and (3) the financial cost of an im-
proved design did not outweigh the adverse consequences to the pro-
duct and the consumer, will also be found guilty of "callousness" and
the "conscious disregard of the probability of harm"? Posed another
way, will not the automobile manufacturer found strictly liable in tort
for not choosing a feasible alternative design be a per se violator of
the conscious disregard standard?

Professor Owen's analysis of the issue implies an affirmative answer
to this question\textsuperscript{94} and cites this as "the principal fault" of the con-
scious disregard standard.\textsuperscript{95} Owen asserts that when the "balance of
trade-offs between safety, utility, and cost . . . fall within any reasonable
distance of the 'defective line'," an award of punitive damages is
inappropriate.\textsuperscript{96} Owen contends that the conscious disregard standard
mandates punitive damages within this "defect no-man's land"\textsuperscript{97}
because "a careful manufacturer should indeed be 'conscious' of all
foreseeable and significant risks that necessarily result from the dif-
cult design trade-off decisions required to produce affordable prod-
ucts that work well."\textsuperscript{98}

Perhaps the facts surrounding the Grimshaw case impugn Ford's
conduct so clearly that its decision to market the Pinto is not the best
example to use in answering the question just posed. With the role
of cost-benefit analysis in design defect cases clearly established in
California, and the likelihood of the Barker decision influencing the
developing law in other jurisdictions,\textsuperscript{99} the use of cost-benefit analysis
when human life and limb are on the line must be given closer scrutiny.

\textsuperscript{94} See Owen 1982, \textit{supra} note 2, at 23-26 and 36-38.
\textsuperscript{95} \textit{Id.} at 24.
\textsuperscript{96} \textit{Id.} at 38.
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.} at 24.
\textsuperscript{99} The influence of Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443,
143 Cal. Rptr. 225 (1978), can be seen in \textit{Leichtamer}, 67 Ohio St. 2d at 466, 424
N.E.2d at 576 & n.1, and Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska
1979) (adopting Barker two-pronged test). Jurisdictions that have considered and
rejected the Barker test include: Arizona (see Vineyard v. Empire Mach. Co., 119 Ariz.
The trial court record of Grimshaw v. Ford Motor Co.\textsuperscript{100} provides the only complete cost-benefit information that can serve for such scrutiny.\textsuperscript{101} This memorandum, entitled "Fatalities Associated With Induced Fuel Leakage and Fires," commonly referred to as the Grush-Saunby memorandum,\textsuperscript{102} was based on rollover tests. It states, however, that the findings would not be different with other forms of impact. The report concludes by stating that a total cost of $137 million would be required for repositioning the fuel tank to avoid leakage and crash-impact problems. The benefits gained in terms of human lives saved is put at $49.5 million. The cost figure was arrived at by using an $11 per car figure based on all cars and light trucks sold in a given year. The benefits figure was arrived at by using a $200,000 value-of-life figure from the National Highway Traffic Safety Administration (NHTSA). At first glance, one might conclude that a savings in human lives estimated at $49.5 million is not worth the offsetting expense of $137 million.\textsuperscript{103} Even if Ford were faced with ten Grimshaw verdicts, it could absorb the cost with the savings achieved by not making the alternative design changes. However, the real danger lies in the manufacturer’s selective use of figures in a cost-benefit analysis involving human life. The tendency is to use figures which minimize the human life benefits while maximizing the production cost figures. The Grush-Saunby memorandum can be faulted on this account. Ford used the $200,000 life figure from the NHTSA but rejected the same agency’s estimate of 2000-3500 fatalities.\textsuperscript{104} Rather, it chose to use a fatality estimate of 600-700 supplied by the National Safety Council.\textsuperscript{105}


102. Exhibit No. 125, \textit{Grimshaw}. It should be noted that this memorandum was not permitted to be introduced as evidence at the actual trial.

103. Certainly the appropriateness of using cost-benefit analysis in human life situations raises interesting ethical and emotional issues. This article deliberately refuses to address those issues because its focus is on judicial developments in this area which clearly require cost-benefit analysis in design defect cases. \textit{See} text accompanying notes 75-123.

104. \textit{See} discussion in Schmitt & May, supra note 2, at 1023 n.12.

This latter estimate greatly reduced the total human benefits amount. If the NHTSA’s highest fatality estimate is used, the human life benefits figure exceeds the $137 million cost figure. Furthermore, if the $5.25 nylon bladder alternative were used instead of the $11 figure, the resulting figures would read $55 million cost versus a $49.5 million benefit.\(^{106}\) Thus, the cost and benefit figures would be almost equal. When human life is at stake, an “almost equal” cost-benefit ratio would necessitate a decision to make improvements. A decision not to choose the alternative design would inevitably be found by a jury to be “callous” and evincing a “conscious disregard for consumer safety.”

The fact that the use of cost-benefit analysis can be dangerous to the automobile manufacturer (although mandated by Barker) became apparent in the Grimshaw appeal court’s discussion regarding the sufficiency of the evidence to support the finding of malice and corporate irresponsibility.\(^{107}\) The court acknowledged that 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 against corporate profits.”\(^{108}\) The court found that Ford’s institutional mentality was shown to be one of “callous indifference to public safety.”\(^{109}\) The court concluded that Ford’s decision to proceed with the production of the defective Pinto constituted corporate malice.\(^{110}\)

Careful cost-benefit analysis with heavy emphasis on the benefits factor (savings in terms of the reduction in both the number of fatalities and the seriousness of injury) seems, therefore, to be the mandated trend. Indeed, the Leichtamer case clearly stands for the proposition that either inadequate testing or failure to test will automatically generate a punitive damages assessment.\(^{111}\)

Is there a justification for mandating the use of cost-benefit analysis when the result of its use can be as devastating to a manufacturer as the Grush-Saunby memorandum was in the Grimshaw litigation? One may argue that the use of cost-benefit analysis where human life

\(^{106}\) The $5.25 nylon bladder alternative can be found supra part IIA.

\(^{107}\) Grimshaw, 119 Cal. App. 3d at 812-14, 174 Cal. Rptr. at 384-85.

\(^{108}\) Id. at 813, 174 Cal. Rptr. at 384.

\(^{109}\) Id.

\(^{110}\) Id. at 814-15, 174 Cal. Rptr. at 385.

is involved is inherently unethical; however, the danger in accepting this view "is that common and complex safety-related decisions would be made with even less concern for the interests and rights of consumers and affected persons than is now the case. Instead of using CBA (cost-benefit analysis), corporate decision-makers would simply play their hunches."112 In any event, it is doubtful that industry would abandon the use of cost-benefit analysis because "[c]ost benefit analysis is fundamental to the design engineer's trade."113

If cost-benefit analysis is mandated, what is the justification for the type of intense scrutiny given the analysis when examined by a judge or jury? Such scrutiny is justified because of the ethical concerns inherent in the use of cost-benefit analysis in the industrial setting. First, the party who makes the design decisions is the party who will profit from the application of the cost-benefit analysis.114 Second, the manufacturer directly, and each consumer of a product indirectly, benefits from a less expensive design while the burden is borne by those few who are injured.115 Third, the individual consumers of a product cannot participate in the design decision.116 Finally, valuation of life and limb is an especially troublesome matter.117 In this setting the manufacturer's responsibility is at its greatest. The need for a decision is clear; the designer is the only party with the opportunity or capability to make the decision. Once the product rolls off the assembly line with no possibility of alteration, the manufacturer becomes the party of "last resort."118 Strict scrutiny of a manufacturer's choice is merited in this setting.

The likelihood that a court may approve not only the assessment of punitive damages but also the amount of the total award119 should

112. May, §5 for Lives: Ethical Considerations in the Use of Cost/Benefit Analysis by For-Profit Firms, 4 Risk Analysis 35 (1982) [hereinafter cited as May].
114. May, supra note 112, at 41.
115. Id.
116. Id. at 42.
117. Id.
118. Id. at 41.
119. At this point it should be noted that the trial court in Grimshaw reduced the jury's $125 million award to $3.5 million. Although this may have provided some solace to Ford, there are indications that huge punitive damage awards of this nature may not always be inappropriate. In discussing Grimshaw's appeal on this point, the
place the automobile industry on guard in making safety-related design decisions. The *Grimshaw* court noted that in determining the excessiveness of a punitive damages assessment, comparison of the amount awarded with awards in other cases is not a valid consideration. The fact that an award may set a precedent by its size does not, in and of itself, render it suspect. Here, the court noted that Ford’s net worth was $7.7 billion and its income after taxes for 1976 was over $983 million. Thus, the punitive award was approximately .005% of Ford’s net worth and approximately .03% of its 1976 net income.

If corporate decision-making in the automobile industry continues to result in the kind of situations represented in the *Grimshaw* and *Leichtamer* cases, the evolving trend to use the punitive damages mechanism to assure cost-benefit analyses weighted in the consumer’s favor will also continue. Practical steps should, and perhaps must, be outlined to prevent malicious corporate irresponsibility.

V. Suggestions for Reform

Recent case law and scholarly commentary have focused extensively on the changing role of the corporation in society and the resulting changes in society’s expectations regarding corporate responsibility. The trend of using the punitive damages mechanism in design defect cases is representative of the societal expectation that massive private economic institutions be accountable to the consuming public. Unless the automobile industry develops ways of insuring design safety in its products, courts will be forced to rely on the punitive damages mechanism with increasing frequency and firmness.

court of appeals noted: “Evidence pertaining to Ford’s conduct, its wealth and the savings realized in deferring design modifications in the Pinto’s fuel system might have persuaded a different fact finder that a larger award should have been allowed to stand.” *Grimshaw*, 119 Cal. App. 3d at 823, 174 Cal. Rptr. at 391 (emphasis added). The court would not hold, however, that the trial judge abused his discretion in deciding what was a fair and reasonable award. Insofar as Professor Owen’s article has influence on this developing area (see discussion *supra* note 4), it should also be noted that under certain conditions Professor Owen acknowledges the necessity of apparently excessive awards and judicial competence to equitably direct their distribution. See Owen, *supra* note 2, at 1319-25.

121. *Id.*
122. *Id.* at 820, 174 Cal. Rptr. at 388-89.
123. The author does not intend to use the phrase “malicious corporate irresponsibility” in a pejorative way. Rather, the phrase is used as an expression of a judicially created definition of clearly undesirable social conduct.
124. See D. RICE, CONSUMER TRANSACTIONS ch. 23 (1975) (compilation of recent literature on the changing corporate role).
Professor Owen noted that the institutional "state of mind" is the key factor in assessing a manufacturer's culpability and hence in determining whether punitive damages are appropriate. He proposed a standard of punitive damages liability tailored to fit the specific needs of products liability litigation: "Punitive damages may be assessed against the manufacturer of a product injuring the plaintiff if the injury is attributable to conduct that reflects a flagrant indifference to the public safety."126

The automobile industry could avoid punitive damages liability and the societal ill-will which is naturally generated from the attendant publicity of such liability by developing intracorporate mechanisms of review which evidence the manufacturer's concern for product safety. Essentially, the mechanisms of review could be classified as pre-accident and post-accident prevention of liability.127

A. Pre-Accident Prevention of Liability

Every automobile manufacturer should initially review its current safety program and decision-making processes to insure that at least the following elements are present.

First, a committee should be active on a permanent, full-time basis to review product integrity specifically relating to design defects. The committee should establish a design review process prior to marketing by conducting safety analysis, identifying hazards, and participating in trade-off decisions.128 Had this process been established at American Motors Corporation, the undesirability of fastening a roll bar to the sheet metal housing of the rear wheels would have been immediately apparent.129 The committee should also review all design changes.130

Second, the committee should review the accountability structures of the decision-making process to assure that the structures are not subject to influences which solely promote profits. The history of difficulties encountered by design engineers trying to fulfill their respon-

125. Owen, supra note 2, at 1362.
126. Id. at 1367.
127. This classification was used in Ross, Prevention and Defense of Manufacturers' Products Liability, Course Handbook Series No. 121, Practicing Law Institute (1978) [hereinafter cited as Ross].
128. Id. at 32.
129. For a more detailed description of the roll-bar attachment problem, see Leichtamer, 67 Ohio St. 2d 459, 424 N.E.2d at 572.
130. A detailed design review process can be found in Ross, supra note 127, at 391-412.
sibility to the public\textsuperscript{131} exposes the problems often present in corporate accountability structures.

Third, the committee should create an atmosphere which encourages support for product safety. Engineers who tried to call attention to an inadequate stopping device on BART railroad cars destined for San Francisco were fired for their efforts.\textsuperscript{132} A crucial expert witness in the Grimshaw case testified that he was forced to take an early retirement because he spoke out on matters of safety.\textsuperscript{133} The committee should insure that efforts by personnel to provide safety are rewarded and not punished.

Finally, the committee should establish cost-benefit analysis procedures which use the factors set forth by the Barker court.\textsuperscript{134} Such analysis will enable management to avoid not only a punitive damages assessment, but also strict products liability.\textsuperscript{135}

B. Post-Accident Prevention of Liability

If a design defect is not discovered at the pre-accident phase and the manufacturer becomes aware that a product line released into the stream of commerce has caused injury to consumers, procedures must be established to insure that the manufacturer not be exposed to liability for failure to warn and to correct. Procedures should include a process by which prompt ascertainment of the cause of the design defect can be established and assessment of means by which the defect can be

\begin{itemize}
  \item[131.] The Code of Ethics § 2 (National Society of Professional Engineers rev. July 22, 1978) reads in part:
  Section 2—The Engineer will have proper regard for the safety, health, and welfare of the public in the performance of his professional duties. If his engineering judgment is overruled by non-technical authority, he will clearly point out the consequences. He will notify the proper authority of any observed conditions which endanger public safety and health.
    a. He will regard his duty to the public welfare as paramount [sic].
    c. He will not complete, sign, or seal plans and/or specifications that are not of a design safe to the public health and welfare and in conformity with accepted engineering standards. If the client or employer insists on such unprofessional conduct, he shall notify the proper authorities and withdraw from further service on the project.


  \item[133.] Grimshaw, 119 Cal. App. 3d at 785, 174 Cal. Rptr. at 366-67.

  \item[134.] See supra note 84.

  \item[135.] This, of course, assumes that management will not make the decision against an alternative design when the cost-benefit analysis justifies such an alternative.
remedied. The corporation must then determine whether a warning would be insufficient in the circumstances of actual use.136 Not only did Ford fail to issue any warnings to purchasers of the Pinto, it strenuously fought a recall program until 1978.137 It is clear that the doctrine of punitive damages will apply in situations where manufacturers fail to warn of known risks138 as well as to their post-marketing failures to remedy known dangers. Naturally, recall programs can be very expensive. This is the very reason that design defects should be ferreted out in the pre-accident phase. The automobile industry seems to be aware of this fact.139

VI. Focus for the Future:

Responsibility vs. Accountability140

Perhaps the trend towards relying on punitive damages as a mechanism to deter industrial misconduct can be summarized through the close examination of two concepts: responsibility and accountability. Within the subtle distinctions between these two concepts may lie the answer as to why punitive damages can succeed where other mechanisms have failed. Although the economic cost to industry concomitant with the punitive damages mechanism may be great, the corresponding intangible societal savings should counterbalance this loss.

Society’s goal should be responsibility and the promotion of an individual’s introspective examination of his own conduct, but the accountability structures aimed at this goal generally fall short. Government regulation and the civil and criminal law are composed of sets of specific rules to govern conduct. An individual need not examine the propriety of his conduct beyond the bounds of these rules, for he will not be held accountable for acts not proscribed. An individual need not be truly responsible unless the laws or regulations define for every situation the extent of society’s expectations and desires for an individual’s behavior, and this these mechanisms cannot do.

137. See Schmitt & May, supra note 2, at 1024.
138. See Owen, supra note 2, at 1352-61.
139. According to a recent Associated Press dispatch from Detroit, Ford Motor Co. recently announced a $200 million, five-year quality improvement program with the slogan, “Do It Right The First Time.” The Los Angeles Herald Examiner, Mar. 5, 1979, § C, at 2, col. 5.
140. Some of the ideas expressed in these concluding remarks appeared in an earlier article by this author. See Schmitt & May, supra note 2, at 1043-50.
The punitive damages mechanism overcomes this flaw. Because the standard for imposition of punitive damages is stated in terms reflecting an individual's state of mind rather than merely his conduct, an individual is forced to consider, before taking action, the opinion of his peers regarding the propriety of his conduct. When his peers judge his conduct while sitting on a jury, they determine not whether a specific provision of the law has been violated, but whether his conduct fell below societal expectations in the particular factual context involved. The question follows as to whether this mechanism can work when an industrial entity, rather than an individual, is involved.\footnote{141}

The compensatory damages mechanism focuses on the actions of an industrial entity and compensates an individual who is injured by those actions. Similarly, an award of punitive damages is assessed against the entity and in favor of the injured party. The punitive damages mechanism is not concerned with the conduct which injures, but with the motives of the individuals, whether director, officer, or employee, who made the conscious decisions which resulted in the injury. Although these individuals are not forced to bear the economic cost of punitive damages, it is their decisions and conduct which are held up to public scrutiny. Those who have behaved irresponsibly are identified as the cause of the economic loss to the entity. Thus one would expect that the individual at fault would be held accountable, not only by society but by the entity itself, as the cost to the entity can be more than substantial.

Corporate responsibility is not cheaply purchased. The economic cost is borne directly by industry and it can be devastating.\footnote{142}

\footnote{141. This issue is discussed by Professor Owen in his most recent article; however, this author does not agree completely with his conclusions. See Owen 1982, \textit{supra} note 2, at 15-16.}

\footnote{142. Professor Owen raises this concern in his most recent article. See Owen 1982, \textit{supra} note 2, at 6. See also Wangen v. Ford Motor Co., 97 Wis. 2d 260, 331, 294 N.W.2d 437, 472 (1980) (Coffey, J., dissenting) ("The implications for free enterprise system, and therefore the structure of our economy, are too disturbing to leave a decision of this magnitude to five jurists."). See also \textit{Business Week}, Jan. 12, 1981, at 86, for observations of products liability lawyers on the increasing frequency of cases of this type; H. Nolte (Vice President and General Counsel, Ford Motor Co.), Comments on Products Liability Law 20-23 (unpublished address to ABA Comm. on Corporate Law Departments, Spring, 1981) (on file with \textit{The University of Chicago Law Review}). See generally \textit{U.S. Dept. of Commerce, Interagency Task Force on Product Liability, Final Report VII-75 to -80} (1977).

It should not be inferred that plaintiffs always win products liability cases. "Studies of recent products liability case outcomes vary in their results, with defendants prevailing in 50-75% or more of the cases." See W. \textit{Keeton, D. Owen & J. Montgomery, Products Liability and Safety: Cases and Materials} 28 (1980).}
sider, for example, the fate of the Manville Corporation which recently filed for bankruptcy reorganization in the wake of over 15,550 present and 32,000 potential lawsuits arising from asbestos-related injuries to workers.\textsuperscript{143} A recent decision by the California Supreme Court allowed a worker with asbestos-related injuries to recover damages beyond workmen's compensation. That ruling surely played a part in the \textit{Johns-Manville} case\textsuperscript{144} in which there was a prayer for punitive damages.\textsuperscript{145} Of course, the economic price of responsibility is ultimately paid by the consumer in the form of higher priced products.

Is responsibility worth the price? This author believes that it is. As industry becomes responsive to societal expectations, the economic cost of responsibility will decrease. But the ultimate reward for responsibility will be less obvious; it will be the reduction of human suffering which results from irresponsibility.

\textsuperscript{143} \textit{In re Johns-Manville Corp.}, 26 Bank. 405, 407 (S.D.N.Y. 1983). \textit{See also} Parnell, \textit{Abstract Bankruptcy: Are They the Answer?}, 12 \textit{Brief} 5 (1983).


\textsuperscript{145} \textit{Id.} at 470, 612 P.2d at 951, 165 Cal. Rptr. at 861.