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### The "Middle Ground" of Products Liability Analysis

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Professor Kelder

Torts: Personal Injury Law

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### The “Middle Ground” of Products Liability Analysis

The area of products liability has been the subject of intense debate for the past half-century, perhaps never more strongly than the decades comprising the second half of the twentieth century. Specifically, the 1970s was the decade that introduced the judicial community to this debate. In the 1970s and a few decades prior, consumerism skyrocketed to levels never seen before in the United States and in the world. Logically, this drastic increase in consumerism came with a drastic increase in products liability lawsuits. Manufacturing companies and corporations were forced to pay damages to injured parties at levels they never came close to prior. As a result, they used their wealth and power to influence legislatures to change the law in their favor. Courts, beholden to special interests, took the opposite approach to counteract this imbalance. The result was a decades-long back and forth of extremism. Depending on the time period and depending on the jurisdiction in question, there were two extremes: one that regularly ruled against corporations with drastic variations in punitive damage amounts that accomplished little to deter wrongful conduct, one of the purposes of tort law, and one that regularly ruled against plaintiffs with unreasonable, unconstitutional reform statutes and evidentiary standards. Throughout the past half-century, there has been what amounts to a “tug-of-war” process in which the judicial and legislative branches of government, both at the federal and state level, have caused a back and forth paradigm from a pro-plaintiff mindset to a pro-corporation one. The ideal way for products liability analysis to operate lies on a “middle

ground” which society has failed to come close to reaching. In Part One of this paper, the facets of the corporate interest of limiting the scope of products liability as well as the plaintiff interest of holding manufacturers accountable for the harm that their products cause will be analyzed and evaluated for their effects on society as a whole. A specific focus will be paid to the economic consequences of these factions’ policies. In Part Two, a “middle ground” solution will be proposed that limits the harms that both have inflicted throughout the years and maximizes the benefits that both have contributed. These solutions, if enacted, will lead to a greater understanding of the roles and expectations of manufacturers and consumers in the future, thereby eliminating the possibility of the contrivance of gray areas for exploitative purposes.

#### Part One: “Tug-of-War” Between Injured Parties/Courts and Corporations/Legislatures

This “Tug-of-War” between plaintiffs, through the judicial branch of government, and defendants, through the legislative branch of government, has consisted of a constant back-and-forth. Both sides have made headway at times but, generally speaking, both sides have failed to sustainably accomplish their goal of creating an unfair advantage that favors their interests. There are certain jurisdictions in which legislatures have made more strides than courts just as there are certain jurisdictions in which courts have made more strides than legislatures. Overall, though, neither side has altered the process of products liability for a significant length of time. This part will explore what each side has sought to accomplish in its quest for dominance in the sphere of products liability. Specifically, this part will explain in depth 1) the desire of corporations to make it impossible for those whom they injure to obtain compensation through

their push for statutes of repose and their push to implement a judicial interpretation that is designed specifically for pre-industrial times and 2) the desire of courts to implement a products liability analysis that seeks to punish corporations excessively rather than examine the merits of individual cases brought before them through improper jury guidance concerning punitive damages that fail to follow a concrete system of analysis.

To understand exactly what this legal and political war between corporations and the consumers that they injure is about, one must first understand exactly why this war began in the first place. The drastic increase in products liability lawsuits in the 1970s occurred because industrialization expanded so widely and, therefore, more people were becoming injured (Freudenberg, 2014, pp. 77-78). The reason why industrialization expanded as widely as it did in the 1970s and beyond is because of a sudden surge in technological innovation. Id. Corporations had been in existence for hundreds of years prior but were not in possession of the technology necessary to create a coordinated plan to ensure that as many individuals were dependent upon their products as possible. Id. Throughout the 1970s and the several decades after, creativity and innovation took off at levels never seen before. Id. This made it much easier for large corporations to communicate for the purpose of maximizing their power and influence. Id. While these corporations were competitors, they were also naturally allies as they had the same goals of creating a necessary reliance on their products that they realized could be achieved if they worked together. Id. This increase in technology made this possible. Id. These wealthy corporations used these tools not only to communicate with each other, but also to communicate with consumers. Id. While the interests of consumers generally are opposed to these corporations, enough consumers were convinced that this was not the case. Id. This consumer communication was primarily carried out through advertising. Id. Advertising made

corporations even wealthier than they already were. Id. As a result, more jobs were created, thereby adding more women to the workforce. Id. As a result, fewer women were cooking for their family at home, thereby growing the influence of large food corporations even further. Id. This was an endless cycle that has become known as “the rich getting richer.” In other words, the wealthy becoming wealthier made it easier and more likely that they would become even wealthier. This was a never-ending cycle that gave corporations seemingly endless influence. In fact, “by 1998, according to the Center for Responsive Politics, special-interest groups had accumulated more than thirty-eight registered lobbyists and \$2.7 million in lobbying expenditures for every member of Congress. Between 2000 and 2005 alone, the number of registered lobbyists in Washington, D.C., more than doubled, from 16,342 to 34,785, and annual spending on federal lobbying reached \$2 billion.” Id. at 85. One of the many areas in which they used this influence was in products liability, through statutes of repose and the implementation of laws designed for pre-industrial times, which produced a response from the legal system.

One way in which corporations and the legislatures that they have influenced have dangerously limited the scope of products liability is through statutes of repose. Terry Morehead Dworkin, *Product Liability of the 1980s: Repose Is Not the Destiny of Manufacturers*, 61 N.C. L. REV. 33 (1982). Statutes of repose are statutes that prevent injured parties from bringing claims for their injuries after a certain period of time, regardless of when a cause of action is apparent to the party. Id. at 33. Statutes of repose were viewed by corporations as the best way to limit the ability of injured parties to bring suit. These statutes turned the way in which products liability functioned on its face. Since injuries caused by products often do not manifest themselves until years after they are consumed, it would be foolish for any objective, reasonable person to argue that statutes of limitations should be interpreted in such a way as to begin at the time that the

product was used rather than the time that the injury became visible. This is exactly what corporations and legislatures argued was the most just way for products liability actions to be analyzed and that is what these statutes of repose were designed to incorporate. Id. at 35. Statutes of limitations are an absolute necessity in products liability in order for potential defendants to be able to function without interference after a certain period of time. If manufacturers constantly have to worry about potential lawsuits stemming from incidents that happened several decades ago, their ability to function and subsequently maximize their contributions to the community will be diminished. That is not the purpose of products liability. The purpose of products liability and torts in general is to ensure that all injured parties are made whole. Indirectly, the purpose is to ensure that all people are treated fairly and able to reach their full potential. There comes a point where the interest in making an injured party whole is outweighed by a defendant's desire to be free from old, irrelevant claims. Id. at 36. The problem with statutes of repose is that they turn the statute of limitations as a necessity to ensure that defendants can function without unreasonable interference into an evil that prevents legitimately injured parties from having any recourse to achieve justice. American corporations were so desperate to suppress this influx of legitimate litigation that occurred in the 1970s that they had successfully lobbied a majority of state legislatures by 1982 to adopt reform statutes, the vast majority of which included statutes of repose. Id. at 34. In effect, these statutes made it so that if manufacturers knew that they could enrich themselves by selling a product that they knew would cause harm to consumers, they could sell that product so long as it would take a certain amount of time for the injury to appear. This simply flies in the face of the entire purpose of products liability.

Another way in which corporations and the legislatures that they have influenced have dangerously limited the scope of products liability is through the re-introduction of laws that were eliminated through case law and statutory law due to their irrelevance to modern times. Frances E. Zollers, Sandra N. Hurd & Peter Shears, *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 Syracuse L. REV. 1019 (2000). Prior to the beginning of mass industrialization in the United States, products were almost always sold directly from manufacturers to consumers. *Id.* at 1021. As a result, it is logical that product liability law required that the manufacturer and consumer be in privity in order for the consumer to state a valid claim as a result of an injury. *Id.* There could not be a “middleman,” in other words. With the advent of mass industrialization, however, came a drastic surge in the presence of these “middlemen.” Large manufacturing corporations were born which sold products to retailers before they ultimately landed in the hands of consumers. As a result, a large percentage of those injured by defective products had no recourse under the law in order to receive compensation for the damages that they endured. *Id.* The judicial system was forced to respond in order to correct this imbalance and it did so through MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916). This was a case in which Buick Motor Company sold a vehicle to a car dealership which resold said vehicle to a consumer. *Id.* at 385. The consumer was thrown out of the vehicle and seriously injured as a result of it collapsing while he was driving. *Id.* The reason why this happened is because one of the wheels was made of defective wood. *Id.* The court broke precedent in holding that Buick Motor Company had a duty of care to MacPherson and breached said duty. *Id.* at 394. This case changed the privity requirement by holding that a manufacturer has a duty of care to those it does not sell its products directly to. The court responded to this industrial era by ruling that plaintiffs have rights and that even if they are not

buying products directly from the manufacturer like they have in the past, they should still have a means to be compensated for harm that they suffer. While this was a step in the right direction, it was clear that it was not enough as proving negligence is difficult to impossible when the manufacturer had no direct relationship to the party who was injured. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (NJ 1960) created a precedent of removing this fault-based negligence requirement that other courts began following. Citing the Uniform Commercial Code and the Uniform Sales Act, courts began viewing products liability claims as breach of warranty claims which, unlike negligence, are not based on fault. Frances E. Zollers, Sandra N. Hurd & Peter Shears, *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 Syracuse L. REV. 1019, 1022 (2000). This was again a step in the right direction but was still not all the way there as not every products liability case involves a clearly-defined contract to be interpreted as a breach of warranty case. Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (CA 1963) introduced the notion of strict liability which meant that whether there was a contract, privity, or negligence involved was irrelevant. The only factor that should be relevant, the court held, is that there was an injury that occurred from the product. Id. at 901. From this point on, courts began to consider whether the product in question was used by the consumer in the way that the manufacturer intended. Frances E. Zollers, Sandra N. Hurd & Peter Shears, *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 Syracuse L. REV. 1019, 1022 (2000). If this test is satisfied, there is no issue as to whether the manufacturer was negligent; strict liability considers only the fact that the consumer used the product the way it was intended to be used and suffered an injury or injuries as a result. Id. This shift from the need for privity to state a products liability claim to strict liability rightfully led to an increase in products liability claims throughout the United States. Frances E.

Zollers, Sandra N. Hurd & Peter Shears, *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 Syracuse L. REV. 1019, 1024 (2000).

Corporations argued that these laws made it so that almost anyone could illegitimately state a products liability claim and too much of courts' time was clogged with bogus claims as a result. Id. They worked hard to convince Americans and legislatures that laws needed to be passed to counteract this. Id. The laws that they had in mind were laws that were designed for the times when business transactions almost entirely took place between manufacturers and consumers. Id. at 1033. For the most part, they were unsuccessful as these bills were not passed on a large scale. Id. at 1032. They did, however, convince large swaths of the population of the need to eliminate this strict liability interpretation and did see success regarding the passage of laws in certain jurisdictions. Id. Their claims that the majority of cases were illegitimate was not true. Id. at 1030. In fact, the opposite was and continues to be true: the vast majority of injured parties who have legitimate claims never seek legal recourse and the laws that corporations demand to be passed would only widen this divide by requiring that those who want to recover damages bought said products directly from them, a business practice that is just about extinct these days. Id.

Like corporations, injured plaintiffs have been given too much leeway in certain regards over the past few decades. Plaintiffs and the courts that have supported them have dangerously expanded the scope of products liability through their application of punitive damages. W. Kip Viscusi, *Does Product Liability Make Us Safer*, 35 REGULATION 24 (2012). The purpose of products liability is not to promote a progressive, anti-corporate agenda but to ensure that corporations are held accountable for defective products they produce that injure consumers and to provide incentives for corporations to produce safe products. Punitive damages are warranted

under certain circumstances but there is no doubt that the way in which judges have weaponized them in recent decades runs counter to the objective that products liability is supposed to advance. This objective, again, is not to punish corporations just for the sake of punishing them but to promote the welfare to the highest degree possible of both plaintiffs and defendants. There are circumstances in which punishment is the most effective method to promote this welfare but there is no doubt that the majority of the instances that punitive damages are invoked, they are not done so for the purpose of promoting the welfare to the highest degree possible of plaintiffs and defendants. Compensatory damages, by contrast, incentivize corporations to include their consumers in their cost-benefit analysis. Investopedia's definition of cost-benefit analysis is "a systematic process that businesses use to analyze which decisions to make and which to forgo. The cost-benefit analysis sums the potential rewards expected from a situation or action and then subtracts the total costs associated with taking that action." (Hayes, 2021). Even in the absence of products liability, cost-benefit analysis is something that all corporations would use to ensure that they were maximizing their profit. Products liability simply forces these same corporations to include their consumers in their analysis to ensure that they are as safe as possible. W. Kip Viscusi, *Does Product Liability Make Us Safer*, 35 REGULATION 24, 28 (2012). This is accomplished through the calculation of the potential losses of the defendant in the event of an injury, including medical bills, lost wages, and pain and suffering. *Id.* In other words, compensatory damages ensure that both plaintiffs and defendants gain the most and lose the least from all of their transactions between each other. In past cases, large corporations have been painted as evil villains who care only about their profit and could not care less about lives simply for undertaking cost-benefit analysis, a practice that courts have encouraged for centuries. *Id.* at 31. In fact, Judge Learned Hand even invented a formula to

determine whether cost-benefit analysis favored a particular plaintiff or defendant in United States v. Carroll Towing Co., Inc., 159 F.2d 169 (1947). This formula is known today as “The Learned Hand Formula.” These corporations have been ordered to pay excessive punitive damages at times as a result of this negative portrayal simply for following basic guidelines that encompass the entire purpose of products liability. W. Kip Viscusi, *Does Product Liability Make Us Safer*, 35 REGULATION 24, 31 (2012). Unfortunately, courts have taken an approach in recent decades that effectively views corporations as evil entities in desperate need of punishment through punitive damages in order to counteract the imbalance created from the statutes that legislatures have passed at the behest of said corporations. This is not and should not be the purpose of products liability. Courts and those who are subjectively supportive of plaintiffs argue that punitive damages are a net positive in that they deter future wrongful behavior. This defies logic and common sense; something as rare in frequency and unpredictable in amount as punitive damages could not possibly influence behavior at the levels that these individuals argue.

## Part Two: The “Middle Ground”

Given these unreasonable and, in some cases, unconstitutional demands of both plaintiffs and defendants regarding products liability analysis for the past few decades, it is more important than ever that a uniform standard be implemented that seeks to maintain the beneficial aspects of legislatures’ and courts’ proposals while eliminating the harmful aspects. This part will propose this “middle ground” and discuss in depth exactly what it entails and how it can best be achieved. Only if this is achieved can there be a sense of clarity that will ensure that all Americans,

whether attorneys or laypersons, truly understand what conduct is expected of them and what facts must exist in order to state a valid claim.

The first factor that must be implemented in order to establish this “middle ground” is the abolishment of statutes of repose. Statutes of repose serve no purpose other than creating scenarios in which legitimately injured parties are unable to find any recourse to make themselves whole. It is because of this that they have been ruled unconstitutional repeatedly in both state and federal courts. Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579 (1981). One would be hard-pressed to find anything that is more in blatant violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution than this. Scenarios in which a wronged party has no ability to recover for the harm that was inflicted upon them are so obviously unequal, to put it mildly. One of the reasons why a legal system exists is so that ordinary people “do not have to take the law into their own hands.” Within the many jurisdictions in which these statutes have not been ruled unconstitutional, there is a question that many are asking: What other option is there to an injured party who has no ability to be repaid for said injury besides taking the law into their own hands? The different rationales that courts have generally provided for striking down statutes of repose on the basis of violation of the equal protection clause is that they are not reasonable in their treatment of injured parties, there is no sense of “uniformity” among the adversarial parties, or the implementation of the statute is contrary to its purpose. *Id.* at 609. In other words, statutes of repose generally have been found to be in violation of the equal protection clause where the defendant has an advantage prior to the case being heard, whether this was the intended purpose of the statute or not. In addition, courts also use the due process clause of the same amendment, the Fourteenth Amendment, in their

reasoning for declaring such statutes unconstitutional. Id. at 613. The basis for this is that such laws restrict the rights of those to sue for personal injuries. Id. at 614. Despite statutes of repose blatantly violating fundamental rights guaranteed in the Constitution, there is no doubt that statutes of limitations are a necessity for the reasons outlined in Part One. Given that these statutes are blatantly unconstitutional while, at the same time, there is a need for some sort of restrictions regarding how long eligibility lasts, the question becomes: What is this “middle ground” that would minimally trounce on fundamental rights while maximally eliminating fraudulent claims that appear several years down the road? The answer is not a simple one. This is not a black and white issue; what would be the most reasonable and equal application of statutes of limitations depends on the individual case in question. Courts and legislatures, if they ever decided to change course and debate what is reasonable and equal for all rather than work to implement their respective agendas, should converse with this basic idea guiding every decision that is made. Legislatures and courts should work to achieve passage and application of a statute that states something to the effect of the following: “No products liability claim shall be brought but within three years of consumption of the product in question, unless the injury resulting in such claim is one in which manifestation typically does not occur until at least a year after consumption. In such a case, no products liability claim shall be brought but within three years of manifestation of the injury that was sustained as a result of consumption of the product in question. If a reasonable person should have realized such an injury had occurred prior to the manifestation of such, no products liability claim shall be brought but within three years of the date in which a reasonable person should have grasped that such an injury had occurred or was reasonably certain to occur.” In other words, the way to reach a “middle ground” between traditional statutes of limitations and statutes of repose is to take manifestation into account if

and only if it is the only way for a plaintiff to be able to recover for the damages that he/she has endured. If manifestation occurred at the time that the product was consumed or if manifestation occurred after the fact but a reasonable person should have known that manifestation was going to occur, the time should start at the time that the product was consumed. This way, the approach that excessively favors plaintiffs through what is known as the causal-connection-accrual rule, which does not begin the limitations period until the plaintiff discovers the injury, discovers that the defendant caused said injury, and that there is a cause of action as well as the approach that excessively favors defendants through statutes of repose are replaced in favor of a more balanced, fair, and equal procedural standard. Terry Morehead Dworkin, *Product Liability of the 1980s: Repose Is Not the Destiny of Manufacturers*, 61 N.C. L. REV. 33, 37 (1982). This standard would ensure that plaintiffs are guaranteed the minimum amount of time necessary to bring suit while being unable to bring a claim far into the future that could have been brought prior.

The second factor that must be implemented in order to establish a “middle ground” of products liability analysis is punitive damage reform. As covered in Part One, punitive damages accomplish very little regarding the deterrence of future conduct as a result of their being rare in frequency and drastic in range. To create a solution for this, one must first understand exactly why punitive damages vary so much in amount in the first place. The reason lies not in the juries who ultimately decide the amount of the punitive damages, but in the judges who are supposed to guide these juries regarding the amount. W. Kip Viscusi, *Does Product Liability Make Us Safer*, 35 REGULATION 24 (2012). The way in which any case, whether it be criminal or civil, is evaluated for its proper application of the law or lack thereof involves the judge. Even though the judge does not decide whether a defendant is liable and, more specifically, does not decide

how much in punitive damages should be doled out in the case of products liability, the judge does explain the law to the juries and informs them of what each and every decision at their disposal entails. Id. at 29. Remarkably, punitive damages within products liability cases is just about the only aspect within the only area of the law in which this does not take place. Id. This desperately needs reform if we are to achieve this “middle ground” of products liability. As it is today, juries are asked if punitive damages are appropriate for any given case and, if so, to state exactly how much punitive damages are warranted without any guidance or instruction. Id. As a result, they are clueless as to how their judgment of the conduct of the defendant relates to the sum of the punitive damages. Id. It is easy for any layperson to evaluate the conduct of the defendant as it relates to economic damages. It involves reviewing medical records to determine how much the injured party was forced to spend on medical care, for example. Non-economic damages, whether it be compensatory damages related to pain and suffering or punitive damages, are much harder to evaluate because they do not have a literal value attached to them. As a result, those who are well-versed in the law should be the ones to explain what each dollar constitutes in order for the jury to make a well-informed decision. Judges have decided to abandon this duty, an act that they know full well has and will continue to cause varying levels of punitive damages to be awarded. Id. at 29. In the future, judges should provide case law to juries in order to explain what similar cases from the past found to be appropriate punitive damage amounts. If this is done, juries will have some idea of what to base their decision off of. As it is today, juries are randomly guessing for the most part which is obviously not an effective way for our civil justice system to operate. Another reform that should be implemented regards when punitive damages should even be on the table. One of the purposes of tort law is to deter wrongful conduct. It has been shown repeatedly in the past that punitive damages do not deter

wrongful conduct to the extent that many believe. In fact, states that bar punitive damages have virtually the same death rates and insurance premiums as states that permit punitive damages. W. Kip Viscusi, *Why There is No Defense of Punitive Damages*, 87 *The Georgetown Law Journal*. 381 (1998). In 1997, for example, the five states that bar punitive damages – Louisiana, Michigan, Nebraska, New Hampshire, and Washington – saw a combined 33.178 deaths per 100,000 people while Washington DC and the 45 states that permit punitive damages saw a combined 34.929 deaths per 100,000 people. *Id.* at 392. In other words, the death rate of states that permit punitive damages, depending on the year in question, can surpass the death rate of states that do not permit such damages. In the same year, the states that forbade punitive damage awards saw a higher average products liability insurance premium at \$8.30 than states that did not at \$7.33. *Id.* at 393. It is clear that punitive damages do not deter conduct as states that prohibit such awards actually see greater results than those that do not. With a lack of guidance provided to the jury and a lack of conduct deterrence, these damages merely act as a form of retribution without logic. This is not the purpose of tort law. Assigning fault is one of the purposes, but this differs greatly from the retribution that this policy has created which effectively seeks to punish corporations without a concrete system of analysis to back said punishment up. Punitive damages should only be permitted in the future if the defendant is a repeat offender and should be evaluated by juries through proper instruction. Many legal scholars point to the fact that punitive damages are not as high in amount as these corporations claim. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 *IOWA L. REV.* 1 (1992). This is undoubtedly true as there is a large amount of empirical data that consistently shows that punitive damage awards are generally proportional to compensatory damage awards. *Id.* at 27. This is an average, meaning

that there are many punitive awards that are higher and many that are lower than compensatory awards. The fact remains, though, that juries are not given proper guidance as to what each dollar of punitive damages that they can award represents. Again, overall, this has not created an excess of punitive damages but it has led to unpredictability and uncertainty. Tort law exists to promote predictability and certainty; it is supposed to encourage rightful conduct and deter wrongful conduct. Something as rare in frequency and unpredictable in amount as punitive damages is not capable of deterring behavior. To summarize, there is not a punitive damage crisis as corporations claim. Punitive damages are very rare in occurrence and have not increased over time. They are also not as high in amount as corporations claim. They are unpredictable, however, and properly informing the jury will improve this and could potentially even completely clear up this unpredictability.

This “middle ground” that would limit the harms inflicted and maximize the benefits contributed throughout the years from legislatures in concert with corporations as well as courts in concert with injured parties includes a reformation of the current statutes of limitations, reformation of the methods in which punitive damages are evaluated and analyzed, and a willingness to adapt with the times. Statutes of limitations must be enacted and interpreted in such a way that plaintiffs’ rights to sue for injuries caused by defective products are protected while, at the same time, the rights of manufacturers of said products to be free from illegitimate claims are protected. This can be accomplished by beginning the limitations period as soon as possible. What is as soon as possible depends on the nature of the product but generally, limitations periods should begin when the plaintiff should have reasonably known that an injury had occurred or was reasonably certain to occur. Punitive damages must only be an option when it is absolutely necessary for a defendant to be punished for their conduct. The facts clearly

demonstrate that punitive damages do not deter conduct. Therefore, these damages should only be available as a last resort: when defendants show a total disregard for the civil justice system through repetition of harmful conduct. In such a case, juries must be made aware of what each dollar is equivalent to with regards to the severity of the conduct they are evaluating. Regarding continuing to adapt to the times, the desire of corporations to return products liability analysis to pre-industrial times must never be realized. Doing so would effectively put products liability law out of existence. In conclusion, the best way to create much-needed balance to this never-ending “tug-of-war” that has been taking place since the 1970s is through a statute of limitations that begins at the time a reasonable person should discover an injury, a limitation of punitive damages through proper jury instruction and exclusive availability for repeat offenders, and a living and breathing analysis that adapts with the times.

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