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Margaret D. Lineberry

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## PRODUCTS LIABILITY VERSUS NEGLIGENCE—VERDICT INCONSISTENCY AND PUNITIVE DAMAGES

*Rinker v. Ford Motor Co.*<sup>1</sup>

While test driving a used 1969 Ford LTD automobile, Patricia Rinker checked the car's acceleration by fully depressing the accelerator pedal. The car's speed continued to increase when she lifted her foot from the pedal, and the car could not be slowed with the brakes. With the car traveling at about 70 m.p.h., Rinker approached a busy intersection, where the cars in her lane were stopped for a light. To avoid colliding with them, she turned the car left into a concrete median. Upon striking the median, the LTD became airborne and struck a car in the intersection.

Rinker sustained severe injuries in the collision and sued Ford Motor Company, who manufactured the automobile, and Bill Woods Ford, the automobile dealer who arranged the test drive, in strict liability. She also proceeded against Ford on a theory of negligent failure to warn. She alleged that the car's acceleration continued even after the gas pedal was released because the fast idle cam, a nylon part of the carburetor assembly, had broken when the accelerator was pressed and had wedged against the fast idle lever, holding open the throttle valves of the carburetor. At trial, Rinker presented testimony that the nylon from which the cam was made was likely to deteriorate when exposed to conditions under the hood of a car. Further testimony indicated that the carburetor was so designed that nothing prevented the fast idle cam from, if it broke, rotating into a position jamming the fast idle lever.

The jury returned a general verdict against Ford for \$100,000 actual damages and \$460,000 punitive damages, which were authorized under the negligent failure to warn submission. Defendant Bill Woods Ford, subject only to the strict liability submission, was exonerated. On Ford's appeal, the trial court's judgment was affirmed by the Kansas City district of the Missouri Court of Appeals. The *Rinker* decision is significant in two respects: an apparently inconsistent verdict was allowed to stand, and punitive damages were, for the first time in Missouri, recovered in a products liability suit.

Ford argued on appeal that its motion for judgment n.o.v. should have been sustained for verdict inconsistency. The basis of its contention was an analysis of the verdict-directing instructions submitted. While this analysis may indeed have pointed up a potential legal inconsistency in the resultant

findings and verdict, the factual situation was such that logically this verdict could have reasonably been returned.

Ford argued that the return of a general verdict against it for both compensatory and punitive damages was possible only under the negligent failure to warn submission. This meant, Ford urged, that the jury must have exonerated both defendant Bill Woods and Ford on the strict liability submission. The asserted verdict inconsistency was premised on Ford's evaluation of the contents of the instructions. Ford concluded that the only difference between the two verdict directors was the inclusion of the term "defective" in the strict liability instruction,<sup>2</sup> since every other element contained therein also appeared in the negligent failure to warn instruction.<sup>3</sup> Ford's contention was that since the jury had failed to find for the plaintiff on the strict liability theory, it must have been unconvinced that the product was "defective." And if the jury could not satisfy itself as to the "defective" nature of the vehicle a verdict against Ford on the negligent failure to warn submission was precluded, since no duty to warn could arise if the product was not defective.

In defense of its inconsistency argument, Ford adduced cases reversed by Missouri courts for inconsistency in which the right to recover was dependent upon, or derivative from, a prior finding. These included respondeat superior actions and claims for personal injury and loss of consortium.

The *Rinker* court, however, summarily rejected Ford's contention that the verdict holding Ford liable under the negligent failure to warn submission while apparently exonerating both defendants from strict liability was inconsistent. It sustained the findings on the basis that the theories relied on were "separate and distinct theories of liability."<sup>4</sup> The court concluded that where several such claims are joined for trial, "consistency among the verdicts disposing of the several issues is not required."<sup>5</sup>

A parallel case arising in California, *Hasson v. Ford Motor Co.*<sup>6</sup> offers an explanation for sustaining these apparently inconsistent findings. It dealt with a used car's brake failure which allegedly resulted from heat-induced vaporization of the brake fluid. In response to special interrogatories, the jury found that no defect in the vehicle existed at the time it was manufactured by Ford, but that Ford, nevertheless, was negligent. This express finding of lack of defect at the time of manufacture distinguishes the *Hasson* case from the noted case, as this finding could only be surmised in *Rinker*. Ford advanced a similar argument in the *Hasson* case as it did in *Rinker* that a finding of negligence depended on a finding of defect. The California court, as in the instant case, found it unnecessary

2. MO. APPROVED INSTR. NO. 25.04 (1969).

3. MO. APPROVED INSTR. NO. 31.01 (1969).

4. 567 S.W.2d at 660.

5. *Id.* at 659 (citing *Page v. Hamilton*, 329 S.W.2d 758 (Mo. 1959)).

6. 19 Cal. 3d 530, 138 Cal. Rptr. 705, 564 P.2d 857 (1977).

to pursue that reasoning and noted that evidence was adduced and instructions were submitted such that the jury could "choose *either* theory as a self-sufficient basis of Ford's liability."<sup>7</sup> Further, the court concluded that "there was no suggestion that failure to find *one* element of *one* theory would preclude assessment of liability on the other."<sup>8</sup>

However, the California opinion is enlightening since it went on to speculate as to the basis for the jury's findings. Perhaps, the court reasoned, although the car was not "defective" at the time of manufacture, the gradual deterioration of some of the component parts as a result of time and use eventually rendered the vehicle dangerous, and Ford could logically be held liable for its failure to warn of these potentialities. This same reasoning could be applied to the *Rinker* case such that Ford could be found negligent for failure to warn, especially considering evidence that Ford had received prior notice<sup>9</sup> of the cam's tendency to break and lodge against the fast idle lever.

The problem in *Rinker* of a potential verdict inconsistency is a difficult one. Ford's argument is, granted, logically seductive. How could the jury, one might ask, arrive at the conclusion that Ford even had a duty to warn if there were no defect inherent in the automobile? On the other hand, the court's conclusion that the theories of liability were separate and independent seems equally compelling, especially if the *Hasson* reasoning is employed. The *Rinker* court noted that the jury requested a definition of the term "defective;"<sup>10</sup> this, considered with the verdict returned, leads one to suspect that the jury felt the vehicle was fit for its intended use at the time of manufacture but that with the passage of time, the nylon's deterioration led to a defect that gave rise to a duty to warn.

From the standpoint of legal theory, Ford's analysis of the instructions and the relationship they bear to each other is sound. The *Rinker* case, however, simply points up the difficulty of conforming relatively static jury instructions to varying factual situations. The 1978 version of the *Missouri Approved Instructions* for strict liability and negligent failure to warn are vulnerable to this same possibility of asserted inconsistency, because just as in the 1969 version used in *Rinker*, the 1978 strict liability instruction<sup>11</sup> employs the term of art "defective," while the corresponding negligent failure to warn instruction<sup>12</sup> only requires that the article in question be named and that its alleged hazard be described. Thus, given a similar set of facts and an equally resourceful defendant, the situation could again arise in which a defendant is seemingly held liable for negligent failure to warn concerning a product with no "defect."

7. *Id.* at 541, 138 Cal. Rptr. at 712, 564 P.2d at 864.

8. *Id.*

9. Ford received 29 reports over a period of four years. 567 S.W.2d at 663.

10. *Id.* at 659.

11. MO. APPROVED INSTR. NO. 25.04 (West Supp. 1978).

12. MO. APPROVED INSTR. NO. 25.05 (West Supp. 1978).

*Rinker* is the first products liability suit in Missouri in which punitive damages have been recovered.<sup>13</sup> The authorization for punitive damages, however, was under a negligent failure to warn submission. Thus, while its character as a products liability action makes it a first of sorts, the court applied the same requirements for the punitive damages recovery as would be used in any negligence suit. There are, however, other theories of recovery subsumed under the appellation "products liability" in which an award of punitive damages might seem to pose a more difficult problem.

Ford attacked the punitive damages award<sup>14</sup> with the argument that such an award is inappropriate in a products liability action.<sup>15</sup> The basis of its contention was the contrast between the possible consequences of a suit for damages for an intentional tort with those of a products liability suit.<sup>16</sup> In the former, there is usually but one victim who can bring suit and recover punitive damages from the tortfeasor. In the instance of a defective mass-produced product, the manufacturer could conceivably be held liable for punitive damages to a great number of injured consumers all over the country.

Ford's argument was premised on the reasoning of Judge Friendly of the Second Circuit in *Roginsky v. Richardson-Merrell*,<sup>17</sup> the case that heralded the beginning of the modern era of punitive damages claims in products liability litigation. *Roginsky* involved MER/29, a drug developed

13. An earlier Missouri case that may have had precedential value as to the question of recovery of punitive damages in a products liability suit was *Crews v. Sikeston Coca-Cola Bottling Co.*, 240 Mo. App. 993, 225 S.W.2d 812 (Spr. 1949). Although it was held that the evidence was insufficient to support an award of punitive damages, the suit gives indication that Missouri could recognize the validity of such an award. This is apparently the only Missouri case on the question to predate *Rinker*.

14. It should be pointed out that the term "products liability" does not designate a theory of recovery, but is used to describe a suit in which a defect in the design, material, or preparation of a product is alleged and where damages are sought on a theory of negligence, 402A or warranty, for example. See generally Igoe, *Punitive Damages in Products Liability*, 34 J. MO. BAR 394 (1978); Owens, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976); Comment, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1972); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957); Comment, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA LAW. 895 (1976).

15. A similar argument is often made concerning the "anomaly" of any award of punitive damages in a tort action, the contention being that it is not the office of the civil law to punish. But as Professor Morris observed, in our fault-based system of tort liability, the reparative function of a tort judgment is coupled with an admonitory one. If the defendant's past conduct is not deserving of punishment, *i.e.*, if he has not been guilty of negligence or intentional wrongdoing, then the injured plaintiff will ordinarily not receive monetary recompense. Morris, *Punitive Damages in Tort Claims*, 44 HARV. L. REV. 1173 (1931).

16. Brief for Appellant at 90.  
17. 378 F.2d 832 (2d Cir. 1967).

and marketed by the defendant designed to aid in the treatment of arteriosclerosis, but causing harmful side effects. In the nationwide litigation which ensued from the marketing of this drug,<sup>18</sup> there was evidence that Richardson-Merrell had falsified data that had accompanied its new drug application to the Federal Drug Administration and had withheld important information concerning side effects such as cataracts, hair loss, and ichthyosis.<sup>19</sup> The award of punitive damages in *Roginsky* was reversed while the compensatory damages judgment was affirmed. One of the major concerns entertained by Judge Friendly in this influential opinion was that a manufacturer who had not otherwise engaged in irresponsible behavior could be driven into financial ruin by an error in judgment concerning a single product, leading to numerous punitive damages claims.<sup>20</sup>

When faced with Ford's reiteration of Judge Friendly's exposition of this theoretical danger, the *Rinker* court pointed out that the punitive damages award had been reversed in *Roginsky* not because such awards are inappropriate in products liability suits but because the evidence was insufficient to satisfy a technical requirement of New York law. Judge Friendly's disapproval of awards of punitive damages in products liability actions for policy reasons was dicta.

With the rejection of Ford's assertion and the affirmance of the punitive damages judgment, Missouri is aligning itself with the growing number of states which allow the recovery of punitive damages in products liability suits. None of the state and federal courts which have considered the question have found such awards to be incongruous with the principles of products liability actions, although some have reversed punitive damages awards where they have found the evidence of the defendant's misconduct insufficient to warrant such an award. Of the reported cases, California,<sup>21</sup> Hawaii,<sup>22</sup> Illinois,<sup>23</sup> New York,<sup>24</sup> Ohio,<sup>25</sup> and Tennessee<sup>26</sup>

18. See Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968).

19. See *Toole v. Richardson-Merrell, Inc.*, another MER/29 case, but one in which the evidence characterized Richardson-Merrell's behavior in a way quite opposed to the characterization in *Roginsky*. 251 Cal. App. 2d 689 at 695-702; 60 Cal. Rptr. 398 at 404-08 (1967).

20. 378 F.2d at 841.

21. *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

22. See *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975), in which defendant was ordered to answer interrogatories concerning financial worth for punitive damages claim.

23. *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).

24. Professor Owens, *supra* note 14 at 1327, n.333, refers to an unreported case, *Ostopowitz v. Richardson-Merrell, Inc.*, N.Y.L.J., Jan. 11, 1967, at 21, col. 3 (Sup. Ct. Westchester County, N.Y.).

25. *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1976).

26. *Johnson v. Husky Indus., Inc.*, 536 F.2d 645 (6th Cir. 1975), *cert.*

have upheld on appeal punitive damages judgments in products liability suits. Florida<sup>27</sup> and Pennsylvania<sup>28</sup> have reported products liability cases in which punitive damages awards have been reversed for insufficiency of evidence as to the defendant's gross malfeasance.

The real question in the products liability arena seems not to be whether punitive damages may be awarded in such actions at all, but under which theories of recovery. In the *Rinker* suit, as mentioned, the punitive damages award was assessed under the negligent failure to warn theory. Awarding punitive damages under a negligence theory, even in a products liability action, would seem to present little difficulty as far as assimilation into our present torts system. If the tortfeasor's behavior is deemed sufficiently egregious, punitive damages can be recovered for gross negligence.

The more difficult situation is a request for compensatory and punitive damages under a warranty or a strict liability submission. If an action is brought in warranty, there are two obstacles to recovery of punitive damages: the rule in contract actions that no punitive damages may be awarded because of the need for certainty of liability in commercial transactions, and the Uniform Commercial Code, which governs most warranty claims. Section 1-106(1) provides that "[t]he remedies provided by this Act shall be liberally administered . . . but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law." The official comment to this section states that the section is included "to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages. . . ." Because of this provision, it seems that recovery of punitive damages would be precluded in a warranty action controlled by the Code.<sup>29</sup>

Finally, there is the situation in which compensatory and punitive damages are requested under a strict liability submission. At first, this combination seems logically impossible because of the apparent incompatibility between the no-fault nature of strict liability and the recklessness or wantonness of the behavior requisite to support a punitive damages claim. However, as Professor Owens points out, the incompatibility argument is premised upon the erroneous assumption that the proof required to establish the punitive damages claim is the same as that required to substantiate the strict liability claim.<sup>30</sup> This is not true. Instead, it is acceptable to establish the strict liability claim and then, by additional proof, the

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27. *E.R. Squibb & Sons, Inc. v. Stickney*, 274 So. 2d 898 (Fla. Dist. Ct. App. 1973), *cert. denied*, 416 U.S. 961 (1974).

28. *Thomas v. American Cyst. Makers, Inc.*, 414 F. Supp. 255 (E.D. Pa. 1976).

29. For a good discussion of punitive damages claims in warranty actions, see Owens, *supra* note 14, at 1271.

punitive damages claim of aggravated fault. This was the reasoning pursued by the Wisconsin federal court in *Drake v. Wham-O Manufacturing Co.*,<sup>31</sup> the first suit to combine a strict liability count with one for punitive damages. The court held that although the proof required to make out a strict liability claim would be insufficient to justify punitive damages, the plaintiff had also alleged a wanton disregard for the safety and well-being of the deceased by the defendant, and that evidence to support that claim would justify a punitive damages award.<sup>32</sup> The most recent cases addressing this question are *Heil Co. v. Grant*,<sup>33</sup> and *Maxey v. Freightliner Corp.*,<sup>34</sup> a crashworthiness case. The federal court in the *Maxey* case dealt with the question of a punitive damages claim accompanying a strict liability submission by noting that the two are independent concepts with different purposes:

The purpose of one is compensation and the purpose of the other is deterrence. The focus of one is redistribution of loss and the focus of the other is punishment. They are related to the extent that actual injury must support an exemplary award and to the extent that some cases suggest that there must be a relationship between the amounts of actual and exemplary damages.<sup>35</sup>

The court then stated that the federal rules allow the "simultaneous presentation of single claims upon different theories,"<sup>36</sup> and that this combination is essentially a matter "of trial efficiency and presents no true substantive issues."<sup>37</sup>

The most important consideration remaining unresolved is the level of malfeasance that the defendant's behavior must reach before punitive damages will be appropriate in strict liability or, possibly, warranty actions. In Missouri, punitive damages are imposed where the defendant has displayed outrageous misconduct. As the court stated in *Warner v. Southwestern Bell Telephone Co.*:<sup>38</sup>

The acts of the defendant which will justify the imposition of punitive damages are those which are willful, wanton, malicious or so reckless as to be in utter disregard of the consequences. Such

31. 373 F. Supp. 608 (E.D. Wis. 1974).

32. However, the *Drake* case was strongly criticized two years later by the same court in *Walbrun v. Berkel, Inc.*, 433 F. Supp. 384 (E.D. Wis. 1976). The *Walbrun* court based its disapproval on the fact that in Wisconsin punitive damages may be recovered not for gross negligence but only for intentional torts. Thus, although there may have been evidence of wanton, willful, or reckless disregard of the plaintiff's rights, a punitive damages award would be improper.

33. 534 S.W.2d 916 (Tex. Civ. App. 1976) (wrongful death suit; dicta that exemplary damages are recoverable under a strict liability theory for defective design and failure to warn).

34. 450 F. Supp. 955 (N.D. Tex. 1977).

35. *Id.* at 961.

36. *Id.*

37. *Id.* at 962.

38. 428 S.W.2d 596 (Mo. 1968).

acts are clearly distinguished from negligence. While they need not always include an intent to do harm, they must show such a conscious disregard for another's rights 'as to amount to willful and intentional wrongdoing.'<sup>39</sup>

In *Rinker* the jury returned a verdict against Ford for punitive damages, based on Missouri Approved Jury Instruction 10.02. That instruction required that the jury find that Ford's conduct showed "complete indifference or conscious disregard for the safety of other."<sup>40</sup> In *Evans v. Illinois Central Railway Co.*,<sup>41</sup> the court discussed the meaning of these terms:

A wanton act is a wrongful act done on purpose, or in malicious disregard of the rights of others. Recklessness is an indifference to the rights of others and an indifference whether wrong or injury is done or not. As we understand the words 'conscious disregard for the life and bodily safety,' they add nothing to the words 'willful, wanton and reckless' and are included within the meaning of those words. As applied to an act, they necessarily mean that such act was intentionally done without regard to the rights of others, and in full realization of the probable results thereof.<sup>42</sup>

The *Rinker* court used the case of *Reel v. Consolidated Inventory Co.*<sup>43</sup> to illustrate the "nature of conduct which may be found to amount to conscious disregard of the safety of others."<sup>44</sup> *Reel* was a negligence suit in which punitive damages were assessed.<sup>45</sup> It involved an owner of a building who, after having been notified by city inspectors of a worn elevator cable, had taken no action for six weeks. The cable broke while the plaintiff was in the elevator, causing him to sustain severe injuries. The court said that the owner's failure to replace the cables during the six-week period "was not, and under the circumstances could not have been, the result of mere inadvertence, but of an utter indifference to the rights of those whose lives and limbs were thereby daily and hourly imperiled, equivalent to intentional wrongdoing."<sup>46</sup>

The *Rinker* court analogized the behavior of Ford to that of the defendant in *Reel*. Ford had received twenty-nine reports of cam breakage during a four-year period yet had remained inactive. It was concluded that on the evidence the jury could have found Ford guilty of conscious disregard of the safety of all of those people who could be endangered by a Ford auto with cam failure.

39. *Id.* at 603.

40. MO. APPROVED INSTR. NO. 10.02 (1969).

41. 289 Mo. 493, 233 S.W. 397 (En Banc 1921).

42. *Id.* at 503, 233 S.W. at 400.

43. 236 S.W. 43 (Mo. 1921).

44. 567 S.W.2d at 668.

45. The judgment was reversed because of an error in the punitive damages instruction. 236 S.W. at 47.

46. *Id.* at 46.