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The Discovery and Proof of a Punitive Damages Claim: Strategy Decisions and Pretrial Tactics When Representing the Plaintiff

Dale I. Larson

Robert M. Wattson

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**THE DISCOVERY AND PROOF OF A PUNITIVE
DAMAGES CLAIM: STRATEGY DECISIONS
AND PRETRIAL TACTICS WHEN
REPRESENTING THE
PLAINTIFF**

DALE I. LARSON†
& ROBERT M. WATTSON‡

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† Member, Hennepin County, Minnesota State, and American Bar. Moorhead State College and University of Minnesota, B.A., 1961; University of Minnesota, L.L.B., 1965. Mr. Larson is a partner at the law firm of Robins, Zelle, Larson & Kaplan, Minneapolis.

‡ Member, Hennepin County and Minnesota State Bar. University of Minnesota, B.A., 1965; University of Minnesota, J.D., 1968. Mr. Wattson is a partner at the law firm of Robins, Zelle, Larson & Kaplan, Minneapolis.

I. INTRODUCTION

When a case involves unprecedented punitive damages issues arising from a "mass" or "cumulative" tort situation, it is extremely important that lawyers take a self-critical and professional view of both parties' positions. Lawyers are often surprised by case outcomes because they fail to thoroughly analyze the issues. Rather, they rely on old habits formed through many years of practice and precedent relating to single case litigation involving only past conduct. In a mass tort punitive damages case, unquestioning reliance on these habits can lead to unexpected results. The defense lawyer who is bewildered by an unexpected verdict against his client may quickly blame "punitive damages." If he proceeds without scrutinizing the factors at work, the defense attorney may consistently use the same tactics with even more disastrous results. Correspondingly, the plaintiff's lawyer may feel particularly brilliant in achieving a verdict. The plaintiff's lawyer who does not objectively analyze the situation may proceed with false bravado to disastrous results in another case where the same factors are not at work.

An objective overview will help attorneys assist the courts in adjusting to current needs and public policy concerns.¹ This analysis will also help attorneys provide their clients with sound advice. This Article is intended to provoke lawyers to objectively scrutinize their client's punitive damage claim, rather than to blindly advocate their client's case. Minnesota law and public policy can be furthered only if lawyers learn to employ this kind of objective analysis.

II. THE RIGHT TO AND NECESSITY FOR PUNITIVE DAMAGES

Before approaching the strategy and tactics involved in punitive damages cases, it is necessary to consider the legal philosophy and psychology of punitive damages affecting the implementation of

1. Public policy supports punitive remedies for their value as a deterrent to conduct that willfully disregards the rights of others. *See, e.g.*, Philadelphia, W. & B. R.R. v. Quigley, 62 U.S. 202, 214 (1858); Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 312 (Minn. 1982); Wilson v. City of Eagan, 297 N.W.2d 146, 150 (Minn. 1980); Caspersen v. Webber, 298 Minn. 93, 99-100, 213 N.W.2d 327, 331 (1973); Crea v. Wuellner, 235 Minn. 408, 411, 51 N.W.2d 283, 284-85 (1952); Haugen & Tarkow, *Punitive Damages in Minnesota: The Common Law and Developments Under Section 549.20 of the Minnesota Statutes*, 11 WM. MITCHELL L. REV. 353, 356-57 (1985); Comment, *Punitive Damages in Products Liability Actions: A Look at a Newly Extended Doctrine*, 7 WM. MITCHELL L. REV. 185, 185-89 (1981).

public policy by the courts. Neither the attorney pursuing a punitive damages claim nor the trial court assigned the case must accept the attitude that punitive remedies are not as legitimate as other more traditional remedies. To the contrary, the punitive damages remedy is valuable to society as a deterrent of willful misconduct.² Attorneys and trial courts often accept the antiquated attitudes of appellate courts and commentators disfavoring punitive remedies.³ These outmoded attitudes characterize punitive damages as a criminal remedy or one which provides a windfall to a plaintiff.⁴

Despite these contrary attitudes, both the Minnesota legislature and courts have expressly recognized a right to punitive damages and the necessity for this remedy in order to deter willful disregard of the rights of others.⁵ Indeed, all tort damages seemingly have a deterrent effect. Minnesota has acknowledged, however, that a recovery limited to compensatory damages long after the injury has occurred will not deter willful misconduct.⁶ This is particularly true given the disparity of economic and information resources between individual victims and today's corporate institutions.⁷

The Minnesota punitive damages statute⁸ specifies and implements this public policy against willful indifference,⁹ and creates a

2. Modern technology makes mass production and distribution of all kinds of products possible. Many of these products, such as drugs, *see, e.g.*, *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), automobiles, *see, e.g.*, *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), and contraceptive devices, *see, e.g.*, *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984), can cause serious and permanent injury or death to consumers if they are defective. Punitive damages ideally discourage manufacturers from knowingly marketing dangerous products for the sake of profit. *See supra* note 1 and accompanying text.

3. *See, e.g.*, *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-51 (2d Cir. 1967); *Ricard v. State*, 390 So. 2d 882, 884 (La. 1980); Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 MARQ. L. REV. 244, 250-51 (1977); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNS. J. 300, 304 (1972); Willis, *Measure of Damages When Property is Wrongfully Taken by a Private Individual*, 22 HARV. L. REV. 419 (1909).

4. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1267 n.41 (1976) (listing the most frequently noted flaws in the doctrine of punitive damages).

5. *See Marston*, 329 N.W.2d at 312; *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 740-41 (Minn.), *cert. denied sub nom. Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980); MINN. STAT. § 549.20 (1982).

6. *See Gryc*, 297 N.W.2d at 732-33; *cf. MINN. STAT. § 549.20.*

7. *See Gryc*, 297 N.W.2d at 732-33. Indeed, the economic prospects of delaying or reducing compensation by litigation can encourage willful misconduct if no punitive element is present.

8. MINN. STAT. § 549.20.

9. The Minnesota statute provides: "Punitive Damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." *Id.*, subd. 1.

right to recover punitive damages¹⁰ if the requirements stated in the statute are fulfilled.¹¹ The statute requires an award of punitive damages to be determined by the following factors, which reflect the public policy behind punitive damages:

1. the seriousness of hazard to the public arising from the defendant's misconduct;
2. the profitability of the misconduct to the defendant;
3. the duration of the misconduct and any concealment of it;
4. the degree of the defendant's awareness of the hazard and of its excessiveness;
5. the attitude and conduct of the defendant upon discovery of the misconduct;
6. the number and level of employees involved in causing or concealing the misconduct;
7. the financial condition of the defendant;
8. the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons;
9. the severity of any criminal penalty to which the defendant may be subject.¹²

The statute lays to rest any notion that punitive damages are a criminal remedy. The last factor listed distinguishes punitive damages imposed under the statute from penalties imposed by a criminal conviction.¹³ In addition, none of the statutory elements contain any requirement of scienter or criminal intent on the part of the defendant.¹⁴

The Minnesota statute also provides that the jury may consider "other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damages awards to the plaintiff and other similarly situated per-

10. *See id.*

11. *See id.*, subds. 1-3.

12. *Id.*, subd. 3.

13. *Id.*

14. Nevertheless, the bulk of discovery requests directed to willful indifference usually revolve around the questions of who knew what, when they knew it, and what they did about it. *See generally infra* notes 54-80 and accompanying text (discussion of discovery). The seriousness of the hazard and the profitability of the misconduct are also major discovery themes. The seriousness of the hazard, however, is easily proven where injury is caused. The profitability of the misconduct to the defendant can be difficult to ascertain depending upon the nature of the accounting system, but gross sales are usually readily ascertainable and admitted into evidence by the courts.

sons.”¹⁵ This provision eliminates the potential constitutional concerns a defendant may raise regarding repeated punishment. The defendant may prove that it either has been or will be punished enough.¹⁶

Before the punitive damages statute was enacted, the Minnesota Supreme Court recognized that punitive damages were appropriate and necessary to assist the tort system in deterring willful misconduct.¹⁷ Although the Minnesota Supreme Court has not yet considered what constitutes “willful indifference,” in *Gryc v. Dayton-Hudson Corp.*¹⁸ the court acknowledged the factors listed in the trial court’s jury instructions regarding whether a defendant had acted in “willful, wanton and/or malicious disregard of the rights of others” under existing common law.¹⁹ These factors mirror the elements provided under the punitive damages statute²⁰ and also reflect the public policy concerns surrounding punitive damages:

1. the existence and magnitude of the product danger to the public;
2. the cost or feasibility of reducing the danger to an acceptable level;
3. the manufacturer’s awareness of the danger, the magnitude of the danger, and the availability of a feasible remedy;
4. the nature and duration of, and the reasons for, the manufacturer’s failure to act appropriately to discover or reduce the danger;
5. the extent to which the manufacturer purposefully created the danger;
6. the extent to which the defendants are subject to federal safety regulation;
7. the probability that compensatory damages might be awarded against defendants in other cases; and, finally,
8. the amount of time which has passed since the actions

15. MINN. STAT. § 549.20, subd. 3.

16. The plaintiff, however, may also establish that the defendant has not been punished enough or that the defendant’s conduct persists irrespective of actual judgments against it. *Id.*

17. *See Gryc*, 297 N.W.2d 732-33, (quoting Owen, *supra* note 4, at 1258-60). In *Gryc*, the court upheld a \$1 million punitive damages award against the manufacturer of a highly flammable fabric called “flannelette,” which was used in children’s pajamas. The court found that consumers had no knowledge of the fabric’s inherent danger, whereas the manufacturer was “uniquely aware” of flannelette’s flammable characteristics. *Id.* at 734, 739.

18. *Id.* at 727.

19. *Id.* at 739-40.

20. *See supra* note 12 and accompanying text.

sought to be deterred.²¹

In acknowledging the right to punitive damages, the *Gryc* court emphasized that compensatory damages, even when coupled with the threat of lost sales and diminished reputation, are inadequate to deter certain types of corporate conduct.²² The *Gryc* court concluded that since the evidence demonstrated that the punitive damages award was reasonable and that the jury verdict was not influenced by passion or prejudice, the one million dollar award was not excessive.²³

The argument that punitive awards reflect either extraordinary advocacy by plaintiffs' lawyers or unjustified passion by jurors is generally unfounded. It is usually the conduct of the defendant, both in and out of the courtroom, that is responsible for large awards. A review of cases involving large punitive damages awards discloses defendants who stretched credulity beyond any degree of common sense and legal theories beyond the spirit of their application.²⁴ In the process, these defendants demonstrated both irresponsibility and arrogance. Defense lawyers have consciously argued for the safety of clearly unsafe devices while claiming that their clients should be rewarded for their conduct and that injured victims should be turned away. In *Gryc*, for example, the corporate defendant based its defense on a government flammability standard for fabric which the company had lobbied for while knowing that it would not assure safety.²⁵

21. *Gryc*, 297 N.W.2d at 739.

22. *See id.* at 741. The court concluded that (a) punitive damages may be awarded in strict liability actions, *id.* at 733; (b) compliance with an applicable federal safety standard does not preclude a punitive damages award as a matter of law, *id.* at 737-38; and (c) policy considerations do not preclude punitive damages in cases where there is potential for multiple plaintiffs, *id.* at 740-41.

23. *Id.* at 741.

24. *See generally id.* at 743 (defendant contended that opposing counsel's behavior denied them a fair trial). In *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), Ford was sued for the defective design of its Pinto automobile. The plaintiffs suffered severe burns, resulting in one fatality, when the gas tank in their Pinto exploded when the car was rear-ended. *Id.* at 773, 174 Cal. Rptr. at 359. On appeal, Ford claimed that the plaintiffs' counsel had committed misconduct. Ford alleged that the counsel's misconduct included violations of in limine orders regarding examination questions that went beyond the scope of the record and suggested that Ford was guilty of criminal misconduct. *Id.* at 793, 174 Cal. Rptr. at 371. The court held that Ford failed to show that the alleged misconduct could not have been remedied at trial with a proper objection. *Id.* at 798, 174 Cal. Rptr. at 376. Ford's list of baseless allegations illustrates a defendant who refuses to follow common sense and stretches his appeal to include unnecessary claims.

25. *Gryc*, 297 N.W.2d at 733-34. The defendant argued that since the flannelette had passed the federal threshold test for fire resistant fabric, the company could not be held

Defense lawyers often anger juries by making these contradictory arguments regarding the liability issue. Typically, the defendant's attorney asserts a tripartite defense: (1) there is nothing wrong with the product; (2) if there is, the product did not cause the injury; and (3) even if the product did cause the injury, it was the plaintiff's own fault.²⁶ At the same time, defense counsel argues that if the jurors find a defect and willful disregard, they should overlook the defendant's denials of liability since the company is sincerely sorry and is doing its best to prevent future injuries. Under the Minnesota punitive damages statute, juries are instructed to measure punitive damages by the "attitude and conduct of the defendant."²⁷ The defendant only invites a large award by feigning innocence and asserting innumerable defenses when some managers or officers have in fact acted culpably.

Corporate institutions bring other defenses to bear which create disfavor toward the punitive damages remedy.²⁸ One such ploy occurs when a corporate defendant facing a punitive damages suit claims that its "survival" is being jeopardized.²⁹ This argument evokes the old adage, "What is good for General Motors is good for America," and ignores the seriousness of the victim's injury, the ongoing misconduct of the defendant, and the callousness of the corporation's behavior. The extent to which this argument violates our notions of equal justice is demonstrated by applying the same defense in a situation involving only an unintentional tort.

liable. *Id.* The trial court held that the company was liable because it knew that the test was improper at the time of the plaintiff's injury. *Id.*

26. *See, e.g., id.* at 732. The defendants in *Gryc* alleged that (1) the flannelette met the federal safety standards, so it was not defective, *id.* at 733; (2) the design of the pajamas—not the fabric—caused the injury, *id.* at 742; and (3) the child and her mother were contributorily negligent, *id.* at 743.

27. MINN. STAT. § 549.20, subd. 3.

28. For example, a bill introduced in the United States Senate and lobbied for by large corporations virtually eliminates punitive damages by proposing that these damages be limited to the first person who brings suit against the manufacturer of a harmful product. *See* S. REP. NO. 476, 98th Cong., 2d Sess. 13, 15, 60 (1984); *see also* Dentzer, *The Products Liability Debate*, NEWSWEEK, Sept. 10, 1984, at 54, 56. The proposed Products Liability Act would essentially eliminate strict products liability and require the return of a negligence standard. Dentzer, *supra*, at 54. The bill was introduced by Senator Robert Kasten (R. Wis.) and originally co-sponsored by Senator Rudy Boschwitz (R. Minn.). *Id.* The proposed goal of the bill is to provide uniformity in products liability law. The bill has been heavily criticized for depriving consumers of adequate redress for injuries caused by defective products. *See, e.g.,* Shrager, *Products Liability Law—A Legal Saga of Consumer Protection*, TRIAL, Nov. 1983, at 4. The bill is supported by President Reagan and many industry leaders who have spent millions lobbying for it. Dentzer, *supra*, at 56.

29. *See, e.g., Gryc*, 297 N.W.2d at 740-41.

An individual faced with possible bankruptcy for the consequences of mere negligence could not honestly make the "survival" argument and expect to avoid or minimize the consequences of his negligence. Even more so, a defendant who acts in reckless disregard of the rights of others should also be denied this defense.

The economic consequences of compensatory and punitive damages in excess of a corporation's net worth seem misunderstood. The popular misconception is that the corporation and its productivity can be destroyed by a punitive damages judgment. Such a judgment, however, only changes management responsibility and shareholder values. In finding a corporation liable, some courts have considered management, rather than shareholders, as responsible for the wanton, reckless, and intentional acts of the corporation.³⁰ Subsequently, courts have imposed liability on shareholders of commercial corporations that acted in reckless disregard of people and their property.³¹ Management changes forced by shareholders reacting to large punitive damages awards due to irresponsible conduct, or the outright sale of corporate divisions to responsible companies, are examples of the prospects that may result if the enunciated public policy of punitive damages has the desired impact and deterrent effect. Thus, although the threat to vested management interests and the value of stockholdings may be substantial, the threat to corporate productivity is minimal.

Whether the public policy enunciated in Minnesota's statute will be consistently enforced remains in doubt. Despite the publicity afforded to large awards,³² relatively few verdicts are returned and fewer still are upheld on appeal. The publicity afforded puni-

30. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 842 (2d Cir. 1967) (punitive damages imposed on a corporation if its management approves or takes part in the act). New York does not impose punitive damages against a corporation unless "the officers or directors, that is, the management [of a company or relevant division] . . . either authorized, participated in, consented to or, after discovery, ratified the conduct." *Id.* at 842.

31. See, e.g., *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 811 (6th Cir. 1982). In *Moran*, the officials responsible for the business decisions resulting in the plaintiff's injuries had since left the corporation. *Id.* at 816. The court stated, "It is the agency at the time of the tortious act, not at the time of litigation, that determines the corporation's liability." *Id.* at 817. The court added that sustaining the defendant's claim of nonliability on this basis would impenetrably shield the corporation from punitive damages. *Id.* at 817.

32. See, e.g., *A.H. Robins Won't Appeal Negligence Award*, Wash. Post, June 19, 1984, at D1, col. 1; *Court Upholds \$1.75 Million Award in Burn Suit*, Minneapolis Star & Trib., May 24, 1980, at A7, col. 5.

tive damages awards vastly outstrips any real deterrent impact or effective application of the public policy. The punitive damages award of \$125 million in *Grimshaw v. Ford Motor Co.*³³ was well publicized due to its size.³⁴ The magnitude of the *Grimshaw* verdict provided a warning to corporations. Yet the warning has gone unheeded. In 1983, for example, the United States Department of Transportation cited General Motors for intentionally and knowingly marketing 1.1 million "X" cars with defective brakes.³⁵

Courts often appear more concerned with the size of an individual award³⁶ than with the statutory elements and the realistic amount needed to carry out the policy of deterrence. Some courts are unwilling to look at the real economic consequences or why willful misconduct has not been deterred.³⁷ They fail to realize that a victim injured by intentional, willful, or reckless disregard often has no insurance to pay for his damages or attorney's fees and costs. The victim is similarly without power to prevent injury to others similarly exposed. The institutional defendant, however, usually has insurance to cover the victim's compensatory damages and its own defense fees and costs. In many jurisdictions, punitive damages may also be covered by insurance.³⁸ In light of these re-

33. 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

34. The original amount was subsequently reduced to \$3.5 million at a new trial. *Id.* at 821-23, 174 Cal. Rptr. at 389-91.

35. *U.S. Releases Data on X-Car Defect*, N.Y. Times, Oct. 21, 1983, at B16, col. 1.

36. For example, the *Grimshaw* court approved the lower court's reduction of the plaintiff's damages from an amount which might effectively deter a corporation as large as Ford (\$125 million), to an amount which was comparatively ineffective (\$3.5 million). 119 Cal. App. 3d at 821-23, 174 Cal. Rptr. at 389-91.

37. For example, General Motors had what appears to be its best year in 1983. *See* N.Y. Times, Oct. 25, 1983, at D1, col. 6 (GM reported third quarter net income rose nearly sixfold, to \$723 million, compared with \$129.4 million in same period last year). The chief executive officer of the A.H. Robins Company, which has been embroiled in litigation involving the Dalkon Shield since 1972, testified in September of 1983 that the litigation had not cost the company anything because the company was backed by \$410 million in insurance coverage. During that period, A.H. Robins rose to become a Fortune 500 company.

38. *See, e.g.*, *Southern Farm Bureau Casualty Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969); *Scott v. Instant Parking, Inc.*, 105 Ill. App. 2d 133, 245 N.E.2d 124 (1969); *Anthony v. Frith*, 394 So. 2d 867 (Miss. 1981); *First Bank Billings v. Transamerica Ins. Co.*, — Mont. —, 679 P.2d 1217 (1984); *Dayton Hudson Corp. v. American Mut. Liab. Ins. Co.*, 621 P.2d 1155 (Okla. 1980); *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964); *State v. Glens Falls Ins. Co.*, 137 Vt. 313, 404 A.2d 101 (1979); *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (W. Va. 1981); *Sinclair Oil Corp. v. Columbia Casualty Co.*, 682 P.2d 975 (Wyo. 1984). *But see* *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); *Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co.*, 172 N.J. Super. 10, 410 A.2d 696 (1980); *Butler v. United Pac. Ins. Co.*, 265 Or. 473, 509 P.2d 1184 (1973).

alities, the defense of economic hardship is meritless.

III. WHEN TO ASSERT A PUNITIVE DAMAGES CLAIM

As long as court and corporate attitudes frustrate the implementation of a strong public policy and overlook the actual economics of both business and litigation, plaintiffs' attorneys must carefully consider whether or not to include a claim for punitive damages. Without a punitive damages element, outraged juries are known to include a punitive element in their compensatory verdicts.³⁹ A punitive count permits the issue to be isolated and subject to judicial control. Therefore, the attitude of a particular court towards punitive damages awards needs to be evaluated. For example, in some jurisdictions, a compensatory award of \$1,250,000 may be sustained while an award of \$750,000 in compensatory damages and \$500,000 in punitive damages may be subject to reduction or elimination of the punitive element.

Another point to consider before asserting a punitive damages claim is its effect on a potential settlement. While logic suggests that a punitive claim should cause the defendant who knows that it acted irresponsibly to settle quickly, the opposite result often occurs. A defendant who has multiple individual exposures and ample coverage for all litigation expenses and compensatory damages, but no coverage for punitive damages, may attempt to reduce the exposure of its own assets by delaying settlements and litigating each case. The defendant will persistently reject any punitive factor in settlement negotiations and appeal all actual awards. The last move the defendant may make is a quick appearance at the bargaining table where value "precedent" can be set.⁴⁰

IV. INSURANCE AND SETTLEMENT CONSIDERATIONS

In cumulative tort cases, plaintiffs' attorneys and courts must give greater attention to insurance coverage issues than was historically given in single case litigation. The duty to defend and the conflicts that develop between the insurer, the insured, and their

39. *See, e.g.*, *Moore v. Fisher*, 117 Minn. 339, 343-44, 135 N.W. 1126, 1128 (1912) (large compensatory award upheld because no evidence of passion or prejudice was indicated, although the court did mention that the jury could have included assessment of punitive damages in its award).

40. Other factors may bear upon the defendant's attempt to set a value irrespective of the existence of past harm or the future potential for harm. These may include corporate business decisions, internal politics, marketing plans, financing, acquisitions, sales, and stock offerings.

counsel are very significant. From the court's standpoint, the public policy favoring statutory punitive damages and the relevance of both compensatory and punitive exposure to the defendant under that statute will require consideration of a number of insurance-related factors. These include the admissibility of insurance coverage limits; whether the limits apply to defense costs as well as indemnity; and whether punitive damages will be covered. From the plaintiffs' standpoint, the potential conflicts between the insurer and insured can create the economic leverage needed to enable or maximize settlements.

Many lawyers assume that punitive damages are not covered by insurance policies. This assumption is based on older precedent that disallowed insurance coverage for punitive damages under the belief that defendants should personally be punished.⁴¹ This can be a costly mistake. Many of these older cases involve the truly intentional tort as distinguished from "wanton and reckless" conduct.⁴² Since some courts are willing to liberalize coverages for corporate defendants, they may also opt for punitive coverage where the actions and results are less than intentional.

The large corporate defendant typically has many primary and excess insurers during the time a particular product is manufactured and marketed. There is a great deal of developing law which relates to the coverage that may be applicable to injuries caused by the product.⁴³ In *Keene Corp. v. Insurance Co. of North*

41. See, e.g., *American Sur. Co. v. Gold*, 375 F.2d 523, 528 (10th Cir. 1966) (public policy forbids contracts insuring against punitive damage awards); *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432, 442 (5th Cir. 1962) (public policy of punishing and deterring defendant prohibits construction of insurance policies to cover liability for punitive damages); *Nicholson v. American Fire & Casualty Ins. Co.*, 177 So. 2d 52, 53 (Fla. Dist. Ct. App. 1965) (public policy precludes allowing motorist to shift responsibility for punitive damages penalty to an insurance company); *Crull v. Gleb*, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964) (if defendant could shift burden of punitive damages award to garnishee, then award would have served no purpose); *LoRocco v. New Jersey Mfrs. Indem. Ins. Co.*, 82 N.J. Super. 323, 197 A.2d 591 (it is contrary to public policy for insurer to indemnify vehicle operator as to punitive damages against the willful wrongdoer), *cert. denied*, 42 N.J. 144, 199 A.2d 655 (1964).

42. *Crull*, 382 S.W.2d at 21-22 (wanton and reckless acts differ subtly from intentional acts so as to allow insurers to deny coverage under a policy that does not cover injuries intentionally caused).

43. See, e.g., *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981) (policies applicable to varying time periods held to provide coverage if there was either manifestation of or exposure to injury during the policy period), *cert. denied*, 455 U.S. 1007 (1982); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980) (court applied exposure theory, obligating insurers to defend suits brought against manufacturers by individuals who contracted disease due to asbestos exposure during the

America,⁴⁴ policies applicable to varying time periods were held to provide coverage if there was either manifestation of asbestos-related diseases or exposure to asbestos during the policy period.⁴⁵ Even if the injury manifests itself years after an insurance policy period expires, that policy will apply if the exposure to injury took place within the policy period. Thus, the existence and extent of the defendant's insurance coverage in cumulative tort situations cannot be determined by simply discovering the amount of coverage applicable in the year injury occurred. These commercial insurance arrangements can also contain very complex deductible or retention arrangements under which the degree of exposure retained by the defendant must be ascertained.⁴⁶

Plaintiffs' lawyers must also demand production of any interim defense agreements. These agreements are typically entered into between insurers and insureds in cumulative tort situations.⁴⁷ The agreements state the means by which claims will be dealt with pending resolution of potential coverage controversies, or measurement of the totality of claims and coverage. The parties to these agreements tend to reserve their rights and provide for coverage litigation at a later time.

Policy limit demands can encourage settlement and create conflict between the insurer and insured where coverage is not complete.⁴⁸ This is especially true in jurisdictions, such as Minnesota, that have adopted the minority rule that standard liability insur-

time insurers provided coverage, rather than the manifestation theory, which would have obligated insurers to defend suits brought by individuals manifesting injury during the period of coverage); *Caspersen v. Webber*, 298 Minn. 93, 213 N.W.2d 327 (1973) (although plaintiff's bodily injury resulted from an assault and battery, exclusion in defendant's liability insurance policy for "bodily injury . . . caused intentionally by or at the direction of the insured" did not relieve insurer of liability where jury found that defendant did not intend to cause bodily harm).

44. 667 F.2d 1034 (D.C. Cir. 1981).

45. *Id.* at 1047.

46. When more than one policy applies to a loss, the insurers' liability is apportioned according to the "Other Insurance" provisions of each policy. *Id.* at 1050.

47. The insurer is bound to defend the insured against suits alleging circumstances covered by the policy. 7C J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4682, at 16 (1979). Nevertheless, the insurer's duty to defend is only contractual. If there is no contract to defend, there is no duty to defend. *Id.* at 27.

48. An insurer may be subject to a bad faith claim by its insured if it has refused to settle for an amount within the insured's policy limits, and the damages after litigation exceed the policy's coverage. See R. KEETON, *BASIC TEXT ON INSURANCE LAW* § 7.8 (1971).

ance policies do not provide coverage for punitive damages.⁴⁹ Assume, for instance, that a defense lawyer evaluates a compensatory claim at \$500,000 and also observes an uncertain exposure to his client for punitive damages. The plaintiff's lawyer evaluates the maximum compensatory value of the case at \$1 million and a potential additional \$1 million in punitive damages based on willful misconduct. The defense lawyer believes his client can win the punitive damages claim, but that the probabilities favor a plaintiff's verdict for compensatory damages. The policy limits are \$1 million and the case is venued in Minnesota where the policy may not insure punitive damages. If the plaintiff's lawyer makes a settlement demand for the policy limits, the insured defendant may support that demand to avoid any punitive exposure to the corporate assets. The insurer may be hard pressed to refuse payment of the demand because of its potential responsibility should the case go to trial. Its insured could be assessed with a multimillion dollar award at trial and subsequently make a bad faith claim against the insurer for amounts in excess of the policy limits.

V. PRETRIAL STRATEGY

A. *The Changing Focus*

Courts and lawyers have a tendency to freeze issues in time. The legal community is trained to handle an individual case in which the facts are long past. In contrast, cumulative tort cases tend to grow from an evidentiary standpoint. They change with time in the sense that the defendant's litigation tactics become part of the defendant's overall pattern of conduct. Thus, cases involving early sales of a defective product may not involve punitive issues while later cases may involve overwhelming punitive conduct because a cover-up or other willful activity is initiated by overzealous officers or attorneys. Similarly, evidence concerning the defectiveness of a product may be marginal in early cases but reach levels beyond a reasonable doubt as evidence of defect, hazard, and injury mounts. Lawyers and courts need to understand that early trials rarely involve the same evidence or conduct as subsequent cases. These differences have a profound impact on how the courts consider and adapt to issues such as the work product privilege as applied to cumulative tort cases.⁵⁰

49. See *Caspersen*, 298 Minn. at 99-100, 213 N.W.2d at 331 (punitive damages were not awarded because of bodily injury, so policy did not cover the punitive damages).

50. See *infra* note 51 and accompanying text (discussing the work product doctrine).

In the work product area injuries may continue to arise after the first suit related to a product is filed. The corporate defendant may seek to shield all knowledge subsequently acquired from experts and investigators under the work product privilege.⁵¹ Even if every expert contacted by the defendant has opined that the device is defective and even though every device the defendant has tested has failed, the defendant will urge that this was done by the lawyer in the context of earlier litigation. Lawyers may try to shield the manufacturer from that knowledge even though that knowledge should have compelled the manufacturer to warn other potential victims to prevent the subsequent injuries. If the plaintiff's attorney is to be successful in obtaining this material through discovery, he must be aware that it is likely to be in the possession of the defendant's attorney, rather than the defendant. The plaintiff may overcome the defendant's work product claim by pointing out the absurdity of allowing the defendant's attorney to shield the corporation from knowledge upon which the corporation would otherwise have a legal duty to act. The court can protect materials from discovery that are legitimately work product by appointing a master to review the information.⁵² In this manner, the plaintiff's lawyer may be able to prevent the work product privilege from becoming a shield to conceal evidence that is not only relevant to defendant's ongoing duty to warn, but which may also reveal willful violations of the law.

While it is important that courts permit discovery of information before trial, it is equally important that courts permit the presentation of relevant if repetitious evidence at trial. For example, the number and level of employees involved in causing or concealing the misconduct is relevant under the Minnesota punitive damages statute.⁵³ Historically, courts are very impatient with

The changing focus effect also poses collateral estoppel issues. For example, in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Court held that the law of collateral estoppel forecloses relitigation of factual issues which were determined in a previous action. *Id.* at 332-33. As applied to mass tort litigation, once a product has been held by a jury to be unreasonably dangerous, the defendant would be collaterally estopped from trying to prove otherwise in subsequent litigation involving the same product.

51. According to Rule 26(b)(3) of the Federal Rules of Civil Procedure, material prepared in anticipation of litigation is only discoverable if the party can show a "substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." FED. R. CIV. P. 26(b)(3). This "material prepared in anticipation of litigation" is commonly referred to as "work product."

52. *See, e.g.*, FED. R. CIV. P. 53.03.

53. *See* MINN. STAT. § 549.20, subd. 3. "Any award of punitive damages shall be

repetitious evidence. In these cases, however, courts must be reminded that repetitious evidence may be necessary to accurately portray the degree of awareness within a large corporation. The plaintiff should be allowed to present copies of numerous documents to the jury which were distributed among forty or fifty officers, employees, or board members over a significant time span. Without this evidence, the plaintiff will be prevented from establishing the defendant's awareness of the situation by clear and convincing evidence. Courts must realize that in many punitive damages cases the conduct of the defendant is a larger issue than the defect. Courts, therefore, must allow tailoring of discovery and trial practices to effectuate the public interest in deterring misconduct.

B. Specific Discovery and Pretrial Tactics

1. Discovery and Information Gathering

a. Product Testing

Both the failure to test and the failure to act upon the information obtained from testing can serve as an important basis for punitive damages.⁵⁴ In *Dorsey v. Honda Motor Co.*,⁵⁵ the fifth circuit reinstated a punitive damages award because the defendant had ignored crash test results revealing that in a thirty-mile-per-hour crash, an average male would strike the dashboard even while wearing lap and shoulder restraints.⁵⁶ In the Mer/29 cases, the

measured by those factors which justly bear upon the purpose of punitive damages, including . . . the number and level of employees involved in causing or concealing the misconduct." *Id.*

54. *See id.* "Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including . . . the degree of the defendant's awareness of the hazard and of its excessiveness, [and] the attitude and the conduct of the defendant upon discovery of the misconduct." *Id.*

55. 655 F.2d 650 (5th Cir. 1981), *modified per curiam on other grounds*, 670 F.2d 21, *cert. denied*, 459 U.S. 880 (1982).

56. *See id.* at 653. The *Dorsey* court reinstated damages in the amount of \$5 million. *Id.* at 652. The crash that caused Dorsey's serious injuries was equivalent to a 20-mile-per-hour crash. *Id.* at 653.

Similarly, in *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981), the court held that punitive damages were proper where a manufacturer's testing of a Jeep CJ-7 was so inadequate as to manifest a flagrant indifference to the probability that the product might expose consumers to unreasonable risk of harm. *Id.* at 472-73, 424 N.E.2d at 573. Appellants, American Motors Corp., responded to interrogatories by stating that no "proving ground," "vibration or shock," or "crash" tests were ever conducted on the Jeep CJ-7's roll bar, the collapse of which greatly aggravated the plaintiff's injuries. *Id.* at 472, 424 N.E.2d at 573.

defendant falsified laboratory test data and intentionally withheld other test data from the Food and Drug Administration.⁵⁷ The plaintiff was awarded \$175,000 in compensatory damages and \$500,000 in punitive damages.⁵⁸

Given the law's intolerance of inadequate testing, this information is essential to the plaintiff's case. Interrogatories and document requests must be developed to discover testing standards and activities. Reports of government agencies or memoranda obtained through the Freedom of Information Act⁵⁹ are also helpful since they frequently document product experience.

b. Internal Recommendations for Safety Improvements

Throughout the design process, the manufacturer may generate memoranda concerning design changes and other recommendations for safety improvements. These documents may be vital to obtaining and keeping a punitive damages award. In *Dorsey*, Honda ignored an employee's recommendation to enlarge the vehicle for added safety.⁶⁰ Similarly, the *Gryc* "powder keg" memorandum⁶¹ demonstrates the importance of obtaining such memoranda.⁶²

Document requests are the key to discovering documentary evidence of a defendant's actual knowledge. The "smoking gun" is the most persuasive evidence of culpability. In addition, plaintiffs'

57. *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Toxicology tests began in 1957 when MER/29 was administered to rats. In its 1959 FDA application requesting permission to market MER/29, the company reported that four out of eight rats died in one study when in fact all eight had died. Fictitious weights and blood tests were reported for dead rats as if they were still living and being studied. False results were also reported on a sample of monkeys that had been administered MER/29. *Id.* at 695-96, 60 Cal. Rptr. at 404. The FDA required further testing, which revealed significant instances of eye opacities. None of the information regarding eye opacities was reported to the FDA. *Id.* at 697, 60 Cal. Rptr. at 405. As a result of using MER/29, the plaintiff developed cataracts in both eyes. *Id.* at 694, 60 Cal. Rptr. at 403.

58. *Id.* at 693, 60 Cal. Rptr. at 403. The plaintiff stipulated to a reduction of the punitive damages from \$500,000 to \$250,000 to avoid a new trial. *Id.* at 717, 60 Cal. Rptr. at 418.

59. 5 U.S.C. § 552 (1982).

60. 655 F.2d at 653.

61. 297 N.W.2d at 734. In 1956, one of the defendant-manufacturer's top officials wrote in a memorandum entitled "Flammability—Liability," which stated, "We are always sitting on somewhat of a powder keg as regards our flannelette being so inflammable." *Gryc*, 297 N.W.2d at 734.

62. See generally Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982).

attorneys should consider deposing former employees, other claimants, experts who have given notice of defects to the company, and legal assistants or lawyers who have been responsible for the handling of documents in large cases.

The information gathered by a defendant's experts in other cases can be a dramatic source of information. In *Stambaugh v. International Harvester Co.*,⁶³ the court permitted the plaintiff to introduce the opinion of an expert from the defendant's company who investigated a similar product defect in a different case, despite the defendant's work product objection.⁶⁴

The existence of safety devices which a defendant could have incorporated into its product may be disclosed by an investigation of patents relating to the products involved. Patents protecting the specific product may be obtained from the patent office or the defendant. In some cases, discovery may even reveal that the defendant owns the patent on a product incorporating the safety device. Patents on similar products should also be investigated.

c. Advertising Claims and Failure to Warn

Two additional factors are common in products liability cases awarding punitive damages: the manufacturer's failure to warn of its product's potential dangers, and the manufacturer's tendency to exaggerate in advertising its product's benefits without also warning of risks involved. In *Gryc*, the defendant claimed that it was not feasible to warn consumers because a warning would stigmatize its product.⁶⁵ The court found that this argument amounted to an admission that the defendant was protecting the market of a product which consumers might deem unreasonably dangerous.⁶⁶ In *Leichtamer v. American Motors Corp.*,⁶⁷ the manufacturer's promotion of off-the-road use of its Jeep CJ-7, while providing a roll bar that did little more than add "rugged good looks," was a sufficient basis to award punitive damages.⁶⁸

Because the defendant's knowledge of the defect is relevant to a

63. 106 Ill. App. 3d 1, 435 N.E.2d 729 (1982) (appellate court affirmed decision, but reduced award of punitive damages where defendant tractor manufacturer was held liable for defect in tractor gas cap).

64. *Id.* at 5-6, 435 N.E.2d at 735 (expert allowed to testify concerning pressure release capabilities of tank gas cap in different type of tractor).

65. *See Gryc*, 297 N.W.2d at 739-40.

66. *Id.*

67. 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

68. *See id.* at 457, 424 N.E.2d at 580.

punitive award, prior consumer complaints establishing notice and knowledge of the defect are critical. In *Ford Motor Co. v. Nowak*,⁶⁹ the plaintiff, who had stepped out of her brand new 1977 Ford SMX to close the driveway gate, was killed when the car apparently self-shifted into reverse and rolled over her.⁷⁰ The court, in finding that the defendant had knowledge of a defect, noted that from 1971 to 1976 Ford had received 728 reports of accidents attributable to SMX transmission failure.⁷¹ These complaints led to a design revision recommendation to remedy the problem at a cost of only three cents per car.⁷² The recommendation was ignored and only the consumers purchasing Fords after November 1976 were warned of the defect.⁷³ The court noted that this overdue warning was insufficient to rectify the dangerous condition.⁷⁴ In *Stambaugh*, the court stated, "Evidence of other sufficiently related accidents, although not competent for the purpose of showing independent acts of negligence, may be admissible to show notice to the defendant that conditions were unsafe and that unsafe conditions caused other accidents."⁷⁵ Some courts have tended to be too restrictive and have admitted other injuries only as to the issue of notice, when that evidence may be necessary and relevant to prove actual knowledge, hazard, and defect.⁷⁶

Interrogatories and document requests should be used to discover design planning, research and development, design changes, manufacturing standards and activities, and the chain of corporate command with respect to design planning, manufacturing, marketing, and component part suppliers, as well as other claims or suits. Depositions should include the corporate hierarchy and the

69. 638 S.W.2d 582 (Tex. Civ. App. 1982).

70. *Id.* at 586.

71. *Id.* at 593-94. Over the same period, Ford also received reports of 234 accidents apparently caused by the backing up of unattended SMX cars. *Id.*

72. *Id.* at 595. The recommendation also noted that the design revision would correct the problem in 95% of the cases. *Id.*

73. *Id.* at 596.

74. *Id.*

75. 106 Ill. App. 3d at 20, 435 N.E.2d at 743.

76. *See, e.g., Johnson v. Amerco, Inc.*, 87 Ill. App. 3d 827, 846-49, 409 N.E.2d 299, 314-15 (1980) (court found accidents were not of sufficient similarity and concluded that any probative value was outweighed by the potential for prejudice); *Ray v. Cock Robin, Inc.*, 57 Ill. 2d 19, 22, 310 N.E.2d 9, 11 (1974) (evidence of other sufficiently related accidents may be used to show notice of the existence of an unsafe condition and that the unsafe condition caused other accidents). *But see Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (discussing the legitimate application of evidence of other claims or injuries on all issues). *See generally* 2 WIGMORE, EVIDENCE §§ 252, 442, 458 (1961).

individuals charged with safety, labeling, advertising, marketing, and design.

d. Ratification of Contract at Appropriate Level of Management

Corporations often attempt to shield top officers from acquiring information concerning possible misconduct by the company. Very few of the reported cases discuss the issue of contract ratification. In *Toole v. Richardson-Merrell, Inc.*,⁷⁷ however, the court found that because the defendant had been conducting experiments for several years, the jury could reasonably infer that management had some knowledge of the test results, especially since other evidence disclosed great company interest and enthusiasm for the product.⁷⁸ Particularly in cumulative tort situations, it is very important to take depositions of officers at an early stage to apprise them of the evidence so that if the company later fails to act, the officers cannot deny knowledge of the hazard or problem with respect to future cases. Even where that need does not exist, it is wise to take depositions of corporate officers to pin them down on their ratification of the actions or inactions of subordinates.

e. Net Worth

Since Minnesota's Punitive Damages Statute requires consideration of "the financial condition of the defendant,"⁷⁹ evidence establishing the wealth of the defendant is admissible.⁸⁰ With respect to public companies, this information can be obtained from published financial statements such as annual reports or the public documents filed for securities purposes. In some instances accountants' testimony and opinions by appraisers and stock analysts may be necessary. In obtaining financial information, it is important to consider both book value and market value, since the higher figure should be presented to the jury. With respect to privately held companies, interrogatories and document requests may be used to discover net worth and insurance information.

77. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

78. *Id.* at 701-02, 60 Cal. Rptr. at 414-15.

79. MINN. STAT. § 549.20, subd. 3.

80. *See generally* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 5.36 (1983) (discussing wealth of defendant as evidentiary concern).

2. *Defendant's Pretrial Motions and Tactics*

a. *Protective Orders*

Defendants routinely demand protective orders restricting documents in cumulative tort cases to the specific case at hand. Plaintiffs' lawyers and courts should hesitate before agreeing to broad protective orders because defendants often seek such orders to prevent plaintiffs' lawyers from cooperating with information while the defendant coordinates its evidence throughout the country. The tactic, if successful, causes other courts to start discovery from scratch.

b. *Demands by Defendant That Plaintiffs' Lawyers Refuse Additional Representation*

Offers of settlement from a defendant to the plaintiffs' lawyer who is handling a number of the product liability claims often demand that the plaintiffs' lawyer refuse to take additional related cases. Accepting this offer could violate the ethical code.⁸¹ In addition, defendants may demand as a condition of settlement that the plaintiffs' lawyer refuse to supply other lawyers or claimants with documentary, demonstrative, or expert evidence, thus depriving claimants and courts from learning about or utilizing existing evidence. The ethical implications of these demands are serious. The demand automatically places the plaintiffs' lawyer in a very difficult ethical conflict between his obligation to represent the public and his obligation to pursue the rights of his existing clients.⁸²

Another tactic, which appears to violate rule 11 of the Federal Rules of Civil Procedure,⁸³ is a settlement made without a satisfaction and conditional upon agreement by the plaintiffs' lawyer not

81. "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(B) (1979).

82. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 with *id.* Canon 6.

83. Rule 11 provides:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11.

to oppose motions by the defendant to vacate the judgment. By this means, a defendant attempts to effectively erase verdicts so that it can create barriers to collateral estoppel by asserting to other courts that cases were settled.⁸⁴ When these conditions are coupled with a confidentiality agreement concerning the amount of the settlement, other courts and attorneys may never learn that the settlement actually involved payment of the full judgment plus interest.

c. Bifurcation Motions

The defense usually attempts to bifurcate the punitive damages trial.⁸⁵ Some commentators have supported this procedure in tort litigation, largely based on the premise that two different burdens of proof will be involved in the trial of the case.⁸⁶ To preclude bifurcation, plaintiffs' lawyers may argue that the motion is in fact an effort by the defendant to assert contradictory arguments; that is, an opportunity to use a tripartite defense while holding back the completely inconsistent *mea culpa* defense.⁸⁷ Bifurcation may benefit the plaintiff, however, where the evidence of the defect and the issues relating to punitive damages are significantly different. Nevertheless, this circumstance is unusual in products cases. The plaintiffs' lawyers must be alert to the tendency of some courts to prejudge the validity of a punitive claim based on the strength of

84. *See supra* note 50 (discussing collateral estoppel concerns).

85. A bifurcated trial divides the issues in a single case into two parts. The findings on each set of issues are made in separate proceedings. In a punitive damages trial, bifurcation means deciding the compensatory damage issues separately from the punitive damage issues. *See Hilliard v. A.H. Robins Co.*, 148 Cal. App. 3d 374, 394-95, 196 Cal. Rptr. 117, 129-30 (1983) (allowing bifurcation); *Newton v. Yates*, 170 Ind. App. 486, 488, 353 N.E.2d 485, 488 (1976) (allowing bifurcation); *Cobb v. Superior Court*, 99 Cal. App. 3d 543, 548, 160 Cal. Rptr. 561, 564 (1979) (denying bifurcation). *See generally* J. GHIARDI & J. KIRCHER, *supra* note 80, §§ 12.01-13 (discussing bifurcation).

86. *See, e.g.*, Fulton, *Punitive Damages in Product Liability Cases*, 15 FORUM 117, 129-30 (1980). The plaintiff in a civil action has the burden of proving the requisite elements of his cause of action by a preponderance of the credible evidence. *See, e.g.*, *Trimbo v. Minnesota Valley Natural Gas Co.*, 260 Minn 386, 110 N.W.2d 168 (1961) (in a civil case, a party need only prove its case by a preponderance of evidence, not beyond a reasonable doubt); *Aubin v. Duluth St. Ry. Co.*, 169 Minn. 342, 211 N.W. 122 (1926) (meaning of preponderance of evidence). In Minnesota, the plaintiff must prove by the higher standard of clear and convincing evidence that the acts of the defendant show a "willful indifference to the rights or safety of others" in order to recover punitive damages from that defendant. MINN. STAT. § 549.20, subd. 1; *see also* J. GHIARDI & J. KIRCHER, *supra* note 80, § 9.12, at 37-38. *See generally* Comment, *supra* note 1.

87. *See supra* notes 26-27 and accompanying text (discussing these contradictory arguments).

the defect claim. Such considerations are not relevant to the punitive damages statute⁸⁸ and plaintiffs are entitled to trial by jury without courts restricting evidence. A prima facie case on all claims must be made; and if it is not made, evidence and claims can be stricken at the conclusion of the case.

d. Pretrial Motions

Motions in limine had fallen into disuse a decade ago but are now the heart of a defendant's attempts to exclude evidence.⁸⁹ For example, a plaintiff's attorney can expect motions to exclude remedial measures and evidence of other claims. Nevertheless, defendants usually want to exclude evidence of remedial measures with respect to the issue of defect but also want to include such evidence to show how responsible they are on the punitive issue. Thus, such motions are often an effort by the defendant to make contradictory assertions⁹⁰ and courts need to be informed that the rulings must be considered in the context of the entire case.

Defendants will often move to strike or seek summary judgment on punitive damages claims. Plaintiffs should treat this motion as an opportunity to apprise the court of the misconduct and to alert the court of the plaintiffs' right to a jury trial on all issues.

VI. CONCLUSION

A successful pretrial strategy in a case involving a punitive damages claim demands an objective and modern analysis of the issues. Attorneys can no longer rely on traditional techniques. The policy, attitudes, economics, insurance considerations, and cumulative nature of these cases must be examined to design a cohesive pretrial plan.

Plaintiffs, defendants, the courts, and the public will benefit with these elements in the forefront. First of all, courts will enforce the plaintiffs' statutory and judicially supported right to punitive damages. This analysis may also force defendants to reconsider their actions and attitudes. Defendants may realize that the issue is not whether the corporation itself is good or bad, but whether

88. See MINN. STAT. § 549.20, subd. 3; *supra* note 12 and accompanying text (discussing the statutory elements).

89. See Davis, *Motions in Limine: Tools for a Fair Trial*, TRIAL, Nov. 1982, at 90; Rodin, *The Motion in Limine: Its Uses and Abuses*, 65 CHI. B. REC. 230 (1984); Saltzburg, *Tactics of the Motion in Limine*, LITIGATION, Summer 1983, at 17; Spencer, *The Motion in Limine: Pretrial Tool to Exclude Prejudicial Evidence*, 56 CONN. B.J. 325 (1982).

90. See *supra* notes 26-27 and accompanying text.

individuals within the corporation acted with willful indifference. Moreover, defendants may recognize that by covering up a bad situation in an effort to reduce claims, they enhance culpability to destructive levels and violate the law. This approach will also provide courts and juries with an objective factual basis upon which to evaluate a punitive damages claim, in the absence of an attorney's subjective advocacy and inconsistent defenses. Above all, an objective overview will promote the public interest by suppressing conduct that willfully disregards the rights of others.

SMALL POWER PRODUCTION IN MINNESOTA

Now that most of the technical barriers to small scale alternative energy production have been largely overcome, only the institutional barriers remain. The two articles that follow address the remaining problems that may discourage the establishment of these facilities. Professor Neil Hamilton addresses two areas of critical importance: the uniform statewide contract between the small producer and the utilities, and the price for the buy-back of power. Without a uniform contract, the small producer faces prohibitively high transaction costs in negotiating with the utility. Under government regulations, the buy-back price of power produced by the small producer is based on costs avoided by the utility, but the formula for determining avoided costs is unsettled. Professor Hamilton examines the various components of a uniform statewide contract and the avoided cost price, and offers suggestions to promote the development of alternative energy production. Seth Colton and James Brehl address the issues confronting the under-forty kilowatt cogeneration facility when it seeks to interconnect with a utility under the Minnesota Cogeneration and Small Power Production Act and the Minnesota Public Utility Commission rules.

