

New Light on Punitive Damages

William M. Landes and Richard A. Posner

THERE IS MUCH TALK these days about the need to reform the tort system. One frequently urged reform would eliminate or curtail punitive-damage awards, particularly in products liability cases. We have no desire to join the debate over whether this or any other tort reform is feasible or desirable or, if so, whether the mechanism of reform should be state or federal legislation or judicial modification of judge-made doctrines. We do, however, have some interesting data that may be relevant to the debate. Collected in the course of writing our forthcoming book, *The Economic Structure of Tort Law*, these data concern punitive-damage awards in recent reported cases, especially but not exclusively products liability cases, in both state and federal courts. The data suggest—though they certainly do not show conclusively—that concern with the incidence of punitive-damage awards may be exaggerated. Other than in cases of intentional wrongdoing, these awards appear to be rare.

Punitive Damages in Tort Cases

The torts system allows victims of negligence and other civil wrongs to sue the alleged injurer for damages. Injurers' damage payments

are usually limited to the losses suffered by victims—medical expenses, lost income, and compensation for “pain and suffering.” In some cases, however, injurers may be assessed an additional amount called punitive damages. The “black-letter law” of punitive damages is that they are awarded “where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime,” or where it indicates “such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton,” or “reckless,” which means “proceeding with knowledge that the harm is substantially certain to occur.” (These quotations are from the current edition of the leading torts treatise, *Prosser and Keeton on the Law of Torts*.)

In general, punitive damages are appropriate in these circumstances for the same reasons punishment is appropriate for criminal offenses. Intentional harms, such as misappropriation of property and deliberate injuring, are likely to be inflicted for purposes of obtaining some specific gain that could be obtained through a voluntary market transaction; also, because intentional harms are engaged in knowingly, their perpetrators may try to conceal them. Damage awards equal to the victim's damages provide inadequate deterrence against such deliberate, concealed harms, since the wrongdoer's expected damage payment is frequently less than his immediate gain. The current debate over punitive damages does not involve intentional torts. It involves products liability and other accident cases where liability is based on negligence or strict liability—where harm has been done, but not deliberately.

*William M. Landes is Clinton R. Musser Professor of Economics at the University of Chicago Law School. Richard A. Posner is a judge of the United States Court of Appeals for the Seventh Circuit and a senior lecturer at the University of Chicago Law School. This article is based on material in Chapters 6 and 10 of their forthcoming book, *The Economic Structure of Tort Law*, which will be published in 1987 by Harvard University Press.*

In an effort to determine whether the formal legal standard for punitive damages is being consistently applied, we first examined a sample of recent tort cases in which awards of punitive damages were affirmed by appellate courts. The sample consists of all the common law tort decisions (in both state and federal courts) affirming such awards reported in the most recent volume of each of the West Publishing Company's case reporters, which publish most significant opinions issued by courts in the United States. There were 46 punitive damage cases in all, most of them decided in January 1986.

Of the 46 cases, 33 cases—or 72 percent—involve intentional torts such as fraud, retaliatory discharge, libel, and battery. These 33 cases are 23 percent of all the intentional tort cases in the volumes examined. (In the other intentional tort cases, punitive damages were not awarded.) The remaining 13 cases where punitive damages were upheld are accident cases. As the formal legal standard would lead one to expect, this is a much smaller percentage of all the accident cases in the volumes examined: only 2 percent. Thus, punitive damages are 10 times more likely to be awarded in intentional than in unintentional tort cases. And accident cases in which punitive damages are awarded are probably overrepresented in a sample of appellate cases. The award of punitive damages in such cases is more problematic than in cases of deliberate injury, and hence is more likely to generate an appeal.

In all but two of the 13 accident cases the evidence of recklessness or gross negligence (similar concepts in tort law) is plain. In one of the remaining cases the evidence is borderline: the defendant was held to be grossly negligent for having served liquor at its bar to a visibly drunk customer who it knew was going to drive

from the bar (*Pfeifer v. Copperstone Restaurant & Lounge, Inc.*, 71 Ore. App. 599, 693 P.2d 644 (1985)). In the other, a case of dental malpractice, the award of punitive damages seems wrong on the facts recited in the court's opinion, which show simple negligence, and the opinion itself wavers between describing the defendant's conduct as negligent and grossly negligent (*Costa v. Storm*, 682 S.W.2d 599 (Tex. Civ. App. 1984)). Nevertheless the sample as a whole seems consistent with the formal legal standard for awarding punitive damages.

PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES

The formal legal standard for awarding punitive damages, if consistently followed, would yield awards of such damages only rarely in products liability cases. Products liability is generally not based on intentional or reckless misconduct; often it is strict liability and no blameworthiness of any kind need be proved.

Federal Cases. We attempted to estimate the quantitative importance of punitive damage awards in products liability cases in the federal courts of appeals from the beginning of 1982 to November 1984. Such a sample is likely to overstate the relative importance of punitive damages because the cases most likely to be litigated and appealed are those where the law is most uncertain and where damages are largest—either circumstance increases the expected gain from an appeal to the party that lost in the trial court. In short, an award of punitive damages increases the probability of an appeal and hence the likelihood that the case will show up in our sample.

Table 1 classifies our sample cases—172

Table 1
PRODUCTS LIABILITY CASES IN FEDERAL COURTS OF APPEAL
JAN. 1982-NOV. 1984

Type of Case	Design Defect	Process Failure	Component Defect/ Failure	Unavoidably Dangerous	Total
Total Cases	141	11	9	11	172
Plaintiff wins					
in trial court	55	3	4	5	67
-Reversed	19	2	1	2	24
Defendant wins					
in trial court	86	8	5	6	105
-Reversed	37	4	2	3	46
Net plaintiff wins	73	5	5	6	89
Net defendant wins	68	6	4	5	83

cases in all—by type of product injury and includes a breakdown of the outcomes in both the trial and appellate courts. We use a fourfold classification of product injuries: design defect (e.g., locating an automobile's gas tank where it is likely to explode in a low-speed, rear-end collision); process failure (e.g., a failure in the manufacturing process); defect or failure in a component used by the manufacturer of the product; and unavoidably dangerous product (e.g., a high-speed motorcycle). The "net wins" figures show the cases plaintiffs and defendants won following the appeals court decisions; that is, "net plaintiff wins" equals the cases in which plaintiffs prevailed in the trial court, minus plaintiffs' trial court victories reversed on appeal, plus defendants' trial court victories reversed on appeal.

Not surprisingly, design-defect claims, where the formal standard of liability is less certain than in other areas of products liability, comprise the great majority (more than 80 percent) of cases. Consistent with a recent economic study of litigation by George L. Priest and Benjamin Klein, we find that plaintiffs win about half of litigated cases—89 of our 172 cases following the appeals court decision, or 52 percent. Interestingly, this is not so at the trial court level, where plaintiffs win only 67 cases, or 39 percent. Plaintiffs ultimately prevail as often as defendants because they obtain reversals of trial court judgments more frequently than defendants. This suggests that, if products liability law is becoming more expansive and favorable to plaintiffs' claims, this may be due more to changes in the standards of liability applied by appellate courts than to increased jury sympathy for accident victims or other factors affecting products liability trials.

Punitive damages were awarded in the trial court in 10 of the 172 cases in our sample. Table 2 provides data on these awards and their fate in the appeals courts: six of the 10 awards were reversed and a seventh was sharply reduced. This is a much higher reversal rate than for other trial court outcomes. In comparison, less than a third of the trial court decisions in favor of plaintiffs but not awarding punitive damages were reversed on appeal.

The relative insignificance of punitive damages once the appellate process is complete is striking: Only four such awards were made and sustained out of 172 cases, which is less than 3 percent of the cases and less than 5 percent of the net plaintiff wins. Recall, furthermore, that a

Table 2
PUNITIVE DAMAGE AWARDS

Trial Court		Appellate Court	
(\$000)		Ratio of Actual To Punitive	Punitive Damages Reversed?
Actual	Punitive		
\$ 400.0	\$ 100.0	4.0	yes
165.0	35.0	4.7	yes
1,060.0	1,000.0	1.1	reduced*
950.0	500.0	1.9	no
100.0	200.0	0.5	yes
391.5	625.0	0.6	yes
560.0	440.0	1.3	yes**
175.0	210.0	0.8	yes
350.0	300.0	1.2	no
127.0	500.0	0.3	no

*Punitive damages reduced to \$300,000 and actual damages to \$290,000 or new trial on damages only.

**Remanded with instructions that punitive damages would be proper if "reckless disregard for public safety" found.

sample limited to appellate cases is likely to overstate the frequency of punitive-damage awards in products liability cases. Finally, notice that the average punitive-damage award is not outlandish in relation to the compensatory damages awarded—on average, punitive and compensatory damages were roughly equal in the cases where punitive damages were upheld.

An extension of our study through mid-1985 yielded a total of 48 more products liability cases (again mostly design-defect cases) in the federal courts of appeals. In only one of these cases were punitive damages upheld on appeal, as shown in Table 3. This is only 2 percent of our sample cases and 4 percent of the cases that plaintiffs won. Again the plaintiffs won half the cases.

Table 3
PUNITIVE DAMAGE AWARDS—FOLLOW-UP SAMPLE

Trial Court		Appellate Court	
(\$000)		Ratio of Actual To Punitive	Punitive Damages Reversed?
Actual	Punitive		
\$ 390.0	\$3,900.0	0.1	yes
1,500.0	750.0	2.1	no
1,000.0	3,000.0	0.3	yes

State Cases. Conceivably a sample of cases limited to federal courts might underestimate the frequency of punitive damages. A products liability plaintiff who wants his case considered in state court can usually defeat the attempt of an out-of-state defendant to remove the case to federal court; by joining as an additional defendant the dealer who sold him the product (typically a local firm in the plaintiff's state), he can destroy

Table 4
PRODUCTS LIABILITY CASES IN STATE APPELLATE COURTS
DEC. 1984-DEC. 1985

Type of Case	Design Defect	Process Failure	Component Defect/Failure	Unavoidably Dangerous	Total
Total cases	103	9	0	7	119
Plaintiff wins					
in trial court	34	5	0	1	40
- Reversed	10	1	0	0	11
Defendant wins					
in trial court	69	4	0	6	79
- Reversed	25	2	0	2	29
Net plaintiff wins	49	6	0	3	58
Net defendant wins	54	3	0	7	61

the complete diversity of state citizenship required for a diversity case. Diversity is generally the only basis for obtaining federal jurisdiction over a products liability claim. Hence if state courts are more sympathetic to punitive-damage claims, we might expect such awards to show up more in state than federal courts.

To evaluate this possibility, we examined all of the products liability cases reported in the 10 most recent (at the time of this study) volumes of each of the West Publishing Company's regional reporters (which report only state cases), excluding New York and California cases for reasons to be explained shortly. This yielded a sample of 119 cases, all decided either in late 1984 or 1985. The characteristics of the sample are shown in Tables 4 and 5, which follow the format of Tables 1 and 2.

As in the samples of federal court cases, design-defect cases greatly predominate and plaintiffs win about 50 percent of the time. Punitive damages were upheld in fewer than 2 percent of cases (in two out of 119 cases) and in only about 3 percent of the cases in which plaintiffs prevailed after appeal. These percentages are lower than in the federal court samples.

We examined the New York and California cases separately to see whether punitive damages are more generously awarded in some of

the more "liberal" states. We found no evidence that this is so. In none of the 20 New York and California cases in our sample were punitive damages awarded. Again plaintiffs won 50 percent of the cases, and again design-defect cases predominated (90 percent).

Conclusion

Punitive-damage awards appear to be rare in reported products liability cases and other cases of accidental torts. Out of a total of 359 cases in all of our samples of products liability cases, punitive damages were allowed in only seven—2 percent. The average award of punitive damages in these seven cases was less than \$500,000, only slightly more than the average actual damages awarded in these cases. Also, punitive damages were awarded in only 2 percent of our sample of accident cases, and most of these were not simple accidents but involved aggravating circumstances of gross negligence or recklessness.

The results of our study are consistent with those of a recent study by the Rand Corporation's Institute for Civil Justice. This study, which reviewed all civil jury trials in San Francisco and in Cook County, Illinois (the county in which Chicago is located) between 1960 and 1984, found only eight awards of punitive damages in products liability cases in the 24-year period. In percentage terms, eight-tenths of 1 percent (0.8 percent) of all jury trials in San Francisco in products liability cases resulted in such an award; the corresponding figure for Cook County was only one-tenth of 1 percent (0.1 percent). These figures, which as expected are lower than those for our samples of appellate

(Continues on page 54)

Table 5
PUNITIVE DAMAGE AWARDS

Trial Court		Appellate Court	
(\$000)		Ratio of Actual To Punitive	Punitive Damages Reversed?
Actual	Punitive		
\$ 349.5	\$ 304.5	1.15	no
1,107.0	750.0	1.50	no
100.0	450.0	3.22	yes