Forum

PUNITIVE DAMAGES

The Courts Are Curbing Creativity

By RICHARD J. MAHONEY



AFTER the longest-running trial in America's history, a jury in Belleville, Ill., last year awarded one dollar to each of 65 plaintiffs as nominal damages for alleged personal injuries in a case involving one of my company's products — orthochlorophenol crude — which is used to make wood preservatives. Then, in a burst of tortured reasoning, the jury awarded $16 million in punitive damages to the plaintiffs.

More recently, Monsanto's G. D. Searle subsidiary was assessed $7 million in punitive damages in a St. Paul, Minn., case involving the Copper-7 intrauterine device that not only has Food and Drug Administration approval, but also a long history of safe use and medical acclaim.

After the Searle verdict, our stockholders — large pension funds and small shareowners alike — lost $700 million in market value. That occurred partly because the significance of the case was greatly exaggerated in the public media, perhaps because of expectations of a big settlement. Both the Minnesota and Illinois cases are being appealed.

These experiences are known only too well by leading American companies. Punitive damages are an anomaly peculiar to the United States and are virtually unknown in the world's remaining civil-law countries. They also depart from usual American legal practice in that defendants are afforded few of the traditional safeguards. The result: Conduct liable for punitive damages is whatever a single jury says it is.

Commenting on punitive damages in a recent Supreme Court decision, Associate Justices Antonin Scalia and Sandra Day O'Connor observed that "this grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

"Across the board, modern tort law weighs heavily on the spirit of innovation," concluded Peter Huber in his book, "Liability: The Legal Revolution and its Consequences."

A 1988 survey of chief executive officers by the Conference Board showed that uncertainty over potential liability had led almost 50 percent to discontinue product lines, and nearly 40 percent to withhold new products, including beneficial drugs. Half said product liability had a major impact on our international competitiveness, and 75 percent expected it to grow in significance.

My own company abandoned a possible substitute product for asbestos just before commercialization, not because it was unsafe or ineffective, but because a whole generation of lawyers had been schooled in asbestos liability theories that could possibly be turned against the substitute.

The punitive-damages system makes it too easy for lawyers to persuade a jury — possessing little scientific background but believing in the possibility of a risk-free society — to enrich plaintiffs and contingent-fee lawyers with multimillion-dollar windfalls.

In addition, according to the Congressional testimony of Malcolm E. Wheeler, a partner in a major law firm, "manufacturers are paying massive amounts in settlement of cases that should never have been settled, that should never have been filed and that certainly should not be resulting in these kinds of settlement sums."

The following is the dilemma of West Virginia Supreme Court Justice

We abandoned a possible asbestos substitute for fear of lawsuits.

Product Liability Mess" who wants the Supreme Court to set national standards: "As a state court judge, much of my time is devoted to designing elaborate ways to make business pay for everyone else's bad luck."

This "harmless" wealth transfer from out-of-state, "deep pocket" companies to local citizens is wrongly perceived as having no cost. Unfortunately, local citizens are not necessarily the ones who pay in the specific case being heard; otherwise, the results might be different.

Clearly, reforms in punitive-damages law are vitally needed by the entire nation. Reform can come in state and Federal courts, particularly in the Supreme Court, which last week agreed to decide whether the Constitution places limits on punitive damages. In an earlier decision, some members of the Court observed that issues, which, in an appropriate setting, must be resolved."

CONGRESS can also deal with the problem. A bipartisan products-liability bill containing punitive-damages reform won approval in a key House committee this year. In the states, courts and legislatures are making some progress in giving better direction to the penalty's use.

For example: Procedurally, trials of cases demanding punitive damages should be divided into two or more phases. In a first phase, the jury would only determine whether the defendant injured the plaintiff, hearing evidence just on this question.

Then, in second or even third phases the jury would decide on compensatory and then punitive damages if the case were still open. This dividing of trials into phases keeps the jury focused on the cause of alleged harm without being confused by often inflammatory, unrelated testimony on alleged damages.

Eighty percent of judges using bifurcation — a two-phase trial — believe it speeds up trials while improving fairness, according to a Louis Harris poll. New Jersey and Missouri laws expressly provide for some bifurcation, which is allowed by court practice elsewhere but not used frequently enough.

Additionally, good-faith compliance with up-to-date Government regulations like those of the F.D.A. should preclude the imposition of punitive damages. Certainly, this should be the case in an era where Government approval for the marketing of certain products is obtainable only after years of data gathering and careful review. Proposed Federal legislation and New Jersey law provide for an "F.D.A. defense."

Finally, judges should more closely review the amounts given in punitive damages and reduce disproportionate awards. Maximum dollar limits are also needed, and, just since 1986, eight states have enacted award-limit legislation. Who loses with these reform proposals? Only plaintiff lawyers and their already compensated clients who might hit the punitive-damages jackpot. But the whole country wins with potentially important gains in jobs, new and improved products, international competitiveness — and a fairer legal system for all.

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