Punitive Damages Awards for Flagrant Mismarketing of Products

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Punitive damages for marketing misconduct have been granted to plaintiffs in product liability litigation over the past 15 years. In this article, the doctrine of punitive damages is defined and its application in several cases involving marketing activities is presented. Several conclusions relevant to marketers are drawn from these developments. Overall, marketing plays a pivotal role, both in product liability lawsuits asking for punitive damages and in firms' anticipating and avoiding situations calling for exemplary awards.

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The assimilation of the punitive damages remedy into the contemporary product liability field has most certainly begun [Owen 1976, p. 1371; Levy 1977; Terflinger 1981, p. 91]. At least fifty product liability cases have included plaintiffs' requests for punitive damages, though some of the arguments have not withstood close scrutiny by courts. Because such cases tend to attract considerable interest [*Business Week* 1981] and because of the magnitudes of possible settlements, in the future it is likely that more plaintiffs injured by defective products will ask for exemplary damages. The prudent executive must therefore understand and avoid those situations which permit even the slightest chance of a punitive damages award.

Marketing appears to be much more important in the company's avoiding punitive damages than it is to the minimizing of product liability claims asking for traditional compensatory damages. Most product liability claims involve manufacturing or design defects, rather than marketing-caused defects [ISO 1977, p. 101], though marketing certainly can play a role in controlling an organization's product liability vulnerability [Morgan 1982]. In those cases in which punitive damages have been assessed, however, the following three abuses have occurred [Owen 1976, p. 1361]:

1. Failing to acquire sufficient product safety information through tests, inspections, or post-marketing safety monitoring;
2. Failing to remedy an excessively dangerous condition known to exist in a product by altering its design, adding warnings or instructions, or recalling the product for repair; and
3. Knowingly misleading the public concerning the product's safety.

Marketing communications, or the lack thereof, are obviously critical elements in each of these categories. By not checking product safety through feedback from salespersons or channel intermediaries, by failing to warn consumers via advertising or labels, or by intentionally deceiving consumers with false advertising or sales presentations, a company may find itself exposed to a punitive damages claim.

Clearly, then, marketing plays a pivotal role in any products liability litigation which may include a punitive damages request. For this reason, marketers need to know how to behave to defeat such a request and, more importantly, to keep from ever being involved in such a lawsuit. Thus, the purpose of this article is to acquaint marketers with the basic aspects of punitive damages as they relate to product liability. First, the doctrine of punitive damages is defined in various ways and its several elements are presented. Second, those cases in which marketing activities were mentioned as part of the evidence leading to punitive damages requests are highlighted. Third, conclusions based on the earlier sections are developed. Finally, implications for marketers of these developments in the area of punitive damages for flagrant mismarketing are discussed.

The Doctrine of Punitive Damages

Exemplary damages date back nearly 4,000 years to the multiple damages codes of the Babylonians [Driver and Miles 1975, pp. 343–67]. The first reported English case is *Huckle v. Money* (1763), while the first American case expressly permitting exemplary damages is *Genay v. Norris* (1784). *Fleet v. Hollenkamp* (1852), which dealt with the sale of an adulterated drug, is generally acknowledged to be the first product liability case allowing the plaintiff to recover punitive damages. So despite receiving increased attention in recent years because of its association with product liability litigation, the doctrine of punitive damages has a long and well-established history.

Punitive damages are defined as those damages assessed in addition to compensatory damages. . .for the commission of an aggravated or outrageous act of misconduct (a "wanton, willful, or malicious" violation of plaintiff's rights) (*Restatement* 1965, §908(1), Tent. Draft No. 19, 1973; Ross and Foley 1979, p. 575). This definition has been modified and interpreted in a variety of ways by courts hearing product liability cases. Among the various descriptions of corporate behavior deserving punitive damages are the following: "recklessness" [*Knippen v. Ford* 1976], "reckless indifference" [*Dorsey v. Honda* 1981; *Sturm v. Day* 1979; *Wangen v. Ford* 1980], "reckless disregard" (*Wussow v. Commercial* 1980; *Hoffman v. Sterling* 1973; *Forest v. Aderhold* 1981], "willful or wanton" [*Drayton v. Jiffee* 1978; *Roach v. Kononen* 1974], "conscious disregard" [*Rinker v. Ford* 1978], "malicious" [*Siegman V. Equitable* 1972; *Gillham v. Admiral* 1975], "evil" [*Moore v. Jewell* 1969], "oppressive" [*Art v. Callender* 1981; *Searle v. Superior* 1975], and "wicked" [Dobbs 1973, §3.9]. Thus, courts can review a number of strongly worded, but vague, standards for determining the appropriateness of a punitive damages award. The above phrases are attempts to describe the manufacturer's "state-of-mind" when marketing the harm-causing product [Weingarden 1980, p. 650].

As an alternative approach to determine the appropriateness of assessing punitive damages, courts often turn to the functions of punitive damages: to punish the wrongdoer and to compensate the victims [*Schmidt v. Central* 1974; *Jolley v. Puregro* 1972]. Legal scholars have further subdivided punishment to define two additional functions, deterrence and law enforcement [Owen 1976, pp. 1277–99; Weingarden 1980, pp. 647–49]. Even this expanded list of four items does not provide courts with specific criteria either to identify easily those situations calling for an exemplary settlement or to determine the size of such an award. These four functions are cited primarily after granting punitive damages as policy-based justification.

Probably the most widely used basis for determining whether punitive damages may be assessed is Owen's guideline [1976, p. 1367]: if the plaintiff's injury is attributable to conduct that reflects a flagrant indifference to the public safety. In the application of this guideline, the following factors should be examined [Owen 1976, p. 1369; WMLR 1981, p. 192; Terflinger 1981, p. 101]:

1. Magnitude of the potential harm to the public
2. Cost and feasibility of reducing the danger

3. Degree of the manufacturer's awareness of the danger
4. Length of time the manufacturer failed to reduce the danger
5. Extent to which the manufacturer purposely created the danger
6. Profitability of the misconduct
7. Extent to which the manufacturer is subject to safety regulations
8. Number and level of employees involved in the misconduct
9. Extent of compliance with industry customs or standards
10. State of the art at the time of manufacture, and
11. Defendant's liability exposure in other cases.

The ordering of these factors does not necessarily reflect their importance to courts. In the next section, these items are discussed in the context of cases in which questionable marketing behavior was noted by courts.

Cases Involving Marketing Misconduct

Marketing activities are prominent in a number of cases, both reported and unreported, involving punitive damages requests. According to Owen [1976, p. 1329], such cases are characterized by five types of corporate misbehavior: fraudulent-type misconduct, failure to warn, inadequate testing/inspecting, post-sale failure to reduce danger, and intentional violation of statutes or industry standards.

Fraudulent-Type Misconduct

In three cases against Richardson-Merrell for the manufacture and marketing of triparanol, a drug used to reduce the level of blood cholesterol, punitive damages were granted in the amounts of $500,000 (*Toole v. Richardson* 1967, later reduced to $250,000), $100,000 (*Roginsky v. Richardson* 1967, later eliminated), and $850,000 (*Ostopowitz v. Merrell* 1967, later reduced to $100,000). In 1960 Richardson-Merrell had received approval from the Food and Drug Administration to sell triparanol, based on falsified and incomplete laboratory test results. The company advertised its product as "a proven drug, remarkably free from side effects, virtually nontoxic... and completely safe." Further, company sales representatives were told that the product was safe without any significant side effects. So salespersons continued to tell physicians about the drug's positive features, in spite of the fact that the company had received a number of reports of harm to humans and test animals, the most serious being cataracts. The company denied that it was aware of such complaints whenever physicians made inquiries regarding harmful side effects. The product was sold for about two years, grossing $7,000,000 in year one.

The courts referred to the seriousness of the harm, the length of time the product was on the market, the potential profits, and fraudulent testing as factors leading to the verdicts. These three cases, in effect, launched the modern era of punitive damages in product liability litigation [Owen 1976, p. 1332].

Squibb v. Stickney [1973] is another example of a situation in which a firm deliberately tried to conceal dangers which were known to exist, based on numerous tests. Squibb also advertised its product, a bone grafting material, to physicians as being safe and not resulting in adverse patient reactions. An appellate court, however, reversed the judgment based on the defendant's evidence of successful surgeries. Thus, the $500,000 exemplary award was eliminated.

Failure to Warn

Failure to warn via labels, brochures, advertising, or salesperson has resulted in punitive damages claims in several cases. In *Johnson v. Husky* [1976] the label on a bag of charcoal briquets contained the warning, "Caution—for indoor uses—cook only in properly ventilated areas." The failure to warn that the product could be lethal when used indoors resulted in a gross negligence finding and $212,000 punitive damages (now being retried) in a wrongful death action. The defendant presumably had no knowledge of such a tragic possibility, but perhaps should have known this through adequate testing. Thus, the degree of negligence was a jury question of some difficulty.

The defendant in *Engebreth v. Fairchild* [1971] settled before trial for more than $2 million, probably in anticipation of a large punitive damages award [Owen 1976, p. 1346]. The defendant failed to instruct the plaintiff regarding aircraft inspection procedures at time of sale and during post-sale follow-up by sales representatives. Even after four persons died in a plane crash, the defendant failed to provide complete instructional assistance.

In two crashes of similar airplanes, inadequate warnings led to exemplary damages in one case [*Pease v. Beech* 1974], but not in the other [*Kritser v. Beech* 1973]. A test report, dated prior to both crashes, noted that the plane would not be fueled properly if certain maneuvers were conducted when the fuel level was low. After the first crash, the owner's manual was updated, though insufficiently, to warn about the low-fuel handling danger. Thus, the amended owner's manual, a sign that the manufacturer was not grossly negligent, led to plaintiffs in the second crash being able to collect only compensatory damages.

The plaintiff in *Moore v. Jewell* [1969] recovered $10,000 in punitive damages for an eye injury resulting from the explosion of a can of drain cleaner. This award was based on a failure to warn of a known and serious risk. Legal commentators have criticized this application of exemplary damages because such a product is inherently dangerous; hence, no warning could have protected the plaintiff [Owen 1976, p. 1351]. Apparently no other courts have applied this faulty reasoning to later fact situations.

In *Cantrell v. Amarillo* [1979] a stepladder contained a label rating the ladder's capacity at 200 lbs. The ladder collapsed, however, when the 165 lb. plaintiff attempted to use it. Evidence demonstrated that the defendant had already been informed about five other ladder failures and that Underwriters Laboratories had notified the defendant that the ladder would be decertified unless corrections were made. The defendant disregarded this evidence and marketed the ladder for several months. An $18,500 exemplary award was upheld by the Kansas Supreme Court.

A four year old child suffered disfiguring burns when his pajamas touched an electric stove [*Gryc v. Dayton* 1980]. The manufacturer had faced six other lawsuits involving cotton flannelette, but elected not to provide any warnings to consumers about the pajamas' flammable tendencies. The manufacturer did not want to increase production costs by applying readily available flame retardants. It argued that the pajamas complied with the Flammable Fabrics Act. Thus, the plaintiff was awarded $1 million punitive damages in addition to $750,000 compensatory damages. Both awards were affirmed by the Minnesota Supreme Court.

The manufacturer of a football helmet made a conscious decision not to place a warning on either the helmet or carton regarding the possibility of head injuries, even though it had knowledge that between 30 and 40 head-related deaths occur each year in football [*Rawlings v. Daniels* 1981]. So when the helmet he was wearing deformed one and one-half inches inward, a high school football player suffered permanent brain damage. The manufacturer was held strictly liable for the manufacturing defect, and the plaintiff was awarded $750,000 exemplary damages because of the manufacturer's negligent failure to warn.

The defendant in *Hoffman v. Sterling* [1973], a drug manufacturer, was sued for punitive damages due to failure to warn. According to the defendant, it began warning physicians by having its salespersons deliver updated promotional brochures and warning cards as soon as it learned of product-related dangers. Despite these efforts, the court concluded that the jury should consider the possibility of an exemplary award. The court found evidence that many physicians discount the comments of drug company representatives; hence, the defendant's efforts may have been insufficient. The court stated that the company must choose an effective way to warn its customers because it has a working knowledge of its own distribution system. The case was settled out of court for $600,000, $163,000 more than the original compensatory damages award.

Inadequate Testing/Inspecting

Insufficient product testing has resulted in punitive damages awards in at least three cases. The jury awarded the plaintiff $75,000 exemplary damages in *Deemer v. Robins* [1972] for complications arising from the use of an intrauterine contraceptive. The device had been tested for an average use time of less than six months, which was ruled to be quite insufficient. In addition, fraudulent promotion and misleading advertising were alleged.

In *Smith v. Cessna* [1972], the severely injured survivor of a plane crash was awarded $180,000 in punitive damages, while the plaintiff in a snowmobile accident was awarded over $1 million exemplary damages [*Sabich v. Outboard* 1976], later overturned because of erroneous jury instructions. The size difference in these awards is very likely due to the relative ease of crash-testing the products, especially since one airplane may cost several million dollars [Owen 1976, p. 1342]. The fact that the manufacturer had promoted the snowmobile as being safely operable on steep slopes without thoroughly testing this claim was also germane to the punitive damages question.

Post-Sale Failure to Reduce Danger

Failure to reduce the danger discovered following the marketing of products has resulted in several exemplary awards. In *Gillham v. Admiral* [1975], *Rinker v. Ford* [1978], and *Sturm v. Day* [1979], the defendant manufacturers learned that serious accidents had resulted from malfunctioning television sets, automobiles, and revolvers, respectively. The products were not recalled nor were subsequent products redesigned because of cost considerations. Further, top executives in each company evidently knew about the problems but did nothing to encourage their subordinates to act. Punitive damages in these three cases in which plaintiffs were injured were $100,000 (reversed on appeal), $460,000 (affirmed on appeal), and $2,985,000 (to be considered again for a maximum of $500,000), respectively.

Other cases, including requests for punitive damages for post-sale failure to recall products, are *Thomas v. American* [1976] and *Scott v. Outboard* [1971]. The jury awarded the *Thomas* plaintiff $200,000 punitive damages (later reversed), but denied such an award in *Scott.* In neither case was the probability of an injury high. In fact, the defendant in *Thomas* had received only one report of a minor injury in the seventeen years it had been selling the product.

Intentional Violations of Statutes/Standards

Knowing violations of regulatory statutes or industry safety standards can result in exemplary awards, though these cases typically involve manufacturing or design problems, not marketing practices. Compliance with these guidelines may not be enough to avoid punitive damages if evidence of misconduct is present [Burdin 1979, p. 1127]. *Rosendin v. Avco* [1972], *Hayman v. Arcoa* [1970], and *Barth v. Goodrich* [1968] are examples of such cases.

Other Cases

Two other cases not falling neatly into the above categories are important for marketers. The defendant, an automobile dealer, in *Art v. Callender* [1981] took several months to repair the plaintiff's truck. A variety of causes were stated for the delays. An executive in the manufacturer's department which distributes parts to such dealers testified that he had no knowledge of the parts shortage which the dealer claimed caused the delay. Other evidence indicated that the dealer and the plaintiff had experienced disagreements at other times. Thus, the jury apparently decided the dealer's conduct was intentional and awarded the plaintiff $7,000 punitive damages.

In *Beerman v. Toro* [1980], the Hawaii appellate court decided that a plaintiff may, under certain circumstances, attempt to recover exemplary damages after successfully pursuing compensatory damages in an earlier action. The distinguishing feature of this case is that the court noted that the distributor as well as the manufacturer might properly be parties to such a lawsuit. Distributors who merely pass along products are typically not parties to suits asking for compensatory damages; hence, the disposition of *Beerman* will be particularly relevant in terms of its impact on the distribution channel.

An overview of the most important punitive damages cases which have referred to questionable marketing activities is presented in Table 1.[1]

Conclusions Drawn from Case Examples

The cases presented here cover the various kinds of marketing misconduct which can lead to punitive damages awards. While the marketing actions may not have been the decisive factors leading to an exemplary award in each case, they nevertheless were sufficiently flagrant to be noted by the court. Through an examination of all of the cases and the preceding analysis, the following conclusions can be offered to marketing managers:

Punitive damages for flagrant mismarketing can be awarded under several product liability theories of recovery, including warranty, negligence, strict liability, fraud, statutory violation, and misrepresentation.

Both active (e.g., intentionally misleading advertising) and passive (e.g., failure to warn) marketing behavior can lead to punitive damages.

Merely complying with regulations may not be enough to avoid punitive damages, but knowingly violating such rules could well lead to such an award.

Taken collectively, several questionable marketing activities could lead to punitive damages, though considered individually, each would be insufficient.

Marketing communications (i.e., advertising, personal selling, labels, point-of-purchase materials) will be scrutinized particularly carefully by a court considering a punitive damages request.

Intentional delays in repairing products could lead to punitive damages awards.

To avoid exemplary awards, marketing personnel are especially important information sources regarding potentially dangerous effects of product use.

Marketing communications will be useful in warning of product-related dangers discovered subsequent to sale, even if a recall is necessary, to avoid punitive damages.

Corrective communications campaigns on a timely basis may help to avoid punitive damages, but not compensatory damages, for subsequent injuries.

Distributors will generally not be liable for punitive damages, though there is uncertainty in this area.

Table 1. **Summary of Critical Product Liability Cases Awarding Punitive Damages for Flagrant Mismarketing**

Cases	Marketing Misconduct	Theories of Liability	Compensatory/Punitive Damages
Art v. Callender (1981)	Intentional delay of service repair	Breach of warranty, misrepresentation, negligence, fraud	$4,822/$7,000
Beerman v. Toro (1980)	Potential liability of distributors	Negligence	$63,656/to be tried later
Cantrell v. Amarillo (1979)	Incorrect label	Express warranty	$13,500/$18,500
Drayton v. Jiffee (1978)	Misleading televised advertising	Express & implied warranty, negligence, strict liability	$1,620,000/none
Engebreth v. Fairchild (1971)	Failure to give safety precautions	–	$2,070,000 (settled pretrial – no categories)
Gryc v. Dayton (1980)	Conscious decision not to use warning labels	Express warranty	$750,000/$1,000,000
Hoffman v. Sterling (1973)	Inadequate use of salespersons to convey warnings	Negligence, strict liability, fraudulent misrepresentation	$600,000 (out-of-court settlement $163,000 larger than original compensatory award)
Johnson v. Husky (1976)	Inadequate warning	Negligence	$212,500/$212,500 – reversed on appeal
Rawlings v. Daniels (1981)	Conscious decision not to use warning labels	Strict liability	$750,000/$750,000
Rosendin v. Avco (1972)	Statutory violation of informative labeling requirement	Intentional violation of statute	$3,900,000/$10,500,000 – to be retried, ruled excessive
Sabich v. Outboard (1976)	Inadequate product testing & misleading promotion	Strict liability	$600,000/$1,254,000 – reversed because of trial court errors
Sturm v. Day (1979)	Deliberate refusal to recall product because of costs; top management agreed	Strict liability	$137,750/$2,895,000 – to be retried for $500,000 maximum
Toole v. Richardson (1967)	Contrived testing, false advertising & salespersons' claims	Strict liability	$175,000/$500,000 – reduced to $250,000

Implications and Discussion

On balance, it appears that punitive damages awards will continue to be granted in product liability litigation. Some commentators argue, however, that exemplary damages are unnecessary and perhaps even inappropriate, given the widespread reach, availability, and application of strict tort liability [Haskell 1974; Snyman 1977; Coccia and Morrissey 1978; Fulton 1979]. These experts point to a number of legal controversies which they feel must be resolved before allowing punitive damages in product liability cases. For example, an exemplary award resulting from the defendant's conduct may be incompatible with a strict liability action which presumably focuses on product quality, not on defendant behavior. Beyond this, some jurisdictions limit the kinds and amounts of damages which can be recovered in wrongful death actions, resulting in the anomalous situation where punitive damages are allowed when the consumer is injured but not when the victim is killed. Several other questions are also being debated regarding the usefulness and implementation of punitive damages for product-related injuries.[2]

The more common view is that even strict liability is ineffective to deal with and insufficient to deter manufacturers who intentionally ignore public safety [*Drake v. Wham-O* 1974]. Owen [1976, p. 1259–60] has perhaps stated it best in his seminal article on punitive damages:

> The strict liability theory of modern products liability law explicitly addresses the loss distribution problems that arise when an injury is caused by a defective product marketed by an "innocent" manufacturer, since liability is imposed even though the manufacturer has exercised due care. But the principles of strict liability are ill-equipped to deal with problems at the other end of the culpability scale where an injury results when a manufacturer markets its products in intentional or reckless disregard for consumer safety. Nor has the criminal law filled this void. A legal tool is needed that will help to expose this type of gross misconduct, punish those manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare. The punitive damages remedy is such a tool.

Further support for the ongoing application of exemplary damages in cases involving consumer injuries can be found in the treatment of punitive damages in the Model Uniform Product Liability Act [MUPLA 1979, §120A]:

> Punitive damages may be awarded to the claimant if the claimant proves by clear and convincing evidence that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers, or others who might be harmed by the product.

The Act allows juries to determine if plaintiffs are entitled to punitive damages, but in a significant departure from current practice [Elfin 1981, p. 283] the Act assigns the court the responsibility of determining the amount of the damages [MUPLA 1979, §120B]. The Act further directs courts in the determination of the amounts of exemplary awards by suggesting several guidelines virtually identical to those noted on pp. 114–15 of this article [MUPLA 1979, §120B].

Since punitive damages will likely continue to be a concern of manufacturers/marketers of products, company personnel must be informed regarding the dividing line between acceptable and unacceptable behavior. Unfortunately, a straightforward standard cannot be drafted. Failure to undertake certain basic steps to discover product-related hazards is bad. Actually knowing about the danger but refusing to recall the product or to warn users is worse. Finally, deliberately concealing serious product flaws to enhance a product's appeal is worse yet [Owen 1976, p. 1371]. Perhaps the last situation requires punitive damages, but the other two illustrations are less clear-cut.

From a normative standpoint, the marketing manager should adhere to the company's standardized code of ethical conduct and should monitor his/her subordinates' behavior with respect to the same code. This is seemingly a simple task; however, since the application of punitive damages in product liability is an evolutionary area, mere compliance with today's standards may not be enough. As societal standards develop, behavior justifying punitive damages might change. Thus, behavior classified as "tolerable oversight" today may be described as "reckless indifference" in a few years. Statutes mandating punitive damages for certain conduct are likely to develop [MS 1980] to help to reduce uncertainty [WMLR 1981, p. 217].

To protect itself, the firm must establish a system for identifying potential product hazards (Chandran and Linneman 1978). But simply identifying problems is not enough. In fact, such a system would increase the probability of an exemplary award if the firm does not quickly follow up on leads regarding possible defects/hazards. So the reasoning underlying punitive damages is compelling and complete. If you fail to discover the problem, you pay because of your flagrant indifference. If you identify the problem but do not correct it, you pay because of your conscious disregard.

From a pragmatic standpoint, marketing plays a critical role in the identification of potentially dangerous situations requiring immediate attention. Salespersons and retailers will know of product-related dangers because of their customer contacts. Marketing research may inadvertently learn of problems via consumer behavior studies or directly through product safety surveys. Finally, unsolicited communications from consumers are another highly useful source of information about product hazards. All such information should be collected in a central location and should be studied by the firm's interdepartmental product safety committee [Chandran and Linneman 1978, p. 41] to facilitate the earliest possible warning about a serious problem.

After having pinpointed a dangerous situation, marketers have two responsibilities. The first is to warn users of the hazard, and the second is to inform production/engineering, perhaps through the safety committee, about the problem. The warning must be conveyed in a manner which will both reach and be understood by users. This is an especially critical step because many courts have chastised firms for failing to conduct "corrective marketing" programs.[3]

Engineering must develop cost estimates of any product redesigns needed to eliminate the problem. Then in conjunction with marketing, they must determine the cost feasibility of a recall campaign if the product has already been sold. At this point the tradeoffs become extremely sensitive since correction costs are being weighed against potential lawsuit settlements, which are based on consumer injuries and perhaps even fatalities. Obviously, legal counsel becomes invaluable because the various guidelines that courts and juries use when considering the possibility of an exemplary award must also be weighed by the firm.

Overall, then, marketing activities are substantial factors in product liability litigation involving punitive damages. Flagrant mismarketing of a product can be particularly condemning when considered along with a defective product and a permanently disfigured plaintiff. As Levy [1977, p. 145] notes:

> In most instances where plaintiff has a real punitive case, settlement will be reached because some individual or group of individuals in the company are more than negligent: they are morally wrong, and, in effect, have deliberately caused injury to one or more of their fellow human beings.

The marketing department is therefore essential in identifying those situations which could lead to an exemplary finding and in taking the necessary follow-up action to warn consumers and to redesign and/or recall products.

Notes

1. Other recent product liability cases involving requests for punitive damages are *Robert v. Ford* [1980], *Utterman v. Johnson* [1981], *Hibschman v. Batchelor* [1976], *Newding v. Kroger*

[1977], *Ford v. Mayes* [1978], *Kicklighter v. Nails* [1980], *AMC v. Ellis* [1981], *Maxey v. Freightliner* [1980], and *American v. Horan* [1980]. Exemplary awards are being retried in *Utterman* and *AMC*, while no punitive damages were granted in the remaining cases. The marketing implications of this group of cases were minimal in comparison with those discussed earlier.

2. For a discussion of these issues, see Owen [1976], Coccia and Morrissey [1978], Elfin [1981], Hoenig [1980], Ghiardi and Koehn [1977], Snyman [1977], Schulkin [1979], and Terflinger [1981].

3. A treatment of the warning/recall campaign is well beyond the scope of this article because of the numerous factors which must be considered. For a detailed discussion of this topic from a marketing perspective, see "Post-Sale Warnings: The Role of the Marketing Manager," an unpublished working paper by the present author. For a general discussion of the legal considerations, see Shafer [1978] and Ross [1981].

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