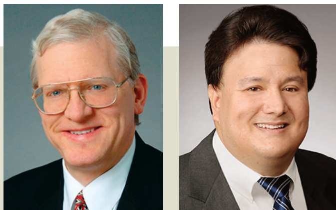
By James M. Beck and Kevin Hara

How Much Increased Risk Is Enough?

A recurrent issue in the defense of punitive damages claims—one that gets less attention than it deserves—is how much increased risk is enough to justify an award of punitive damages? In many cases, plaintiffs allege that the defendant's conduct increased the relative risk of injury two, ten, even a hundred times over, but the absolute risk remains very small, such as from one in ten million to one in a million. The Second Restatement of Torts addresses risk criteria in sections that define "recklessness," as required for punitive damages purposes in terms of a "high degree of risk." *Restatement (Second) of Torts* §§500, 908 (1975). To put the question in the affirmative, to what extent can punitive damages claims be defeated, despite a large relative increase in serious risk, where the absolute increase in risk remains minuscule?



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The Restatement Approach to Punitive Damages and Risk of Injury

As with many difficult legal questions, judicial decisions do not provide a definitive answer, but the Restatement is the place to start. *Restatement* §500 has been followed by a substantial number of courts. This section is two-pronged, offering alternative definitions of "recklessness"—with scienter and without. The former requires conscious knowledge: "(1) where the actor knows, or has reason to know,… of facts which create a *high degree of risk* of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk." *Restatement* §500, comment a (emphasis added). The second, more permissive, definition eschews actual awareness, but still demands a "high degree" of risk: "(2) where the 'actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the *high degree of risk* involved, although a reasonable man in his position would do so.'" *Id.* (emphasis added).

Section 500 works in tandem with *Restatement (Second) of Torts* §908 (1977), which addresses the "reckless indifference" standard for punitive damages, as explained in a leading decision applying them both:

> Comment b following §908 further states that "[r]eckless indifference to the rights of others and conscious action in deliberate disregard of them (see §500) may provide the necessary state of mind to justify punitive damages."… Comment a to Section 500 describes two distinct types of reckless conduct which represent very different mental states: (1) where the "actor knows, or has reason to know,… of *facts which create a high degree of risk of physical harm* to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk;" and (2) where the "actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." The first type of reckless conduct described in §500 demonstrates a higher degree of culpability than the second on the continuum of mental states which range from specific intent to ordinary negligence. An "indifference" to a known risk under §500 is closer to an intentional act than the failure to appreciate the degree of risk from a known danger.

SHV Coal, Inc. v. Continental Grain Co., 526 Pa. 489, 587 A.2d 702, 704 (1991) (emphasis added) (citation and quotation marks omitted).

> To what extent can punitive damages claims be defeated, despite a large relative increase in serious risk, where the absolute increase in risk remains minuscule?

An equivalent standard for the degree of risk required for punitive damages is that the plaintiff must be "substantially certain" to be injured. This test derives from the Restatement's definition of "intent." "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." *Restatement (Second) of Torts* §8A (1965). The Wisconsin Supreme Court has employed this standard:

> [W]e conclude that a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are *substantially certain* to result in the plaintiff's rights being disregarded. This will require that an act or course of conduct be deliberate. Additionally, the act or conduct must actually disregard the rights of the plaintiff.

Strenke v. Hogner, 279 Wis.2d 52, 694 N.W.2d 296, 304 (2005) (emphasis added).

Punitive Damages and Risk of Injury in the States

For a defendant to have a good chance of prevailing with an argument against punitive damages based on a low incidence of the particular risk, the jurisdiction would have to include this element as a factor in its legal standard for the award of punitive damages. Fortunately, most states that allow punitive damages do so.

Alabama: By statute, Alabama defines "wantonness" justifying punitive damages as requiring that "injury will likely or probably result" from the defendant's act or omission. *Wal-Mart Stores, Inc. v. Thompson*, 726 So.2d 651, 654 (Ala. 1998) (construing *Ala. Code* §6-11-20(b)(3). Unlike the restatement formulations, in Alabama, the operative risk quantification is "likely" and "probably."

Alaska: In *Hayes v. Xerox Corp.*, 718 P.2d 929 (Alaska 1986), the court was "persuaded by the comments to the *Restatement (Second) of Torts* §500, which define reckless disregard of safety." *Id.* at 935. The subsequent Alaska punitive damages statute retained the common law's "malice" or "reckless indifference" standard, and added as a factor "the likelihood at the time of the conduct that serious harm would arise." *Alaska Stat.* §09.17.020(b-c).

Arizona: The Arizona Supreme Court in Rawlings v. Apodaca, 151 Ariz. 149, 726 P.2d 565 (Ariz. 1986), did "not believe that the concept of punitive damages should be stretched." Id. at 578. It therefore followed Restatement §908, although it described the standard as "a substantial risk of significant harm" and "a substantial and unjustifiable risk." Id. See Mein v. Cook, 219 Ariz. 96, 193 P.3d 790, 795 (Ariz. App. 2008) (applying "substantially certain" standard of Restatement §8A).

Arkansas: Arkansas has a punitive damages statute requiring that the defendant "knew or ought to have known… that his or her conduct would naturally and probably result in injury or damage." *Ark. Code* §16-55-206. As in Alabama, the legislature used a standard somewhat different from the Restatement formulations, but the idea is the same.

California: California has employed both Restatement standards. *See Schroeder v. Auto Driveaway Co.*, 11 Cal.3d 908, 523 P.2d 662, 671 (1974) (describing standard as conduct "substantially certain to… injure plaintiffs"); *Lackner v. North*, 135 Cal. App.4th 1188, 37 Cal. Rptr.3d 863, 873

(2006) (approving test based on *Restatement* §500).

Colorado: Colorado's punitive damages statute requires "fraud, malice, or willful and wanton conduct," with "willful and wanton" defined as conduct "purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly" without regard to others' safety or rights. *Colo. Rev. Stat.* §13-21-102; *see also Palmer v. A.H. Robins Co.*, 684 P.2d 187, 215 (Colo. 1984) (willful and wanton conduct "creates a substantial risk of harm to another and is purposefully performed with an awareness of the risk in disregard of the consequences").

Delaware: In *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987), the court cited *Restatement* §908, ruling that outrageous conduct is required to support punitive damages for "evil motive or reckless indifference," *i.e.*, either "conscious awareness" or "conscious indifference" to "particular harm" resulting from that conduct. *Id.* at 529–30.

District of Columbia: In *Destefano v. Children's National Medical Center*, 121 A.3d 59, 66 (D.C. 2015), the District adopted the *Restatement* §500 "high degree of risk of harm" standard.

Florida: Florida follows *Restatement* §500. *Dyals v. Hodges*, 659 So.2d 482, 485 (Fla. App. 1995) (approving *Restatement* §500); *cf. Eastern Airlines, Inc. v. King*, 557 So.2d 574, 576 (Fla. 1990) (adopting *Restatement* §500 in non-punitive damages context).

Georgia: Georgia appellate courts follow the *Restatement* §8A standard. *J.B. Hunt Transportation, Inc. v. Bentley*, 207 Ga. App. 250, 427 S.E.2d 499, 504 (1992); *Viau v. Fred Dean, Inc.*, 203 Ga. App. 801, 418 S.E.2d 604, 608 (1992). *See Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1313 (11th Cir. 2007) ("where the actor believes that the consequences of his act are substantially certain to result from [it]") (applying Georgia law).

Hawaii: Hawaii courts follow *Restatement* §908. *Ass'n of Apt. Owners v. Venture 15, Inc.*, 115 Haw. 232, 167 P.3d 225, 291 (2007); *Masaki v. Gen. Motors Corp.*, 71 Haw. 1, 780 P.2d 566, 570–71 (1989). They have not, however, addressed degree of risk specifically.

Idaho: Idaho requires *both* "intentional conduct and knowledge of a substantial risk of harm" to constitute willful or reckless misconduct sufficient to support punitive damages. *See Carrillo v. Boise Tire Co.*, 152 Idaho 741, 274 P.3d 1256, 1266 (2012).

Illinois: In *Ziarko v. Soo Line Railroad Co.*, 161 Ill.2d 267, 641 N.E.2d 402, 407 (1994), the court applied "the definition of 'reckless' under the Restatement." *Id.* at 407 (citing §500). *Accord Loitz v. Remington Arms Co.*, 138 Ill.2d 404, 563 N.E.2d 397, 403 (1990) (adopting *Restatement* §908/§500 punitive damages formulation); *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 675 (7th Cir. 2003) ("substantial certainty" of injury was "sufficient evidence of 'willful and wanton conduct' within the meaning that the Illinois courts assign to the term to permit an award of punitive damages") (applying Illinois law).

> An equivalent standard for the degree of risk required for punitive damages is that the plaintiff must be "substantially certain" to be injured.

Indiana: In Indiana "[i]t is not enough that the tortfeasor engage in conduct that she knows will probably result in injury." *Juarez v. Menard, Inc.*, 366 F.3d 479, 482 (7th Cir. 2004) (applying Indiana law). Rather "willful and wanton misconduct" requires that the defendant have engaged in "a course of misconduct calculated to result in probable injury." *Miner v. Southwest School Corp.*, 755 N.E.2d 1110, 1113 (Ind. App. 2001).

Iowa: By statute Iowa has limited punitive damages to conduct that "constituted willful and wanton disregard for the rights or safety of another." *See Iowa Code* §668A.1. This definition, like *Restatement* §908, requires "disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." *See Kuta v. Newberg*, 600 N.W.2d 280, 288–89 (Iowa 1999) (citing *Restatement* §500 standard).

Kansas: Kansas follows Restatement §500. *Wiehe v. Kukal*, 225 Kan. 478, 592 P.2d 860, 864–65 (1979) (citing §500 in defining "reckless" conduct, stating that an actor must "know or have reason to know of facts which create a high degree of risk of harm to another, and then, indifferent to what harm may result, proceed to act."); *See* Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038, 1061–62 (1984) (citing Restatement §908; "the duty of the manufacturer must be commensurate with the seriousness of the danger. The greater the danger, the greater the duty").

Kentucky: In *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389 (Ky. 1985), the court applied *Restatement* §908, but without mentioning the high degree of risk language.

Maine: Maine has adopted a "narrower view" of recklessness than that employed in *Restatement* §908. *Tuttle v. Raymond*, 494 A.2d 1353, 1362 (Me. 1985). How that "narrow" approach translates into degree of risk is uncertain.

Maryland: In *Richardson v. McGriff*, 361 Md. 437, 762 A.2d 48, 94 (2000), the court applied the *Restatement* §8A "substantial certainty" standard.

Minnesota: Minnesota courts have followed both the *Restatement* §8A "substantial certainty" standard, *Kaluza v. Home Insurance Co.*, 403 N.W.2d 230, 233 (Minn. 1987), and the "high degree of risk" standard, *Gabrielson v. Nelson*, 1994 WL 694863, at *2 (Minn. App. Dec. 13, 1994) (citing standard jury instruction for punitive damages).

Mississippi: The Mississippi Supreme Court has cited *Restatement* §908, but not the risk-related portion. *Weems v. American Sec. Ins. Co.*, 486 So. 2d 1222, 1226–27 (Miss. 1986). In *Thomas v. State Farm Fire & Casualty Co.*, 856 So.2d 646, 649 (Miss. App. 2003), the court applied a "substantial certainty" standard.

Missouri: In *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. 1989), the court adopted *Restatement* §908, holding that "the

Restatement properly sets out the law in language readily understood by lawyers and lay people alike." *Id.* at 789. *See also Haynam v. Laclede Electric Co-operative, Inc.*, 889 S.W.2d 148, 152 (Mo. App. 1994) (collecting cases applying *Restatement* §500 as an adjunct to *Burnett*'s adoption of §908).

Montana: In *Owens v. Parker Drilling Co.*, 207 Mont. 446, 676 P.2d 162, 165 (1984), the court adopted *Restatement* §500, comment a—"a jury question of punitive damages is raised" where an enactment involving protection "of a person from a high degree of risk… is violated either intentionally or recklessly."

Nevada: Nevada's punitive damages statute authorizes recovery for "express or implied" malice, defined as a defendant's knowledge of "the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." *Nev. Rev. Stat. Ann.* §42.001; *see also Winchell v. Schiff*, 124 Nev. 938, 193 P.3d 946, 952–53 (2008) (affirming trial court's decision declining to award punitive damages where there was no knowledge "of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act" to avoid the result).

New Jersey: New Jersey was an early adopter of the "high degree of probability of harm" standard for punitive damages. *Berg v. Reaction Motors Division*, 37 N.J. 396, 181 A.2d 487, 496 (1962) (preceding adoption of *Restatement* §500). In *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466, 480–81 (1986), the court found that standard met by asbestos workers' risks of chronic exposure to asbestos.

New Mexico: New Mexico follows the "substantially certain" formulation of *Restatement* §8A. *Hartford Fire Insurance Co. v. Gandy Dancer, LLC*, 2011 WL 1336523, at *13 (D.N.M. March 30, 2011).

New York: New York law requires conduct "in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." *Saarinen v. Kerr*, 84 N.Y.2d 494, 644 N.E.2d 988, 991 (1994) (citing, *inter alia*, *Restatement* §500).

North Carolina: The North Carolina punitive damages statute sets the quantum of risk needed to support such damages at "reasonably likely to result in injury." *N.C. Gen. Stat.* §1D-5.

North Dakota: By statute, North Dakota allows punitive damages where "a reasonable relationship [exists] between the exemplary damage award claimed and the harm likely to result from the defendant's conduct." *N.D. Cent. Code* §32-03.2-11(5)(a).

> A number of courts have given meaning to the terms "substantial" or "high degree," in cases involving plaintiffs seeking punitive damages notwithstanding only a slight increased risk of actual injury.

Ohio: The standard for punitive damages in Ohio is whether the conduct amounts to "a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 575 N.E.2d 416, 419 (1991). *See also Anderson v. Massillon*, 134 Ohio St.3d 380, 983 N.E.2d 266, 273 (2012) (following *Restatement* §500 as to recklessness).

Oklahoma: Oklahoma's punitive damages statute does not mention degree of risk. 23 Okl. St. §9.1(B)(C). In *Stroud v. Arthur Andersen & Co.*, 37 P.3d 783 (Okla. 2001), the court approved an instruction that required the jury to find a "high probability that the conduct would cause serious harm." *Id.* at 793. The current Oklahoma punitive damages jury instruction requires "that there was a substantial and unnecessary risk." OUJI-CIV 5.6.

Oregon: The general Oregon punitive damages statute defines the quantum of risk necessary to support an award as "a highly unreasonable risk of harm." *Or. Rev. Stat.* §31.730(1). In addition, the separate product liability statute also includes as a factor "[t]he likelihood at the time that serious harm would arise." *Or. Rev. Stat.* §30.925(2)(a).

Pennsylvania: The Pennsylvania Supreme Court has expressly adopted the "high degree of risk" standard from *Restatement* §500. *SHV Coal*, *supra* (quoting *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 494 A.2d 1088, 1097 (1985) (plurality opinion)). *See also Evans v. Philadelphia Transportation Co.*, 418 Pa. 567, 212 A.2d 440, 443 (1965) (punitive damages require "that the actor… at least… was aware that [the harm] was substantially certain to ensue").

Rhode Island: A Rhode Island trial court applied a punitive damages standard of "knowing and deliberate disregard of the objectively substantial certainty of those consequences," that is, of the risks at issue. *Manocchia v. Narragansett Television*, 1996 WL 937020, at *3 (R.I. Super. Dec. 12, 1996).

South Carolina: In *Addy's Harbor Dodge, LLC v. Global Vehicles U.S.A. Inc.*, 2014 WL 4929335, at *10 (D.S.C. Sept. 30, 2014), the court defined malice as "[s]ubstantially certain to cause injury."

South Dakota: South Dakota applies a "substantial certainty" of risk standard to punitive damages. *Olson-Roti v. Kilcoin*, 653 N.W.2d 254, 260 (S.D. 2002); *Berry v. Risdall*, 576 N.W.2d 1, 9 (S.D. 1998).

Tennessee: In Tennessee, punitive damages require a "substantial and unjustifiable risk." *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 535 (Tenn. 2008) (award allowable based on "consistent" adverse test results).

Texas: In Texas, corporate liability for punitive damages requires proof of "malice." *Tex. Civ. Prac. & Rem. C.* §41.005(c)(2). "Malice" has been interpreted to include the "substantial certainty" standard. *E.g.*, *Vernon v. Perrien*, 390 S.W.3d 47, 62 (Tex. App. 2012) (the defendant "believes the consequences are substantially certain to result from" its acts); *Seber v. Union Pacific Railroad Co.*, 350 S.W.3d 640, 6540 (Tex. App. 2011) (same). This statutory standard is similar to the prior common-law standard. "[V]iewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of

risk, considering the probability and magnitude of the potential harm to others." *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 23, 1994 WL 246568 (Tex. 1994).

Utah: Utah has a punitive damages statute that codifies a "knowing and reckless indifference" standard. *Utah Code* §78B-8-201(1)(a). The Utah Supreme Court has applied the *Restatement* §500 "high degree of risk" standard to the statute. *Daniels v. Gamma W. Brachytherapy, LLC*, 221 P.3d 256, 269 (Utah 2009).

Vermont: The risk required for punitive damages in Vermont is "a known, substantial and intolerable risk of harm to the plaintiff, with the knowledge that the acts or omissions were substantially certain to result in the threatened harm." *Fly Fish Vermont, Inc. v. Chapin Hill Estates, Inc.*, 187 Vt. 541, 996 A.2d 1167, 1176 (2010).

Virginia: Virginia courts have applied a standard similar to *Restatement* §500, requiring that "the act done must be intended or it must involve a reckless disregard for the rights of another and will probably result in an injury." *Infant C. v. Boy Scouts of America, Inc*., 239 Va. 572, 391 S.E.2d 322, 327 (1990). Courts have also followed §908 for outrageous conduct "done with an evil motive or… reckless indifference to the rights of others." *Simbeck, Inc. v. Dodd-Sisk Whitlock Corp.*, 44 Va. Cir. 54, 65 (1997).

West Virginia: In West Virginia, a "manufacturer may be found liable for punitive damages" on the basis of "actual or constructive knowledge of the severe health hazards caused by [its] product." *Davis v. Celotex Corp.*, 187 W. Va. 566, 570, 420 S.E.2d 557, 561 (1992).

Wisconsin: Wisconsin has a punitive damages statute requiring "an intentional disregard of the rights of the plaintiff." Wis. Stat. §895.85(3). The statute requires "substantially certain" harm to permit punitive damages. *Strenke*, *supra*. *See also Henrikson v. Strapon*, 314 Wis.2d 225, 758 N.W.2d 205, 213-14 (2008).

Wyoming: *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813, 837 (Wyo. 1994) (applying similar restrictions to *Restatement* §500, requiring "willful and wanton misconduct" such that a defendant would know, or have reason to know, his conduct "would, in a high degree of probability, result in substantial harm."); *Sheridan Commercial Park v. Briggs*, 848 P.2d 811, 817–18 (Wyo. 1993) (finding that punitive damages "are to be allowed with caution," citing *Restatement* §908, comment b).

Finally, several states simply do not allow recovery of punitive damages in personal injury litigation. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495–96 (2008) (listing Connecticut, Louisiana, Michigan, Massachusetts, Nebraska, New Hampshire, and Washington).

Decisions Limiting Punitive Damages Where the Risk of Injury Is Low

A number of courts have given meaning to the terms "substantial" or "high degree," in cases where plaintiffs sought punitive damages notwithstanding only a slight increased risk of actual injury. The leading case is *Toole v. McClintock*, which reversed punitive damages verdict against a breast implant manufacturer, holding that the evidence of actual injury incidence of 1 percent was insufficient to show that the manufacturer "had knowledge that the implants were likely to rupture when [the surgery] were performed." 999 F.2d 1430, 1435–36 (11th Cir. 1993) (applying Alabama law). The court found that the plaintiff failed to meet the Alabama burden for "wanton" conduct (a basis for punitive damages) because the relevant consideration for the wantonness is the likelihood of the actual injury suffered by the plaintiff, ruling that "[t]he evidence in this case showed that the actual incidence of implant ruptures… is probably slightly less than 1 percent." *Id.* (emphasis added).

Toole was applied in *Scharff v. Wyeth*, 2011 WL 4361634 (M.D. Ala. Sept. 19, 2011), holding that the plaintiff's "evidence [was] insufficient to create a genuine issue of material fact that breast cancer is a likely or probable event for those consuming" the drug because the "actual [increased] incidence of invasive breast cancer attributable to [the drug] was .42 percent,"—meaning less than one half of one percent, thereby justifying summary judgment against punitive damages. *Id.* at *17:

> [E]ven construing the evidence through that heavily jaundiced lens, far beyond the light most favorable to the plaintiff requirement, the actual incidence of breast cancer remains too small as a matter of law for a reasonable jury to find that breast cancer was a likely or probable event.…

Id. If mere negligence had been the relevant standard, a jury question would have resulted. However, negligence claims were independently barred. More was required for "wantonness" allowing punitive damages:

> [T]he negligence standard is inapplicable. Given [plaintiff's] evidence, and applying the plain meaning of "likely," "probable," "risk substantially greater in amount than that which is necessary [for negligence]," "strong probability," "highly probable," and "the risk is great," there is no genuine issue of material fact.

Id. at *18.

The New York Court of Appeals unanimously affirmed the setting aside of a punitive damages award in an asbestos case, where the plaintiffs had "mesothelioma, a rare form of cancer." *In re New York City Asbestos Litigation*, 89 N.Y.2d 955, 678 N.E.2d 467, 468 (1997). Applying the New York requirement of a "risk that was so great as to make it highly probable that harm would follow," the court held that "no valid line of reasoning and permissible inferences could possibly lead rational people to the conclusion reached by the jury." *Id.*

> Applying that standard here, we conclude that the evidence is insufficient to support the jury's finding of reckless disregard for the workers' safety. At most, the evidence reveals [defendant's] general awareness that exposure to high concentrations of asbestos over long periods of time could cause injury, but not that workers such as [these plaintiffs] were at risk at any time it could have warned them.

Id. at 468–69. Thus, the "risk" at issue in punitive damages litigation in New York is that faced by the specific plaintiff who brought suit, not some amorphous risk to the public at large.

In *Calmes,* the Ohio Supreme Court held as a matter of law that the risk of harm from mismatching of multi-piece tire rim components could not support punitive damages under Ohio's "great probability of

substantial harm" standard. That standard required much more than mere "foreseeability" of injury:

> [Plaintiff argues] that foreseeability stands in place of great probability. However, mere foreseeability cannot be equated with great probability. In the law of negligence, foreseeability is the threshold level of probability at which conduct becomes negligent. Great probability, then, can be likened to high foreseeability.

575 N.E.2d at 474. The requisite "great probability" is more likely to exist where a product is used "in its intended manner with no apparent outside contributing causes." *Id.* at 475. Such was not the case in *Calmes* where plaintiff ignored the manufacturer's warnings, and an intermediary (plaintiff's employer) provided the mismatched components and failed to supply recommended safety equipment. *Id.* at 474.

In a situation involving one-in-a-million odds, the court in *Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994), rejected punitive damages, also in a mismatched multi-piece tire rim case. The court required entry of judgment n.o.v., because "the evidence demonstrated that the actual incidence of mismatches was roughly one in millions and that [defendant] knew of only four other mismatch incidents." *Id.* at 1058. A mere four mismatch injuries was insufficient against "thirteen to fifteen million" units of the product that had been manufactured. Such a low incidence meant the manufacturer could not have known mismatches "[were] likely or that the failure to warn [the plaintiff] of the risks of mismatches made such explosions likely." *Id.*

In another case with a remote risk of harm, the court found that an incidence of product failure of 1 in 1 million failures warranted entry of judgment for the defendant under Virginia law. *Dudley v. Bungee International Manufacturing Corp.*, 76 F.3d 372, 1996 WL 36977 (4th Cir. Jan. 31, 1996) (table opinion). Plaintiff introduced no evidence of "wanton negligence," defined as "conscious disregard of another person's rights" arising from a defendant's "knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." *Id.* at *2. That standard could not possibly be met "[s]ince the evidence in this case shows the incidence of… failure was literally one in millions." Thus, the defendant "could not have known from claims in two lawsuits that the design of its cords probably would cause injury to another." *Id.* at *4.

The Tennessee "substantial and unjustifiable risk" standard for recklessness precluded an award of punitive damages against a pharmacist for the alleged misfilling of drug prescriptions in *Beal v. Walgreen Co.*, 408 F. Appx. 898, 905 (6th Cir. 2010). The defendant's "act of dispensing the drugs while it was cognizant of the general fact that mis-filled prescriptions could cause harm" was "not sufficient" in the absence of actual knowledge of the errors. *Id.* Tennessee law "rejected the argument that improperly dispensing pharmaceuticals" could "giv[e] rise to punitive damages on the basis that it 'involved a dangerous or lethal instrumentality.'" *Id.* at 906.

Drake shifted the burden of proof on punitive damages to the defendant – using an inapplicable FDA regulatory standard rather than the Vermont standard for risk in punitive damages cases.

Additional courts holding that punitive damages are precluded as a matter of law due to a probability of actual injury include:

- *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 327 (Tex. 1993) ("[T]here is no evidence that [defendant's] conduct created an extreme risk of harm," because the store "averaged 50,000 patrons per month in the three months it had been open before [the plaintiff's] accident," therefore any defect "simply did not impose an extreme risk creating the likelihood of serious injury.").
- *Merrell Dow Pharmaceuticals v. Havner*, 907 S.W.2d 535, 561–62 (Tex. App. 1995) (punitive damages reversed because no evidence of "extreme risk" was shown based on 96 adverse event reports out of more than approximately 7 to 9 million prescriptions of the product), *rev'd on other grounds,* 953 S.W.2d 706 (Tex. 1997) (rendering judgment for defendant on all claims).
- *Lockley v. Deere & Co.*, 933 F.2d 1378, 1388–89 (8th Cir. 1991) (applying Arkansas law) (affirming directed verdict against punitive damages claim where there was "no substantial evidence from which a reasonable jury could have inferred that [equipment manufacturer] acted with such conscious indifference to the safety of others," based on 16 similar injuries out of 39,000 machines).
- *Dow v. Rheem Manufacturing Co.*, 2011 WL 4484001, at *20 (E.D. Mich. Sept. 26, 2011) (two similar incidents "out of 40 million" product units over ten years held an "insufficient basis on which to hold [defendant] liable for gross negligence and/or willful disregard"; applying statutory standard for "gross negligence").
- *Strothkamp v. Chesebrough-Pond's, Inc.*, 1993 WL 79239, at *9–11 (Mo. App. March 23, 1993) (unpublished) 40 injuries over 10 years from some 36 billion product units held insufficient to establish high degree of probability of injury necessary under Missouri law to support punitive damages claim).

Decisions Not Limiting Punitive Damages Where the Risk of Injury Is Low

Despite applicable state law and/or relevant Restatement sections indicating that punitive damages require a thorough consideration of the incidence of actual injury, all too many courts have allowed punitive damages despite minuscule increases in absolute risk. A couple of representative examples will suffice. The first is *In re Prempro Products Liability Litigation*, 586 F.3d 547 (8th Cir. 2009) (applying Arkansas law), where the court affirmed sending punitive damages to the jury on the same evidence as in *Scharff*—a less than one half

of 1 percent increase in risk. *Id.* at 573. Not without reason, *Scharff* commented that "the Eighth Circuit's analysis of the relevant evidence and Arkansas law ignored the probability of injury and defendant's knowledge of probable risk requirements in the plain language of the Arkansas statute." 2011 WL 4361634, at *18 n.24. Fortunately, *Prempro* is at least in some sense *dictum* on this issue, since the punitive damages award in that case was overturned on other grounds—inadmissibility of prejudicial "expert" testimony. 586 F.3d at 571–72.

Perhaps even more egregious is *Drake v. Allergan, Inc.*, 111 F. Supp.3d 562 (D. Vt. 2015), *appeal pending*, No. 15-1848 (2d Cir.). As mentioned above, the Vermont standard for punitive damages requires "disregard of a known, substantial and intolerable risk" with "knowledge that the acts or omissions were substantially certain to result in the threatened harm." The result in *Drake* is unsupportable. The risk in *Drake* was never quantified. Rather, the district court excused the plaintiffs' failure of proof of increased risk due to alleged off-label promotion:

> The jury could have reasonably found that promoting doses above 8 u/kg created a substantial and intolerable risk of harm because doses above 8 u/kg *were not proven to be safe and effective* and nearly every incident in which a child was harmed occurred at a dose above 8 u/kg.

Id. at 578 (emphasis added). This "not proven" standard means there may not have been any increased risk at all. The only evidence was anecdotal. *Drake* shifted the burden of proof on punitive damages to the defendant—using an inapplicable FDA regulatory standard rather than the Vermont standard for risk in punitive damages cases.

Opposing Punitive Damages in Low Risk Cases

There are not a large number of product liability decisions explicitly rejecting punitive damages claims because the statistical increased risk was too low. In seeking to preclude punitive damages based in insufficient "high degree"/"certainty" of risk, defendants will need to scour the punitive damages precedents of their jurisdiction to find other support for dismissing such claims on low quantification of risk.

Using Pennsylvania as an example of what such research may produce, the only Pennsylvania Supreme Court case addressing the degree of certainty of the risk required for conduct to be "reckless" does not involve punitive damages—but rather is a criminal case. In *Commonwealth v. Young*, 494 Pa. 224, 431 A.2d 230 (1981), the court found the requisite high degree of risk present where the defendant "intentionally aim[ed] a gun at [a person] without *knowing for a certainty* that it was not loaded." *Id.* at 232 (emphasis added). More recently, in *Phillips v. Cricket Lighters*, 584 Pa. 179, 883 A.2d 439 (2005), evidence that "children playing with butane lighters resulted in the deaths of 120 people per year, with an additional 750 people being injured in these fires" was insufficient as a matter of law to establish a claim for punitive damages. *Id.* at 446.

> We base our conclusion on many factors. First, the allegedly dangerous aspect of this product did not arise out of intended use of [defendant's] product.… [S]uch a failure looks far less wanton than if the alleged danger arose in connection with the normal use of the product. Second,… [the product] complied with all safety standards…, [which] is a factor to be considered in determining whether punitive damages may be recovered. Finally, we flatly reject [plaintiff's] assertion that [defendant's] weighing of financial concerns in determining whether to incorporate additional safety features into its product on a unilateral basis establishes that [defendant] acted wantonly.

Id. at 447. *Accord Thomas v. Staples, Inc.*, 2 F. Supp.3d 647, 665 (E.D. Pa. 2014) (similar case dismissing punitive damages arising from known, unquantified, but small, risk from misuse of the product).

Other Pennsylvania courts have used statistics, or the equivalent, to preclude punitive damages. In *Acosta v. Honda Motor Co.*, 717 F.2d 828 (3d Cir. 1983), punitive damages were barred as a matter of law where the alleged design flaw existed in 270,000 product units for six years without prior incident. *Id.* at 841. In *Pullaro v. Ricciardi*, 2002 WL 31261102 (E.D. Pa. Oct. 10, 2002), "[k]nowledge of a previous [dog] bite [wa]s not enough to establish a conscious disregard of a known risk." *Id.* at *2. Still other Pennsylvania courts have rejected punitive damages claims as a matter of law because, for one reason or another, the increase in risk attributable to the defendant's conduct was not sufficiently large. *See Richetta v. Stanley Fastening Systems, L.P.*, 661 F. Supp.2d 500, 514, (E.D. Pa. 2009) ("that Defendant had notice of injuries resulting from its [product's use], yet Defendant did not redesign its [product]" insufficient for punitive damages); *Jones v. McDonald's Corp.*, 958 F. Supp. 234, 236 (E.D. Pa. 1997) (no evidence that the place where plaintiff slipped was any more "prone to a heavy build-up of oil and grease" than any other part of defendant's parking lot); *Dillow v. Myers*, 78 Pa. D. & C.4th 225, 240 (Pa. C.P. 2005) ("failure to check the driving record of a prospective employee or to conduct a driver background check does not create such a sufficiently high degree of risk of harm to others as to warrant punitive damages"), *aff'd mem.*, 916 A.2d 698 (Pa. Super. 2007). It is likely that similar precedential support will be available in most states, at least large ones, for defendants seeking to limit punitive damages on the basis of insufficiently increased risk.

Conclusion

Given the current state of the law in most jurisdictions, successful assertion of lack of sufficient increased risk as a defense to punitive damages will require searching the law of any given state in the same manner as just demonstrated for Pennsylvania. Although the exact degree of increased risk is subject to debate, low absolute additional risk, as in the cases discussed herein should not, as a matter of law support an award of punitive damage. As the *Scharff* court aptly held, courts should examine the actual probability or likelihood of the risk of injury (similar to punitive damages risk standards in many states) before a product manufacturer is required to pay punitive damages. Otherwise, the availability of potentially useful and beneficial saving products may be severely curtailed or even eliminated by unjustified damages awards.