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COMMENTS

PUNITIVE DAMAGES IN PRODUCTS LIABILITY ACTIONS: A LOOK AT A NEWLY EXTENDED DOCTRINE

[Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980)].

"The assimilation of the punitive damages remedy into the field of products liability has just begun. This blending of distinct doctrines with separate functions cannot be expected to occur without producing a few rough edges. But time and experience will demonstrate that the union is sound."


I. INTRODUCTION

The Minnesota Supreme Court has long recognized the validity of punitive damages. Punitive damages, which may be awarded in addition

1. See, e.g., E.H. Boerth Co. v. LAD Properties, 82 F.R.D. 635, 646 (D. Minn. 1979); Caspersen v. Webber, 298 Minn. 93, 99, 213 N.W.2d 327, 330-31 (1973); Johnson v. Steizer, 268 Minn. 421, 428, 129 N.W.2d 761, 765 (1964); Crea v. Wueblner, 235 Minn. 408, 411, 51 N.W.2d 283, 284-85 (1952); Corn v. Sheppard, 179 Minn. 490, 494-95, 229 N.W. 869, 871 (1930); Kirschbaum v. Lowrey, 165 Minn. 233, 236, 206 N.W. 171, 173 (1925); Muenkel v. Muenkel, 143 Minn. 29, 33, 173 N.W. 184, 186 (1919); Anderson v. International Harvester Co. of America, 104 Minn. 49, 51, 116 N.W. 101, 102 (1908); Germolus v. Sauser, 83 Minn. 141, 144, 85 N.W. 946, 947 (1901); Crosby v. Humphreys, 59 Minn. 92, 96, 60 N.W. 843, 844 (1894); Boetcher v. Staples, 27 Minn. 308, 308, 7 N.W. 263, 263 (1880); Seeman v. Feeney, 19 Minn. 79, 82, 19 Gil. 54, 55 (1872); Lynd v. Picket, 7 Minn. 184, 200-02, 7 Gil. 128, 142-44 (1862).

2. The terms "punitive damages" and "exemplary damages" are often used interchangeably. See, e.g., Dixon v. Northwestern Nat'l Bank, 276 F. Supp. 96, 104 (D. Minn. 1967) ("punitive or exemplary damages"); Easton Farmers Elevator Co. v. Chromalloy Am. Corp., 310 Minn. 568, 579, 246 N.W.2d 705, 712 (1976) (per curiam) ("exemplary damages"); Huesch v. Larson, 291 Minn. 361, 364, 191 N.W.2d 433, 435 (1971) ("punitive" or "exemplary" damages); Bronson Steel Arch Shoe Co. v. T.K. Kelly Inv. Co., 183 Minn. 135, 139, 236 N.W. 204, 206 (1931) ("punitive" or "exemplary" damages).

Other terms that are synonymous with punitive damages include vindictive, punitive, penal, additional, aggravated, plenary, imaginary, presumptive, and smart money. See, e.g., Anderson v. International Harvester Co. of America, 104 Minn. 49, 52, 116 N.W. 101, 102 (1908) ("punitive or exemplary damages"); Lynd v. Picket, 7 Minn. 184, 200, 7 Gil. 128, 142 (1862) ("vindictive or exemplary damages"); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9 (4th ed. 1971); Freifeld, The Rationale of Punitive Damages, 1 L.J. STUDENT B.A. OHIO ST. U. 5, 5 (1935) (now published as OHIO ST. L.J.); Levit, Punitive Damages: Yesterday, Today and Tomorrow, 1980 INS. L.J. 257, 257; Owen, Punitive Damages In Products Liability Litigation, 74 Mich. L. Rev. 1257, 1265 n.24 (1976); Tozer,

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to compensatory damages,\(^3\) are generally imposed upon tortfeasors for injuries resulting from willfull, wanton, or malicious conduct.\(^4\) An injured plaintiff, however, is never entitled to punitive damages as a matter of right.\(^5\) Rather, the granting of a punitive damages award,\(^6\) and the designation of its amount,\(^7\) lies solely within the discretion of the jury.\(^8\)

The primary purpose of punitive damages is to deter the tortfeasor and others from engaging in similar misconduct in the future\(^9\) as well as

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\(^{3}\) Punitive Damages and Products Liability, 39 INS. COUNSEL J. 300, 300 (1972); Note, Allowance of Punitive Damages in Products Liability Claims, 6 GA. L. REV. 613, 614 (1972).  

\(^{4}\) See Benson Coop. Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 529, 151 N.W.2d 422, 428 (1967) ("Punitive damages are an exception to the rule of compensatory damages, which are based on the theory that the injured party is entitled to recover in money damages what he has lost in order to compensate him for such loss."); Crea v. Wuehlner, 235 Minn. 408, 411, 51 N.W.2d 283, 284-85 (1952) (exemplary damages may be awarded in addition to actual damages sustained); Schmidt v. Minor, 150 Minn. 236, 239, 184 N.W. 964, 965 (1921) (punitive damages not awarded to compensate); Berg v. St. Paul City Ry., 96 Minn. 513, 515, 105 N.W. 191, 192 (1905) (in addition to compensatory damages jury may award further reasonable sum as exemplary damages); Hoffman v. Northern Pac. R.R., 45 Minn. 53, 55, 47 N.W. 312, 313 (1890) (exemplary damages are in excess of what may sufficiently compensate for the injury done).

\(^{5}\) See notes 121-44 infra and accompanying text.  

\(^{6}\) Crea v. Wuehlner, 235 Minn. 408, 411, 51 N.W.2d 283, 284 (1952) ("exemplary damages are not a matter of right"); Kirschbaum v. Lowrey, 165 Minn. 233, 236, 206 N.W. 171, 173 (1925) ("Punitive or exemplary damages are not damages to which a party is entitled as a matter of right . . ."); Berg v. St. Paul City Ry., 96 Minn. 513, 515, 105 N.W. 191, 192 (1905) ("plaintiff is not entitled to such [punitive] damages as a matter of legal right").

\(^{7}\) E.g., Wilson v. City of Eagan, 297 N.W.2d 146, 150 (Minn. 1980) (appropriateness of punitive damages is within jury's discretion); Crea v. Wuehlner, 235 Minn. 408, 411, 51 N.W.2d 283, 284 (1952) (question of allowing punitive damages is one for the jury); Bronson Steel Arch Shoe Co. v. T.K. Kelly Inv. Co., 183 Minn. 135, 139, 236 N.W. 204, 206 (1931) (allowance of punitive damages is for jury to determine); Kirschbaum v. Lowrey, 165 Minn. 233, 236, 206 N.W. 171, 173 (1925) (jury is at liberty to grant or withhold punitive damages); Schmidt v. Minor, 150 Minn. 236, 238-39, 184 N.W. 964, 965 (1921) (award of punitive damages is within discretion of the jury); Johnson v. Wolf, 142 Minn. 352, 354, 172 N.W. 216, 217 (1919) (whether exemplary damages shall be allowed rests within discretion of jury); Berg v. St. Paul City Ry., 96 Minn. 513, 515, 105 N.W. 191, 192 (1905) (award of punitive damages is within jury's discretion); Tamke v. Vangsnes, 72 Minn. 236, 239, 75 N.W. 217, 218 (1898) (allowance of "punitory" damages is within sound discretion of jury).

\(^{8}\) E.g., Bronson Steel Arch Shoe Co. v. T.K. Kelly Inv. Co., 183 Minn. 135, 139, 236 N.W. 204, 206 (1931) (amount of exemplary damages is within the discretion of jury and cannot be established by any fixed rule); Johnson v. Wolf, 142 Minn. 352, 355, 172 N.W. 216, 217 (1919) (amount awarded rests largely in discretion of jury); Beaulieu v. Great N. Ry., 103 Minn. 47, 53, 114 N.W. 353, 355 (1907) (amount awarded must necessarily rest in discretion of jury); Berg v. St. Paul City Ry., 96 Minn. 513, 515, 105 N.W. 191, 192 (1905) (in addition to compensatory damages jury may award such exemplary damages as they deem just).

\(^{9}\) See notes 6-7 supra.

\(^{9}\) E.g., Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 145 (3d Cir. 1973) (punitive damages are awarded to punish a person for outrageous conduct); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838 (2d Cir. 1967) (punitive damages serve as punishment
impose a civil punishment upon a tortfeasor. Punitive damages also

for and deterrence from socially disapproved conduct); E. H. Boerth Co. v. LAD Properties, 82 F.R.D. 635, 646 (D. Minn. 1979) (punitive damages not designed to compensate but rather to punish); Maxey v. Freightliner Corp., 450 F. Supp. 955, 964 (N.D. Tex. 1978) (primary purpose of exemplary damages is punishment and deterrence), aff'd, 623 F.2d 395 (5th Cir. 1980); Sturm, Ruger & Co. v. Day, 594 F.2d 38, 47 (Alaska 1979) (punitive damages are designed to punish and deter wrongdoing); Wilson v. City of Eagan, 297 N.W.2d 146, 151 (Minn. 1980) (deterrence of similar future misconduct); Caspersen v. Webber, 298 Minn. 93, 100, 213 N.W.2d 327, 331 (1973) (punitive damages awarded to plaintiff as punishment and deterrent); Hoffman v. Northern Pac. R.R., 45 Minn. 53, 55, 47 N.W. 312, 313 (1890) (punitive damages awarded as punishment and example); Lynd v. Picket, 7 Minn. 184, 201, 7 Gil. 128, 144 (1862) (punitive damages may be allowed as punishment and example); C. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 77, at 275 (1935) ("Exemplary damages are assessed for the avowed purpose of visiting punishment upon the defendant and not as a measure of any loss or detriment of the plaintiff."); W. Prosser, supra note 2, § 2, at 9 (punitive damages are awarded for the "purpose of punishing the defendant" and "detering others from following his example"); RESTATEMENT (SECOND) OF TORTS § 908(1), at 464 (1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); Levit, supra note 2, at 259 (punitive damages punish defendant and deter future wrongful conduct); Owen, supra note 2, at 1265 (punitive damages punish defendant for outrageous acts and deter him and others from such future misconduct); Richardson, A COMMON LAW DOCTRINE IN NEED OF LEGISLATIVE REFORM: PUNITIVE DAMAGES, TRIAL, MAR. 1980, at 31 (punitive damages punish and deter defendants and others from similar future misconduct); Tozer, supra note 2, at 300 ("[P]unitive damages are still awarded . . . as punishment for intentional and outrageous conduct of the defendant rather than to compensate the plaintiff for his injury."). But see Coccia & Morrissey, PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES SHOULD NOT BE ALLOWED, 22 TRIAL LAW. GUIDE 46, 59-60 (1978) ("The windfall of punitive damages may enrich an occasional plaintiff, but in real life punitive damages do no or little real good either as punishment or deterrence.").

10. The award of punitive damages in civil actions has often been criticized as an improper intrusion into the domain of criminal law. The basis for this criticism is that while the objectives of punitive damages are identical in theory to those of the criminal courts, the defendant in a civil action is stripped of his constitutional and criminal safeguards. E. g., DuBois, PUNITIVE DAMAGES IN PERSONAL INJURY, PRODUCTS LIABILITY AND PROFESSIONAL MALPRACTICE CASES: BONANZA OR DISASTER, 43 INS. Counsel J. 344, 348 (1976) (punitive damage awards beyond statutory criminal penalties are arguably unconstitutional for lack of legal safeguards and constitute cruel and unusual punishment contrary to eighth amendment); Freifeld, supra note 2, at 10 (since objective of punitive damages is identical in theory with that of the criminal courts, and since criminal safeguards are stripped from the civil litigant, any attempt to punish should remain with criminal courts); Fulton, PUNITIVE DAMAGES IN PRODUCT LIABILITY CASES, 15 FORUM 117, 120-21 (1979) (punitive damages raise questions under the fourth, fifth, sixth, eighth, and fourteenth amendments, "particularly with respect to multiple punishment and double jeopardy without any of the safeguards afforded by the criminal law"); Richardson, supra note 9, at 32 (criminal actions have the same purposes as punitive damages); Tozer, supra note 2, at 303 (punitive damages have been attacked on constitutional grounds of due process, double jeopardy, and cruel and unusual punishment). But cf. Owen, supra note 2, at 1277-78 (rejecting notion that injection of criminal objectives into civil law destroys "majestic symmetry" of the law).

The late Professor McCormick, commenting on the alleged impropriety of punitive damages in civil actions, summarized the conflict with the criminal law as follows:

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have several ancillary purposes. First, punitive damages provide punishment in those instances in which the criminal law is either unwilling or unable to punish the wrongdoer. Second, punitive damages provide a private revenge, as well as public revenge, which promotes public peace by channeling individual retaliation into the courtroom. Third, punitive damages encourage private plaintiffs to litigate their claims and enforce the law by rewarding those who bring wrongdoers to justice.

It is alleged that to subject the defendant both to criminal prosecution and to punishment in the form of civil punitive damages for the same act (usually an act which is criminally punishable) exposes the defendant to "double jeopardy" in violation of the spirit, if not the letter, of the constitutional prohibitions against punishing a man twice for the same offense. Similarly, it is objected that the jury is permitted to assess a punishment under a procedure which deprives the person punished of the safeguards traditionally regarded as necessary in criminal trials, such as the rule which requires the wrong to be established beyond a reasonable doubt, and that which exempts the accused from being forced to take the stand as a witness. Again, it is urged that, while fines in criminal cases are limited by statutes, exemplary damages are limited only by the caprice of the jurors, subject to a review by the judges only in the rare case where the judge can find impropriety of motive or gross disproportion, and that this want of a guiding measure leads to excess and injustice.

Although a punitive damage award in a civil action does not prevent a subsequent criminal prosecution, this exposure of defendants to dual punishment has been justified on several grounds. First, criminal fines may be small and readily paid by a defendant without causing him to account for the profits acquired through his wrongful conduct. Second, criminal laws often fail to "provide a fine enough mesh to net many wrongdoers." Third, overburdened prosecutors must devote their time and efforts to "street crimes." Fourth, "[J]uries are often reluctant to apply harsh remedies and stigmatize defendants with criminal convictions." See also C. McCORMICK, supra note 9, at 275-78.

15. E.g., Sturm, Ruger & Co. v. Day, 594 P.2d 38, 49 n.18 (Alaska 1979) (recognizing that punitive damages "reward the private plaintiff for enforcing the rules of law against one who otherwise would not be coerced into observing those rules"); C. McCORMICK, supra note 9, at 278 (incentive to litigate as a principal advantage of punitive damages); Owen, supra note 2, at 1287. Professor Owen explains that the prospect of receiving punitive damages motivates reluctant plaintiffs to press their claims thereby serving as a law enforcer.
Fourth, punitive damages compensate those plaintiffs whose actual damages exceed the compensatory damages awarded or whose recovery has been substantially depleted by attorney's fees. Finally, punitive damages serve as a reformative device by teaching tortfeasors to respect society's legal values, while mandating atonement for their wrongful conduct through economic suffering.

Although the Minnesota Supreme Court has upheld punitive damage awards in a wide variety of actions, until recently the court had never addressed the question of whether punitive damages are recoverable in products liability actions. In the recent case of *Gryc v. Dayton-Hudson*...
the Minnesota Supreme Court was afforded the opportunity to address this highly-debated issue.\textsuperscript{21}

In \textit{Grye}, the four-year-old plaintiff was wearing pajamas made from a fabric manufactured by the defendant.\textsuperscript{22} Although this fabric, commercially known as “flannelette,” was made of 100\% untreated cotton, it nevertheless met the minimum federal standards for product flammability.\textsuperscript{23} As the plaintiff reached across the electric stove in the family

punitive damages may be appropriately awarded in the context of a strict liability action.” \textit{Id.} (emphasis added).

The only other Minnesota case involving punitive damages in a products liability action, Oakhurst, Inc. v. Tasco, Inc., No. 27015 (Minn. 3d Dist. Ct. Jan. 23, 1978) (trial court memorandum) was settled prior to appeal. The action in \textit{Oakhurst} arose out of an explosion and fire that destroyed a hog farrowing complex. See \textit{id.}, slip op. at 1. The plaintiff alleged strict liability, negligence, breach of express warranty and sought punitive damages for the defendants’ use of the product Styrofoam in the construction of the hog complex. \textit{Id.} The jury awarded compensatory damages of $489,900 and a total of $900,000 in punitive damages against two of the defendants. \textit{Id.}, slip op. at 2. The trial court concluded that punitive damages were warranted because of the defendants’ knowledge of the Styrofoam’s high flammability when used in the sandwich panel construction found in the hog complex and because of the decision by the defendants’ high level executives to withhold relevant test data from salesmen and consumers. \textit{Id.}, slip op. at 69.

In rendering its opinion, the trial court also engaged in an excellent discussion of the background of punitive damages in Minnesota and why such awards are appropriate in products liability actions. See generally \textit{id.}, slip op. at 63-80.

20. 297 N.W.2d 727 (Minn. 1980).

21. During the past decade numerous commentators have spoken out on the propriety of awarding punitive damages in products liability actions. Professor Owen, who has written the most comprehensive article in this area, see Owen, \textit{supra} note 2, concludes that punitive damages are both appropriate and necessary in products liability actions. \textit{Id.} at 1371. The same position has been taken by other commentators as well. \textit{E.g.}, Igoe, \textit{Punitive Damages in Products Liability Cases Should be Allowed}, 22 \textit{TRIAL LAW. GUIDE} 24, 29 (1978) (punitive damages will contribute to greater product safety); Richardson, \textit{supra} note 9, at 30 (favoring punitive damages in products liability cases provided that a “rational reconstruction” is forthcoming); Robinson & Kane, \textit{Punitive Damages in the Products Case}, \textit{TRIAL}, Jan. 1979, at 36 (policy considerations militate in favor of punitive damages in products liability actions); Note, \textit{supra} note 2, at 629-30 (approving of punitive damages in products liability actions despite the problems involved). Other commentators, however, have sharply criticized any extension of punitive damage awards to products liability actions. \textit{E.g.}, Coccia & Morrissey, \textit{supra} note 9, at 64-65 (urging abolition of punitive damages in all tort litigation); Fulton, \textit{supra} note 10, at 135-36 (strict liability and punitive damages are incompatible); Ghiardi & Koehn, \textit{Punitive Damages in Strict Liability Cases}, 61 \textit{MARQ. L. REV.} 244, 251 (1977) (punitive damages are inconsistent with theory of strict liability and contrary to public policy); Synman, \textit{The Validity of Punitive Damages in Products Liability Cases}, 44 \textit{INS. COUNSEL J.} 402, 406-07 (1977) (punitive damages are incompatible with products liability); Tozer, \textit{supra} note 2, at 301 (strict liability and punitive damages are not compatible).

22. 297 N.W.2d at 729.

home to shut off a timer,24 her pajamas came in contact with a lighted burner on the stove and ignited instantly.25 The pajama top burned for an estimated eight to twelve seconds before it was extinguished.26 As a result, the plaintiff suffered severe second- and third-degree burns and permanent scars over twenty percent of her body.27

The plaintiff brought suit against the manufacturer of the fabric based on strict products liability.28 The trial court entered judgment against the defendant for $750,000 in compensatory damages and $1,000,000 in punitive damages. Therefore, the defendant argued, its actions in placing the pajamas on the market were justified.29

The court rejected this contention and upheld the findings of the trial court.30 First, the flammability test used under the Act was not a valid indicator of the flammable characteristics of fabrics and failed to account for the uses to which a fabric would be put in determining its safety.31 Second, Congress intended the test to protect the public only from certain highly flammable synthetic products, not all types of unreasonably dangerous clothing.32 Third, because the test was originally adopted through the textile industry's influence, it protected the industry rather than the public.33 Fourth, the evidence indicated that the defendant knew that the test was invalid and that unreasonably dangerous fabrics could pass the test. As one of the defendant's top officials wrote in a memorandum entitled "Flammability—Liability," "We are always sitting on somewhat of a powder keg as regards our flannelette being so inflammable."34 Based upon these four factors, the court concluded that while the defendant's compliance with the Act's flammability test was relevant to the issue of punitive damages, it did not preclude such an award as a matter of law.35

The defendant also asserted that because the fabric complied with the Federal Flammable Fabrics Act, the state court, by awarding punitive damages, would be applying an inconsistent law that was preempted by the Act. At 735. Consequently, an award of punitive damages would violate both the Act and the supremacy clause of the United States Constitution.36 The court concluded, however, that because Congress did not expressly intend to preempt state private civil remedies, such as punitive damages, and because no preemption could be implied, the preemption argument was without merit. See id. at 735-38.

For a general discussion of Gyc and related cases in other jurisdictions, see 23 ATLA. L. REP. 250, 250-52 (1980). Also cited are numerous authorities critical of the flammability tests used under the Act, id. at 251, and authorities that discuss the issues of federal preemption and the recovery of punitive damages in products liability cases. Id. at 251-52.

24. 297 N.W.2d at 729.
25. See id. at 729-30.
26. Id. at 729.
27. Id.
28. See id. at 730. The plaintiff contended that the fabric was defective and claimed that their evidence tended to show: the cotton flannelette was unreasonably dangerous for use in children's pajamas because of its highly flammable characteristics; flame-retardant chemicals that could have increased the product's safety were commercially available; other inherently flame-retardant synthetics could have been used in the pajamas instead of the cotton flannelette; manufacturers, sellers, and consumers should have been warned of the fabric's flammable characteristics; consumers should have been informed of a simple home remedy that could easily be used to flame retard the cotton flannelette after each washing. Id.
punitive damages. The Minnesota Supreme Court upheld the trial court's award, and concluded that there was substantial evidence from which the jury could find that the defendant had acted in "willful, wanton and/or malicious disregard of the rights of others." The court considered eight factors that reflected on the defendant's conduct and the appropriateness of a punitive damages award. Among the three factors the court emphasized was the danger of the product to the public. The court concluded that this danger was substantial because the cotton flannelette ignited instantaneously and burned with nearly the rapidity of newsprint. The court also noted the evidence regarding the feasibility of reducing the flammability hazard and stated that although there was contrary evidence at trial, "plaintiffs' experts provided credible evidence." In addition, the court found that the defendant failed to issue any warning with the garment even though a warning would have been inexpensive and simple to provide. Finally, the court emphasized the

29. Id. at 729.
30. Id. at 739.
31. Id. The factors that the Gryc court considered included:
   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 sought to be deterred.

Id. These eight factors were derived from Professor Owen's article, see Owen, supra note 2, at 1369, in which he states that these factors reflect many of the considerations pertinent to both whether punitive damages should be assessed in the first place, and the measurement of such damages. Id. at 1369 n.529.

32. See 297 N.W.2d at 739. In a reconstruction of the accident, it was found that the front of the cotton flannelette burned from hem to neck in four to five seconds. Id. at 730.

In a similar experiment conducted with pajamas made from newsprint, the pajamas burned only slightly faster. Id. Nevertheless, the defendant contended that the cotton flannelette was not unreasonably dangerous because the fabric complied with the Federal Flammable Fabrics Act. See note 23 supra. Plaintiffs' experts concluded, based on the results of these experiments, that the untreated cotton flannelette was unreasonably dangerous for use in children's sleepwear. 297 N.W.2d at 730. Defendants' experts concluded that the fabric in the Gryc pajamas was not defective because the burn characteristics that were demonstrated by plaintiffs' experts were normal for cotton and materials derived from cotton, such as flannelette. Id. at 730-31.

33. Id. at 739. The defendant claimed that there were no flame-retardant chemicals that could be used to treat the cotton flannelette without adversely affecting the qualities of the fabric and its saleability. Id. at 730.

34. See id. at 739-40. The defendants argued that a warning was not feasible because it would "stigmatize" the cotton flannelette. Id. at 740. The Gryc court concluded that
defendant's knowledge of the flammability hazard. A memorandum written by one of the defendant's top officials revealed that a number of clothing fires had caused injuries to persons wearing the defendant’s cotton flannelette and stated that the defendant was "sitting on a powder keg with respect to the flammability of the cotton flannelette." In addition, a letter written by one of the defendant's officials acknowledged that the cotton flannelette had been successfully flame-retarded in experiments but because of the cost involved the defendant would not use flame retardants until federal law so required.37 The Gryc court therefore inferred from the evidence that the defendant was "uniquely aware" of the flammability hazard and yet, for purely economic reasons, failed to take feasible corrective measures.38 Accordingly, the Gryc court affirmed the trial court's judgment and with no apparent hesitancy extended punitive damages to products liability actions.

This Comment will explore the background of punitive damages in products liability actions, the Minnesota Supreme Court's rationale for extending punitive damages to products liability actions, the policy considerations addressed by the court, the proper standard for punitive damage awards and a suggested application of this standard in the products liability context.

II. THE BACKGROUND OF PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES

A plaintiff in a products liability action ordinarily may seek to recover under separate or collective theories of negligence, breach of warranty, and strict liability. Although the earliest products liability cases were this assertion essentially admitted that defendant was "protecting the marketing of a product consumers might deem unreasonably dangerous." Id.

35. Id.
36. Id. at 734.
37. Id. at 740.
38. Id. at 739-40.

In Minnesota, plaintiffs generally tend to plead alternative theories of negligence, breach of warranty, and strict liability. See, e.g., Bigham v. J.C. Penney Co., 268 N.W.2d 892, 896 (Minn. 1978) (negligence, breach of warranty, and strict liability); O'Laughlin v. Minnesota Natural Gas Co., 253 N.W.2d 826, 827 (Minn. 1977) (negligence, strict liability, and implied warranty); Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977)
brought under theories of negligence and breach of warranty, since the early 1960's strict liability often has been considered to be a more advantageous theory of recovery in products liability lawsuits. Strict liability theory requires the plaintiff to prove only that the product causing the injury was in a "defective condition unreasonably dangerous to the user or consumer or to his property." A major justification underlying the theory of strict products liability is that a manufacturer is better able to bear the losses caused by a defective product because a manufacturer is in a position to remedy the defect or equitably distribute the losses to consumers when injuries do occur.

See W. Prosser, supra note 2, §§ 96-97, at 641-56. See generally Steenson, supra note 39, at 7-14 (discussion of historical development of products liability law in Minnesota).

The first cases dealing with the concept of strict liability in defective products cases were Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (setting forth the rationale for strict products liability) and Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (setting out the fundamental rules of strict liability).


RESTATEMENT (SECOND) OF TORTS § 402A (1965). The Restatement sets forth the requirements for strict tort liability as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. See generally W. Prosser, supra note 2, § 75, at 492-96.

43. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). The Henningsen court stated the fundamental rationale for the doctrine of strict products liability:

[Where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.
The first products liability case to consider an award of punitive damages was *Fleet v. Hollenkemp*,44 decided in 1852. In *Fleet*, which involved the sale of an adulterated drug, the Kentucky court upheld the trial court's instruction on exemplary damages and affirmed a general verdict for the plaintiff.45 The next such case, *Standard Oil Co. v. Gunn*,46 did not arise until 1937. Although the cause of action in *Gunn* was for deceit and breach of contract,47 the case was characteristic of a products liability action because the plaintiff sought to recover for property damage caused by the sale of a defective product.48

Despite the decisions in *Fleet* and *Gunn*, however, few courts considered awarding punitive damages in products liability cases until the 1967 decision of *Roginsky v. Richardson-Merrell, Inc.*49 In *Roginsky* the plaintiff suffered scaling, rashes, and loss of hair after using the defendant's drug MER/29 for several months.50 Subsequently, the plaintiff developed “disturbing eye symptoms” that were later diagnosed as cataracts.51 The plaintiff commenced a personal injury action against the defendant

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44. 52 Ky. 219, 13 B. Mon. 175 (1852).
45. See id. at 230, 13 B. Mon. at 184.
46. 234 Ala. 598, 176 So. 332 (1937).
47. See id. at 599, 176 So. at 332.
48. The plaintiff in *Gunn* brought suit for damage caused to his automobile through the use of defendant's adulterated motor oil. See 234 Ala. at 600, 176 So. at 333. See also Owen, supra note 2, at 1326 n.333 (categorizing *Gunn* as a deceit action based upon the fraudulent sale of a “defective” product); Note, supra note 2, at 622-23 (recognizing *Gunn* as an early hybrid case standing somewhere between consumer fraud and products liability).
49. 378 F.2d 832 (2d Cir. 1967).
50. See id. at 836. The drug MER/29 was developed by the defendant to lower blood cholesterol levels. See id. at 835.
51. See id. at 836.
based upon theories of negligence and fraud upon the Food and Drug Administration.\textsuperscript{52} The jury awarded compensatory damages of $17,500 and punitive damages of $100,000.\textsuperscript{53} On appeal, the Second Circuit held that the evidence was insufficient to warrant submission of punitive damages to the jury,\textsuperscript{54} because under New York's recklessness standard punitive damages could be awarded only for conduct that was close to criminality.\textsuperscript{55} Moreover, such reckless conduct had to be clearly established.\textsuperscript{56} Thus, the Roginsky court reversed the punitive damages award notwithstanding evidence that some of the defendant's corporate officers knew that the drug had dangerous side effects, yet failed to inform the Food and Drug Administration, the medical profession, or the general public of the danger.\textsuperscript{57}

Striking down the punitive damages award, Judge Friendly set forth several reasons why punitive damage awards should not be extended to products liability litigation. Among these reasons was the danger that in multiple plaintiff products liability cases, multiple punitive damage awards for a manufacturer's single defective product were likely to subject the manufacturer to excessive punishment or even bankruptcy.\textsuperscript{58} The court reasoned that in these situations heavy compensatory damage awards and criminal penalties would provide adequate punishment and deterrence.\textsuperscript{59} A second reason cited by the Roginsky court was that the deterrent effect of punitive damages probably would be eliminated by the manufacturer's insuring against punitive damages.\textsuperscript{60} Finally, the

\textsuperscript{52} See id. at 834.
\textsuperscript{53} See id.
\textsuperscript{54} See id. at 835.
\textsuperscript{55} See id. at 843. The Roginsky court noted that their standard would only be met if after the drug was marketed the manufacturer had become aware of the danger and did nothing, "deliberately closing its eyes." Id.
\textsuperscript{56} See id. at 850.
\textsuperscript{57} See id. at 842-51.
\textsuperscript{58} See id. at 839-41.
\textsuperscript{59} See id. at 841. The Roginsky court suggested that compensatory damages already contain a punitive element and would take on an even greater punitive role if punitive damages, as a separate award, were eliminated. See id.
\textsuperscript{60} See id.; Ghiardi & Koehn, supra note 21, at 251. If punitive damage awards are allowed in products liability actions no deterrence occurs because increased insurance premiums are passed on to consumers and those companies unable to pass on costs or acquire insurance will be forced out of business. See id. For an extensive discussion of why insurance coverage for punitive damages in products liability litigation should be considered contrary to public policy, see Owen, supra note 2, at 1308-13.

The Minnesota Supreme Court has not yet expressly considered whether insuring against punitive damages is contrary to public policy. In Caspersen v. Webber, 298 Minn. 93, 213 N.W.2d 327 (1973), however, the court did hold that the language of an insurance policy did not cover punitive damages for an assault and battery in which the insurance company's policy only required it to pay all sums the insured would be legally obligated to pay as damages for bodily injury. See id. at 99-100, 213 N.W.2d at 331. Because the compensatory damages awarded compensated the plaintiff for actual loss from bodily injury, the punitive damages were awarded to the plaintiff only as punishment to the de-
court reasoned that if a manufacturer could not insure against punitive damage awards, innocent shareholders of the manufacturer would be punished for the manufacturer’s single instance of wrongful conduct.\footnote{61}

In the same year as the Roginsky decision, however, Judge Friendly’s reasoning was rejected by a California Court of Appeal in Toole v. Richard-

\footnote{62}son-Merrell Inc. \footnote{62} In Toole, which involved facts almost identical to those in Roginsky,\footnote{63} the California court disagreed with the Roginsky decision.\footnote{64} Finding that the actions of the defendant constituted reprehensible conduct, the Toole court stated:

There was ample evidence from which the jury could infer that high level management had knowledge of wrongdoing on the part of depart-

\footnote{64}ment heads and other employees and agents. . . .

In our case there is evidence from which the jury could conclude that appellant brought its drug to market, and maintained it on the market, in reckless disregard of the possibility that it would visit serious injury upon persons using it. Besides the falsification of test data . . . and the withholding from the FDA and the medical profession of vital information concerning blood changes and eye opacities in test animals, there was evidence that . . . appellant continued to represent to the medical profession that MER/29 was a proven drug, remarkably free from side effects, virtually non-toxic, having a specific and completely safe action. In light of appellant’s knowledge, the jury could infer that these state-

\footnote{64}ments were recklessly made, with wanton disregard for the safety of all

\footnote{61}fendant and as deterrence to others. \textit{See id.} at 100, 213 N.W.2d at 331. Thus, because punitive damages were not awarded for bodily injury, no coverage was afforded under the terms of the policy. \textit{See id.}\footnote{61} 61. \textit{See} 378 F.2d at 841; Coccia & Morrissey, \textit{supra} note 9, at 59 (“innocent stockholders are punished”); Kircher, \textit{Products Liability—The Defense Position, 44 INS. COUNSEL J. 276, 301 (1977). But see Owen, \textit{supra} note 2, at 1304. Professor Owen notes that employees of a corporation generally market a defective product because of an intense profit motive rather than out of animus toward consumers. \textit{See id.} Therefore, to the extent that the product is excessively dangerous, the profits reaped from its sale are “excessive profits.” \textit{Id.} Accordingly, recovery of these excessive profits through punitive damages merely constitutes a recoupment of an unjust enrichment of a corporation and its shareholders and does not result in the personal punishment of the corporation or its shareholders. \textit{See id. See also} Robinson & Kane, \textit{supra} note 21, at 35 (“penalizing shareholders is the only practical and effective means of controlling the acts of corporate directors and officers”).\footnote{62} 62. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).\footnote{63} 63. \textit{Compare id. at 695-701, 60 Cal. Rptr. at 404-08 with Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 835-36 (2d Cir. 1967).}\footnote{64} 64. \textit{See 251 Cal. App. 2d at 715 n.3, 60 Cal. Rptr. at 416-17 n.3. In holding contrary to the Roginsky court, the Toole court noted: We see in our record ample evidence of conduct on the part of appellant from which the jury could infer intentional, wilful and reckless conduct on appellant’s part, done in disregard of possible injury to persons such as respondent. The evidence . . . clearly raised an issue on which respondent was entitled to a jury’s determination. \textit{Id.}
who might use the drug. 65 Accordingly, the Toole court upheld the jury's award of $175,000 in compensatory damages and $250,000 in punitive damages for injuries sustained by the plaintiff through use of the defendant's drug MER/29.66

Since the Roginsky and Toole decisions, relatively few cases have considered the propriety of punitive damages in products liability actions.67 It is evident from this limited case law, however, that courts are becoming increasingly more willing to allow punitive damages in products liability litigation.68

In Gryc, the Minnesota Supreme Court demonstrated its willingness to allow punitive damages in products liability cases. The Minnesota court thus has been added to the growing number of jurisdictions willing to

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65. Id. at 712-14, 60 Cal. Rptr. at 414-16.
66. See id. at 693, 60 Cal. Rptr. at 403. Initially the jury in Toole awarded the plaintiff $175,000 in compensatory damages and $500,000 in punitive damages. See id. The punitive damages award was later reduced through remittitur to $250,000 and affirmed by the Toole court. See id. at 717, 60 Cal. Rptr. at 418.
67. See note 68-69 infra.
68. See, e.g., Gillham v. Admiral Corp., 523 F.2d 102, 103-04 (6th Cir. 1975) (fire caused by defective television transformer; reversing judgment n.o.v. and ordering entry of judgment for plaintiff of $100,000 in punitive damages), cert. denied, 424 U.S. 913 (1976); Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 134, 144-46 (3d Cir. 1973) (eye injuries caused by ingesting drug chloroquine phosphate; case remanded for new trial on question of compensatory and punitive damages); Boehm v. Fox, 473 F.2d 445, 446-47, 449 (10th Cir. 1973) (damage to dairy herd from use of feed additive; affirming jury award of $9,000 compensatory and $7,500 punitive damages); Maxey v. Freightliner Corp., 450 F. Supp. 955, 957-59, 961, 966 (N.D. Tex. 1978) (driver burned because of alleged design defect in truck's fuel tank; reversing $10,000,000 punitive damages verdict, but holding that punitive damages are appropriate in strict liability actions), aff'd, 623 F.2d 395 (5th Cir. 1980); Drake v. Wham-O Mfg. Co., 373 F. Supp. 608, 608, 611 (E.D. Wis. 1974) (death caused by use of recreational product; defendant's motion to dismiss punitive damages claim denied); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 44, 48-49 (Alaska 1979) (manufacturing and design defect in revolver; award of $137,750 compensatory and $2,895,000 punitive damages remanded for new trial on entire award with punitive damages not to exceed $250,000); Pease v. Beech Aircraft Corp., 38 Cal. App. 3d 450, 458-59, 465, 113 Cal. Rptr. 416, 421-22, 426 (1974) (crash of airplane caused by defective fuel system; affirming trial court's order granting new trial on $17,250,000 punitive damages award); Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 233-34, 240-41, 71 Cal. Rptr. 306, 307-08, 313 (1968) (automobile accident caused by defective tire; no punitive damages awarded, but punitive damage charge held proper); Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 693-94, 714-17, 60 Cal. Rptr. 398, 403, 416-18 (1967) (catastrophic results resulting from use of drug MER/29; punitive damages award affirmed after remittitur from $500,000 to $250,000 by trial court); Moore v. Jewel Tea Co., 46 Ill. 2d 288, 290, 300, 263 N.E.2d 103, 104, 109 (1970) (loss of sight from spontaneous explosion of Drano can; affirming $900,000 compensatory and $10,000 punitive damage award); Rinker v. Ford Motor Co., 567 S.W.2d 655, 658-59, 667-69 (Mo. Ct. App. 1978) (collision caused by defective automobile accelerator; affirming verdict of $100,000 actual and $460,000 punitive damages). But see Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 834, 851 (2d Cir. 1967) (catastrophic results resulting from use of drug MER/29; reversing $100,000 punitive damage award).
allow punitive damages in products liability actions.69

III. THE RATIONALE FOR EXTENDING PUNITIVE DAMAGES TO PRODUCTS LIABILITY ACTIONS

Although Gryc was a case of first impression in Minnesota,70 the court discussed only briefly the rationale behind its decision to extend punitive damage awards to products liability lawsuits. The Gryc court generally relied upon the decisions of other jurisdictions that already had allowed punitive damages in products liability lawsuits,71 but the reasoning of Professor Owen72 seemed to be more influential. The Gryc court took the position set forth in Professor Owen's article that manufacturers have the unique ability to discover and correct product hazards.73 This ability to protect consumers from dangerous products arises out of the manufacturer's exclusive control over the processes of design, testing, inspection, and collection of data relating to the safety of a particular product.74 The Gryc court also adopted Professor Owen's position that

[most manufacturers, both from a desire to avoid liability and from a generalized sense of social responsibility, prudently use their resources to prevent excessively hazardous products from reaching or staying on the market. On occasion, however, manufacturers abuse their control over safety information and market defective products in flagrant disregard of public safety. . . . A legal tool is needed that will help 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.75

Using this reasoning, the Gryc court held that punitive damages may be awarded in appropriate strict liability actions.76

IV. POLICY CONSIDERATIONS RESOLVED IN FAVOR OF EXTENDING PUNITIVE DAMAGE AWARDS TO PRODUCTS LIABILITY ACTIONS

The Minnesota Supreme Court was faced with many of the same important policy considerations that caused the Roginsky court to decline to

69. Punitive damages are permitted in at least 46 of the 50 states. See DuBois, supra note 10, at 347; Tozer, supra note 2, at 300. It is presently unclear, however, how many states permit punitive damage awards in products liability actions. For an extensive list of the reported and unreported cases that have considered such awards, however, see Owen, supra note 2, at 1326-29 nn.333-34.
70. See note 19 supra.
71. See 297 N.W.2d at 732. See generally cases cited in note 68 supra.
72. Owen, supra note 2.
73. See 297 N.W.2d at 732-33.
74. See id.
75. Id. at 733 (quoting Owen, supra note 2, at 1259-60).
76. 297 N.W.2d at 733.
award punitive damages. The G** court, however, resolved these considerations in favor of awarding punitive damages.77

The G** court examined the problem of multiple plaintiffs seeking punitive damage awards for a defendant's single punishable act.78 The danger of multiple punitive damage awards, which is peculiar to products liability actions,79 has been a source of constant criticism.80 The danger is that defendants are likely to suffer severe economic hardship81 or even bankruptcy.82 The Roginsky court acknowledged this danger by

77. Id.
78. See id. at 740-41.
79. See Maxey v. Freightliner Corp., 450 F. Supp. 955, 962 (N.D. Tex. 1978) (recognizing that multiple punitive damage awards are a procedural anomaly in products liability cases), aff'd, 623 F.2d 395 (5th Cir. 1980); Coccia & Morrissey, supra note 9, at 57 (inequity and harmful effects of civil punitive damages are multiplied many times over in "mass disaster" situation); Kircher, supra note 61, at 301 (because most products are mass produced, danger of multiple punishment for single product defect is present); Owen, supra note 2, at 1314 (because of multiple lawsuits, measuring and controlling punitive damage awards in products liability litigation is particularly difficult); Robinson & Kane, supra note 21, at 34 (danger of excessive awards in consumer settings); Tozer, supra note 2, at 301 (mass disaster situation produces many plaintiffs seeking punitive damages).
80. See, e.g., Coccia & Morrissey, supra note 9, at 62 ("If each plaintiff-user of a mass-produced good is allowed to recover punitive damages, the cumulative effect would be staggering."); DuBois, supra note 10, at 349 (characterizing multiple punitive damage actions arising from a single act as "double jeopardy"); Kircher, supra note 61, at 301 (recognizing multiple punishments as one factor dictating elimination of punitive damages in all civil actions); Tozer, supra note 2, at 301 (arguing that fundamental fairness requires limitation on punitive damages in mass disaster situations); notes 81-86 infra and accompanying text. But see Owen, supra note 2, at 1322-25 (acknowledging multiple actions as a "troublesome" aspect of punitive damages in products liability actions but nevertheless favoring the continued use of punitive damages).
81. See Maxey v. Freightliner Corp., 450 F. Supp. 955, 962 (N.D. Tex. 1978) (because exemplary award is not controlled by a single plaintiff, multiple cases can be devastating), aff'd, 623 F.2d 395 (5th Cir. 1980); cases cited note 68 supra. For a discussion of the far-reaching effects of the increased use of punitive damages, see DuBois, supra note 10, at 349-51.
82. Observing that the financial danger underlying multiple punitive damage awards is the inability effectively to limit the number and size of such awards, the Roginsky court stated:

[The] apparent impracticability of imposing an effective ceiling on punitive awards in hundreds of suits in different courts may result in an aggregate which, when piled on large compensatory damages could reach catastrophic amounts. . . . [A] sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin.
378 F.2d 832, 841 (2d Cir. 1967). The danger of bankruptcy is further magnified by past experience which indicates that "juries are proven to act unrealistically in awarding punitive damages." Coccia & Morrissey, supra note 9, at 58.

Several commentators have also emphasized that the good of the public is not served by forcing manufacturers out of business because the disastrous economic effects of doing so will eventually fall upon society as a whole. See DuBois, supra note 10, at 349; Coccia & Morrissey, supra note 9, at 60; Fulton, supra note 10, at 121.
stating:

The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded these would run into tens of millions, as contrasted with the maximum criminal penalty of “imprisonment for not more than three years, or a fine of not more than $10,000 or both . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.83

This danger of “overkill”84 or “annihilation”85 is particularly acute in products liability actions because, unlike traditional punitive damages lawsuits, they often involve more than a single plaintiff. Judge Friendly emphasized this distinction in Roginsky, in which he noted:

“Typical of the torts for which such damages may be awarded are assault and battery, libel and slander, deceit, seduction, alienation of affections, malicious prosecution, and intentional interferences with property such as trespass, private nuisance, and conversion.” . . . What strikes one is not merely that these torts are intentional but that usually there is but a single victim; a punitive recovery by him ends the matter, except for such additional liability as may be provided by the criminal law.86

Although the defendant in Gryc argued that the danger of multiple punitive damages awards should preclude recovery,87 the Minnesota Supreme Court dismissed this argument, noting that it had been consistently rejected by other courts and commentators.88 Moreover, the Gryc court held that the likelihood of multiple punitive damage awards is not demonstrated by present products liability case law.89 In support of this position, the court referred to Roginsky, Toole, and a number of other cases that arose out of a single defendant’s marketing of the drug MER/29:90

[A] contrary conclusion can be drawn from the MER/29 litigation, the

83. 378 F.2d 832, 839 (2d Cir. 1967).
84. Id.
85. Pease v. Beech Aircraft Corp., 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974). See DuBois, supra note 10, at 349 (“economic annihilation by successive punitive verdicts”); Fulton, supra note 10, at 119 (suggests that new punitive damages standards are developing because traditional standards are inadequate to meet the demands of advocates who seek to “annihilate as well as to punish”).
86. 378 F.2d 832, 838 (2d Cir. 1967) (citation omitted).
87. See 297 N.W.2d at 740; Brief for Appellant at 79-82.
88. 297 N.W.2d at 740-41 & n.7. See, e.g., Vollert v. Summa Corp., 389 F. Supp. 1348, 1351 (D. Hawaii 1975) (rejecting argument that punitive damages are inappropriate in products liability actions “simply because there might be other suits filed against defendant” (emphasis in original)); cases cited note 68 supra. See generally Igoe, supra note 21; Owen, supra note 2; Robinson & Kane, supra note 21; Note, supra note 2.
89. See 297 N.W.2d at 740-41.
90. Id. at 740 & n.7. At the time Roginsky was heard there were 75 other cases pending in the same district and hundreds of actions had been filed in other jurisdictions for
only mass disaster products liability litigation that has run its course. While some 1,500 claims were filed against the manufacturer in that case, only eleven were tried to a jury verdict. Out of these, only seven were decided for the plaintiff, and only three of these included awards for punitive damages, one of which was reversed on appeal. No doubt many claims were settled out of court. Yet if this is an example of the most crushing punishment that will befall a manufacturer guilty of flagrant marketing misbehavior—and it is difficult to imagine a more extreme case of such misbehavior than that of Richardson-Merrell in marketing MER/29—then the threat of bankrupting a manufacturer with punitive damage awards in mass disaster litigation appears to be more theoretical than real.91

The court also noted that the defendant was protected from excessive punishment because the manufacturer’s wealth or poverty and the degree to which it had already been punished were factors considered in the decision to uphold the amount of the award.92 Furthermore, these same considerations would remain relevant in future actions against the defendant.93 Thus, in spite of the growing number and size of punitive damage awards in products liability actions,94 the Minnesota Supreme Court concluded that the danger of overkill was an unrealistic fear that could be minimized through judicial safeguards.

The Gryc court also examined the defendant’s contention that the deterrent of punitive damages was unnecessary. The defendant argued that because a heavy compensatory damage award admonishes a defendant and reinstates a plaintiff to his original position, punitive damages were unnecessary.95 Furthermore, the adverse publicity arising out of a large compensatory damage award, coupled with damage to a defendant’s reputation and concurrent loss of sales, should provide sufficient

injuries caused by the drug MER/29. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 834 (2d Cir. 1967).

91. 297 N.W.2d at 740-41 (quoting Owen, supra note 2, at 1324-25). The Task Force that drafted the proposed Uniform Product Liability Act noted that under the Product Liability Closed Claim Survey conducted by the Insurance Services Office in 1976-1977 the number of cases in which punitive damages were imposed was not substantial enough to justify the concern of product sellers over the impact of punitive damages. See Fulton, supra note 10, at 123-24.

92. See 297 N.W.2d at 741. These same considerations for awarding punitive damages have been incorporated into Minnesota’s newly enacted punitive damages statute. See notes 176-81 infra and accompanying text.

93. See id.

94. See, e.g., cases cited note 68 supra. Commentators generally agree that there is a trend toward granting large punitive damage awards in products liability actions. See DuBois, supra note 10, at 346; Ghiardi & Koehn, supra note 21, at 245; Heins, Statutory Changes in Minnesota Tort Law—1978, 48 HENNEPIN LAW. 6, 6 (1978); Owen, supra note 2, at 1261; Tozer, supra note 2, at 301.

95. See Brief for Appellant at 82-83, Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980).
deterrence. In addition, the defendant submitted that because it no longer manufactured the potentially dangerous product, the need for deterrence had been eliminated.

Rejecting the defendant’s contentions, the court emphasized that the defendant had acted in reckless disregard of the public in the past, and furthermore, had acted purely for its own economic benefit. Consequently, the court concluded that the defendant had misperceived the true function of punitive damages. Punitive damages serve as punishment for past misconduct as well as a deterrent from future wrongful acts. Because the potential of compensatory damages, loss of reputation and loss of sales did not adequately prevent the defendant’s past misconduct, the court concluded that punitive damages were necessary to deter future misconduct. The court also concluded that to award punitive damages for the defendant’s past misconduct would serve the punishment function.

Despite the persuasiveness of the court’s argument, the defendant’s position is not without support. Many commentators claim that the need for punitive damages has ceased because compensatory damages now provide compensation for all of the elements of damages that punitive damages were originally designed to cover. As one commentator points out, courts in most states include medical bills, loss of earnings, expenses reasonably connected with physical recovery, temporary and permanent diminution in the plaintiff’s ability to earn an income, and pain and suffering in their jury instructions on compensatory damages. Furthermore, such compensatory damage awards should quell

96. See 297 N.W.2d at 741; Brief for Appellant at 83-84.
97. See 297 N.W.2d at 741. The defendant also argued that because the Federal Flammable Fabrics Act, see note 23 supra, now has more stringent standards than when the cause of action arose, no deterrent was necessary. See id.
98. See id.
99. See id.
100. See id.
101. See id.; notes 9-10 supra and accompanying text.
102. See 297 N.W.2d at 741; notes 9-10 supra and accompanying text.
103. See 297 N.W.2d at 741.
104. See id.
105. See Coccia & Morrissey, supra note 9, at 46; Fulton, supra note 10, at 120; Kircher, supra note 61, at 301. One commentator who argued that the need for punitive damages in personal injury actions no longer existed concluded that:
Where there are or may be many plaintiffs claiming injuries from the same product, multiple compensatory damage awards, together with the legal costs and disruption of business attendant on the defense of the many suits will visit upon the manufacturer all the punishment and all the deterrence any fair mind could desire. Surely the damage done to the reputation and the treasury of Richardson-Merrell by the MER/29 suits, even without the several awards of punitive damages, served to make that corporate disaster an example for the entire drug industry.
Tozer, supra note 2, at 304. See generally Richardson, supra note 9, at 32.
106. See Fulton, supra note 10, at 134. But see Robinson & Kane, supra note 21, at 35.
the plaintiff's outrage and reduce frustration over the apparent inability to hold an anonymous corporation accountable for its wrongdoing. Consequently, it may be argued that punitive damages provide plaintiffs with a windfall and impose unwarranted liability on manufacturers and ultimately on society as a whole.

In light of these arguments, the court's decision to extend punitive damages into the realm of products liability was significant. The decision was important because it demonstrated that the court was willing to punish manufacturers that act in willful, wanton, or reckless disregard of the rights of others in the marketing of their products. In addition, the court implicitly rejected any notion that punitive damages and strict liability are incompatible doctrines, again apparently following the reasoning of Professor Owen. According to the incompatibility argument, "[i]n strict liability the character of the defendants' act is of no consequence; in the punitive damages claim the character of the act is paramount." Professor Owen contends that this charge of incompatibility misperceives the role of fault in products liability law because rather than eliminating fault from strict liability, the theory of strict liability expands fault by implicitly extending liability to encompass even innocent manufacturers of defective products. Moreover, the incompatibility argument improperly assumes that punitive damage claims are

(punitive damages compensate victims whose actual losses exceed the compensatory damages permitted by law); notes 12-17 supra and accompanying text.

107. See Fulton, supra note 10, at 134. Fulton also suggests, contrary to Professor Owen, see notes 13-14 supra and accompanying text, that the financial incentive to uncover conduct warranting punitive damages and the recovery of attorney's fees need not arise from a punitive damages award. See Fulton, supra note 10, at 134. Rather, such incentive may be found in attorney's fees recovered through prosecution of a consumer protection act violation. See id.

108. See Coccia & Morrissey, supra note 9, at 64 ("Society can no longer tolerate the allowance of punitive damages in multimillions of dollars. . . . [T]he punitive damages doctrine seriously affects not only manufacturers, but every industry, every professional man or woman, and in fact every person in the United States."); Ghiardi & Koehn, supra note 21, at 250, ("[A] punitive damages recovery in a products liability case results in punishing the public, not the wrongdoer."); cf. Kircher, supra note 61, at 301 ("[T]he 'punishment' of punitive damages is borne by the company's stockholders . . . or, more likely, by the buyers of the company's products.").

109. See note 120 infra.

110. 297 N.W.2d at 732-33.

111. Owen, supra note 2, at 1268-77.


One commentator, who contends that strict liability and punitive damages are incompatible, notes that because liability is based upon the condition of the product and because the character of defendant's act is of no consequence, punitive damages create a windfall and unjust enrichment for the plaintiff rather than spreading the risk of loss as is contemplated under the theory of strict liability. See Fulton, supra note 10, at 121-22. See also Ghiardi & Koehn, supra note 21, at 249-51; Synman, supra note 21, at 406-07.

113. See Owen, supra note 2, at 1269.
established by the same facts that support a claim for compensatory damages. An award of punitive damages does not depend upon whether the action brought is based upon strict liability or some other theory of recovery, but focuses solely upon the severity of an injury and the manner in which it was inflicted, whether by recklessness, willfulness, or with malice.\textsuperscript{114} The Wisconsin Supreme Court recently adopted this position when it considered the incompatibility argument in \textit{Drake v. Wham-O Manufacturing Co.}.\textsuperscript{115}

Where the principal claim is based on strict liability in tort and there is an additional claim of wanton disregard of the plaintiff's rights, it is a simple matter to allow the plaintiff to make a supplementary showing of aggravating conduct for the purpose of proving entitlement to punitive damages.\textsuperscript{116}

Furthermore, using similar reasoning, courts have long awarded punitive damages in cases involving various causes of action based on principles of strict liability. As Professor Owen notes, punitive damages have often been awarded in cases of nuisance, trespass to land, liability for ultrahazardous activities, negligence per se, defamation, and implied warranty in the sale of drugs.\textsuperscript{117}

Thus, because the \textit{Gryc} court failed to mention the incompatibility issue and because the recent trend has been to permit punitive damages in strict liability actions, it is apparent that, like Professor Owen, the Minnesota Supreme Court does not seriously question the compatibility of punitive damages with products liability actions.

\section*{V. The Common Law Punitive Damages Standard}

Although the Minnesota Supreme Court's decision in \textit{Gryc} finally resolved the issue of whether punitive damages are appropriate in the products liability context, the decision left a major question unresolved. In \textit{Gryc}, the supreme court did not address the issue of the proper standard for an award of punitive damages in a products liability lawsuit.

\textsuperscript{114} See \textit{id.}; W. PROSSER, supra note 2, § 2, at 11 ("it is not so much the particular tort committed as the defendant's motives and conduct in committing it which will be important as the basis of the award").

\textsuperscript{115} 373 F. Supp. 608 (E.D. Wis. 1974).

\textsuperscript{116} Id. at 611; accord, Maxey v. Freightliner Corp., 450 F. Supp. 955, 961-62 (N.D. Tex. 1978) (dismissing incompatibility argument stating "simultaneous pursuit of actual damages bottomed on principles of strict liability and exemplary damages bottomed on fault concepts are essentially matters of trial efficiency and presents no true substantive issues"), aff'd, 623 F.2d 395 (5th Cir. 1980); Rinker v. Ford Motor Co., 567 S.W.2d 655, 668 (Mo. Ct. App. 1978) (expressly finding no fundamental reason for excluding products liability cases from cases in which punitive damages are recoverable); Hilber v. Roth, 395 Pa. 270, 276, 149 A.2d 648, 652 (1959) ("The right to punitive damages is a mere incident to a cause of action—an element which the jury may consider in making its determination—and not the subject of an action itself.").

\textsuperscript{117} See Owen, supra note 2, at 1270-71.
The standard that the trial court used, one of wanton or reckless disregard of the plaintiff's rights as demonstrated by a preponderance of the evidence, is the traditional common-law standard for punitive damages in Minnesota. This standard was also used by the Gycz court. The Gycz court, however, concluded that substantial evidence indicated that the defendant had acted in "willful, wanton, and/or malicious disregard of the rights of others." This imprecise application of the punitive damages standard is characteristic of Minnesota's punitive damages case law, which has left the standard for punitive damages in a state of uncertainty. This uncertainty and imprecision is demonstrated by three distinct trends.

First, the supreme court frequently has applied a punitive damages standard based upon willful, wanton, and malicious conduct. This fundamental standard focuses upon the essential element of malice.

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118. See notes 121-45 infra and accompanying text.
119. See 297 N.W.2d at 739. On appeal the defendant attempted to argue that the "reckless disregard" standard was improperly applied and that the proper burden of proof should have been that of clear and convincing evidence rather than a preponderance of the evidence. See id. at 738. The Gycz court, however, refused to consider these arguments on appeal because the defendant failed to raise them at trial or in its post-trial motions.
120. 297 N.W.2d at 739. The Gycz court's opinion variously referred to the standard for punitive damages as conduct which was "willful or reckless," id. at 739, "willfully, wantonly, or maliciously" done, id. at 736, "willful, wanton and reckless," id. at 737, and conduct which was in "willful, wanton and/or malicious disregard of the rights of others," id. at 739.
121. See, e.g., Benson Coop. Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 528-29, 151 N.W.2d 422, 427 (1967); Butler v. Whitman, 193 Minn. 150, 152, 258 N.W. 165, 166 (1934); Bronson Steel Arch Shoe Co. v. T.K. Kelly Inv. Co., 183 Minn. 135, 139, 236 N.W. 204, 206 (1931); Johnson v. Lindquist, 177 Minn. 270, 271, 224 N.W. 839, 839 (1929); Schmidt v. Minor, 150 Minn. 236, 238, 184 N.W. 964, 965 (1921); Anderson v. International Harvester Co. of America, 104 Minn. 49, 51, 116 N.W. 101, 102 (1908); Vine v. Casney, 86 Minn. 74, 76, 90 N.W. 158, 159 (1902); Lynd v. Picket, 7 Minn. 184, 200-02, 7 Gil. 128, 143-44 (1862). See also Ag-Chem Equip. Co. v. Hahn, Inc., 480 F.2d 482, 491 (8th Cir. 1973).
122. The punitive damages standard originally adopted in Minnesota was established by the court in the 1862 case of Lynd v. Picket, 7 Minn. 184, 7 Gil. 128 (1862). In Lynd, the Minnesota Supreme Court held that the defendant's attachment of plaintiff's horses, knowing that the horses were exempt from attachment, constituted willful and malicious conduct. Id. at 200, 7 Gil. at 143. Since Lynd, the Minnesota Supreme Court has added the element of wantonness to the fundamental punitive damages standard. See cases cited note 126 infra.
123. See Cherne Indus., Inc. v. Grounds & Assocs., Inc., 278 N.W.2d 81, 95 (Minn. 1979) (malice necessary for imposition of punitive damages is defined as intentional doing of a harmful act without legal justification); Easton Farmers Elevator Co. v. Chromalloy Am. Corp., 310 Minn. 568, 579, 246 N.W.2d 705, 712 (1976) (per curiam) (willful and wanton misrepresentations were insufficient for punitive damages absent proof of actual malice); Johnson v. Radde, 293 Minn. 409, 410, 196 N.W.2d 478, 480 (1972) (per curiam) (malice is necessary component of the wrong which will support exemplary damages); Benson Coop. Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 528-29, 151 N.W.2d
which may be demonstrated either expressly or implicitly through the nature of the tort itself. 124 Although the Minnesota court generally has defined willful 125 and wanton 126 to mean intentional conduct, 127 that is, 422, 427 (1967) (punitive damages intended as punishment for willfully wrongful act, done with malice). But see Anderson v. International Harvester Co. of America, 104 Minn. 49, 52, 116 N.W. 101, 102 (1908). The Anderson court upheld a jury instruction for assault that omitted the term malicious. Although the court admitted that "willful" and "unlawful" do not always imply malice, it held that requiring the term malicious to be included in the instruction would unduly restrict the cases in which exemplary damages are recoverable. Id. In a dissenting opinion, Justice Brown argued that a jury instruction based on "willful" and "unlawful" conduct alone lacked "the essential element of malice." Id. at 53, 116 N.W. at 103 (Brown, J., dissenting). Consequently, Justice Brown felt that punitive damages may have been awarded for merely "intentional and unlawful" conduct. Id. at 54, 116 N.W. at 103 (Brown, J., dissenting).

The Minnesota Supreme Court has indicated that malice may not be essential to the punitive damages standard by phrasing the willful, wanton, and malicious standard disjunctively. See Crea v. Wuellner, 235 Minn. 408, 411, 51 N.W.2d 283, 284 (1952) (assault and battery committed wantonly or maliciously); Kirschbaum v. Lowrey, 165 Minn. 233, 236, 206 N.W. 171, 173 (1925) (punitive damages are punishment or deterrent for willful, wanton, or malicious wrongs); Hively v. Golnick, 123 Minn. 498, 502, 144 N.W. 213, 215 (1913) (plaintiff must allege act was wantonly or maliciously done); Berg v. St. Paul City Ry., 96 Minn. 513, 515, 105 N.W. 191, 192 (1905) (conductor's assault on street car passenger was not wanton or malicious).

124. See Ward v. National Car Rental Sys., 290 N.W.2d 441, 443 (Minn. 1980) (record failed to show aggravated circumstances from which malice might be inferred); Hively v. Golnick, 123 Minn. 498, 502, 144 N.W. 213, 215 (1913) (when wrongful act does not imply malice, plaintiff must allege intent or purpose behind defendant's wrongful act); Anderson v. International Harvester Co. of America, 104 Minn. 49, 52, 116 N.W. 101, 102 (1908) ("authorities very generally permit recovery [of punitive damages] when the tort is committed with cruelty, oppression, insult, or such gross negligence as to justify the inference of malice as a matter of law"); Vine v. Casmy, 86 Minn. 74, 76, 90 N.W. 158, 158 (1902) (when act does not imply malice, plaintiff should allege facts warranting exemplary damages); Hoffman v. Northern Pac. R.R., 45 Minn. 53, 55, 47 N.W. 312, 313 (1890) ("malice may often be inferred from the nature of the wrong"). But see Benson Coop. Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 529, 151 N.W.2d 422, 428 (1967) ("[a]lmost universally the decisions hold that mere 'implied malice,' which is attributed to any actionable conduct, does not suffice") (quoting C. McCormick, supra note 9, § 79).

125. While the Minnesota Supreme Court has seldom defined the term willful in the punitive damages context, it is apparent that the court equates "willful" with "intentional." See, e.g., Anderson v. International Harvester Co. of America, 104 Minn. 49, 53, 116 N.W. 101, 102 (1908) ("'willful' and 'unlawful' . . . designate a wrongful act, done intentionally, without just or reasonable cause"); id. at 54, 116 N.W. at 103 (Brown, J., dissenting) ("'willful' . . . is that of intention").

In the context of criminal assault and battery, the Minnesota court has expressly defined "willful" to mean "intentional." See State v. Bowers, 178 Minn. 589, 591, 228 N.W. 164, 165 (1929) (willful as meaning wrongful and intentional assault); State v. Smith, 159 Minn. 511, 516, 199 N.W. 427, 429 (1924) ("willfully means deliberately; and intentionally and with design and purpose"); State v. Damuth, 135 Minn. 76, 80, 160 N.W. 196, 198 (1916) ("'willfully' means 'designedly' or 'intentionally'"). 126. Although the Minnesota Supreme Court has not expressly defined the term "wanton" in the context of punitive damages, it is nevertheless evident that "wanton" conduct may be categorized as intentional conduct. See, e.g., Ward v. National Car Rental Sys., 290 N.W.2d 441, 443 (Minn. 1980) (false arrest was not committed so wantonly or mali-
unlawful conduct done freely and purposely,128 the court's definition of malice has been far less consistent.129 The Minnesota Supreme Court has variously defined malice130 as a wrong "malevolently done, or in wanton indifference to the rights invaded,"131 an act done "in the spirit of mischief or criminal indifference to civil obligation,"132 "the intentional doing of a harmful act without legal justification,"133 and other assorted definitions.134

Despite this instability in definition, however, it is clear that the malice required for an award of punitive damages is more than the mere doing of an unlawful and injurious act.135 Rather, the intent and motive be-

ciously as to show a conscious or reckless disregard of plaintiff's rights) (citing Crea v. Wuellner, 235 Minn. 408, 411, 51 N.W.2d 283, 284 (1952)); Hiveley v. Golnick, 123 Minn. 498, 502, 144 N.W. 213, 215 (1913) (plaintiff must allege wanton or malicious intent or purpose behind defendant's act); Craig v. Cook, 28 Minn. 232, 236, 9 N.W. 712, 714 (1881) ("trespass was wantonly committed . . . by one knowing he had no right to do the acts").

127. See notes 125-26 supra.

128. See State v. Monson, 168 Minn. 381, 383-84, 210 N.W. 108, 109 (1926). In Mon-

son, the trial court stated in its jury instruction: "[i]ntent or intention are difficult to define. The words practically define themselves. It has been stated however by our courts that intent means doing an unlawful act intentionally, that is, freely, purposely. I think I can give you no better definition." See also In re Shotwell, 43 Minn. 389, 393, 45 N.W. 842, 844 (1890); Wilcox v. Davis, 4 Minn. 232, 236, 9 N.W. 712, 714 (1881) ("trespass was wantonly committed . . . by one knowing he had no right to do the acts").

129. See notes 130-34 infra and accompanying text.

130. The malice necessary for an award of punitive damages has been called malice, actual malice, malice in fact, and legal malice. See Cherne Indus., Inc. v. Grounds & Assoc., Inc., 278 N.W.2d 81, 95 (Minn. 1979) (malice); Easton Farmers Elevator Co. v. Chromalloy Am. Corp., 310 Minn. 568, 579, 246 N.W.2d 705, 712 (1976) (per curiam) (actual malice); Benson Coop. Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 529, 151 N.W.2d 422, 428 (1967) (actual malice); Vine v. Casmey, 86 Minn. 74, 76, 90 N.W. 158, 158 (1902) (malice in fact); Lynd v. Picket, 7 Minn. 184, 201-02, 7 Gil. 128, 144 (1862) (legal malice).


133. See Cherne Indus., Inc. v. Grounds & Assoc., Inc., 278 N.W.2d 81, 95 (Minn. 1979); Johnson v. Radde, 293 Minn. 409, 410, 196 N.W.2d 478, 480 (1972) (per curiam).

134. See, e.g., Lewis v. Minneapolis Inv. Co., 153 Minn. 183, 185, 190 N.W. 70, 70 (1922) (an unlawful act done knowingly and purposely is by law malicious); Vine v. Casmey, 86 Minn. 74, 76, 90 N.W. 158, 158 (1902) (malice as wanton negligence). The Minnesota Supreme Court defined malice in Minnesota's first punitive damages case as: Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or, in the language of the charge, to do a wrong or unlawful act, knowing it to be such, constitutes legal malice.

135. See Ward v. National Car Rental Sys., 290 N.W.2d 441, 443 (Minn. 1980) (false arrest without reasonable cause, though unlawful, did not itself justify punitive damages); Benson Coop. Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 529, 151 N.W.2d 422,
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hind a defendant's act are of critical importance. Consequently, the Minnesota Supreme Court generally has limited punitive damage awards to cases involving intentional torts.

Second, the Minnesota Supreme Court occasionally has added the element of reckless disregard to the original willful, wanton, and malicious standard. This addition of reckless disregard to the punitive damages standard may have extended the element of malice to include aggravated and culpable instances of unintentional injury. The Minnesota Supreme Court has indicated that the wrongdoer's motive need not arise out of spite or ill will. See Johnson v. Radde, 293 Minn. 409, 196 N.W.2d 478 (1972) (per curiam). In Johnson, the court stated that "whether a wrongdoer's motive in interfering is to benefit himself, or to gratify his spite by working mischief to another, is immaterial, malice in the sense of ill-will or spite not being essential." Id. at 410, 196 N.W.2d at 480.

136. See Benson Coop. Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 528, 151 N.W.2d 422, 427 (1967) ("To justify an award of punitive damages, the wrongful act must have been done with malicious motive."); Hively v. Golnick, 123 Minn. 498, 501, 144 N.W. 213, 215 (1913) (jury instruction was erroneous for not including the element of defendant's motives); Seeman v. Feeney, 19 Minn. 79, 83, 19 Gil. 54, 57 (1872) (merely taking a horse, while not legally excusable, is not malicious).

137. Although the Minnesota Supreme Court has not defined "reckless disregard" in the punitive damages context, it has defined recklessness in connection with the reckless operation of a motor vehicle. In Brandsoy v. Bromeland, 177 Minn. 298, 225 N.W. 162 (1929), the court noted the following meanings of reckless: "[h]eedless, careless, rash, indifferent to consequences; not recking of consequences; desperately heedless, as from folly, passion, or perversity, impetuosity, or rashly adventurous; rashly or indifferentely negligent; careless, heedless; mindless; rashly negligent; utterly careless or heedless." Id. at 300, 225 N.W. at 163 (citation omitted). The court also cited the Standard Dictionary, which defines reckless as: "1) Destitute of heed or concern for consequences; especially foolishly heedless of danger; headlong; rash; desperate. 2) Not caring or noting; neglectful; indifferent. Obs. 2) Rashly negligent; utterly careless or heedless." Id. at 301, 225 N.W. at 163. The Brandsoy court recognized that none of these definitions make willful, intentional, or wanton acts a necessary element of recklessness. Id. Consequently, the court concluded that while recklessness was more than negligence, it did include conduct "evincing an indifference to or heedless disregard of obvious duty and of probable consequences and dangers." Id.

139. See note 141 infra.

140. See id. The Minnesota Supreme Court has held consistently that mere acts of negligence will not support an award of punitive damages. See Cobb v. Midwest Recovery.
Minnesota court has often limited this apparent extension, however, by using the term reckless disregard only in conjunction with other pejorative terms usually associated with intentional misconduct. Nevertheless, this addition of reckless disregard to the original standard has the practical effect of equating reckless conduct with the malice sufficient to justify an award of punitive damages.

Third, the supreme court has used a disjunctive standard under which reckless disregard or gross negligence may sustain an award of punitive damages independent of a finding of malice. In one case the court noted that the conditions that give rise to punitive damages are stated in the alternative; they all need not be present to warrant an award of punitive damages.

It is apparent from these three trends that the minimum standard for a

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Bureau Co., 295 N.W.2d 232, 237 (Minn. 1980) ("[p]unitive damages are not recoverable where the wrongful conduct is merely negligent"); Benson Coop. Creamery Ass’n v. First Dist. Ass’n, 276 Minn. 520, 529, 151 N.W.2d 422, 428 (1967) (almost universally, negligence will not suffice for exemplary damages).

141. See Ward v. National Car Rental Sys., 290 N.W.2d 441, 443 (Minn. 1980) (false arrest not "committed so wantonly or maliciously as to show a conscious or reckless disregard of the plaintiff’s rights"); Crea v. Wuellein, 235 Minn. 408, 411, 51 N.W.2d 283, 284-85 (1952) (assault and battery committed so wantonly and maliciously as to show conscious or reckless disregard of the rights of plaintiff); Corn v. Sheppard, 179 Minn. 490, 494, 229 N.W. 869, 871 (1930) (assault and battery "committed recklessly, wantonly, and maliciously"); Berg v. St. Paul City Ry., 96 Minn. 513, 515, 105 N.W. 191, 192 (1905) (assault was not "wanton, or malicious, or fraudulent, or oppressive, and of such a character as to indicate that . . . [the defendant] acted with a reckless disregard of the rights of the plaintiff").

142. See note 141 supra.

143. See, e.g., E.H. Boerth Co. v. LAD Properties, 82 F.R.D. 635, 646, (D. Minn. 1979) (punitive damages punish offender for his reckless or oppressive conduct); Dixon v. Northwestern Nat’l Bank, 276 F. Supp. 96, 104 (D. Minn. 1967) (improperly investing trust funds constituted conduct which was “malicious, wilful or in reckless disregard of the rights of others”); Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232, 237 (Minn. 1980) (“[g]enerally, punitive damages are allowed only for conduct which is done with malicious, wilfull or reckless disregard for the rights of others”); Huebsch v. Larson, 291 Minn. 361, 364, 191 N.W.2d 433, 435 (1971) (the general rule in Minnesota is to grant punitive damages for conduct that is malicious, willful, or in reckless disregard of the rights).

In Oakhurst, Inc., v. Tasco, Inc., No. 27015 (Minn. 3d Dist. Ct. Jan. 23, 1978) (trial court memorandum) the trial court, after noting the conjunctive and disjunctive forms of the Minnesota punitive damages standard, also concluded that “the issue of punitive damages is to be submitted to the jury whenever the evidence is sufficient to permit the jury to find malice or ill will or reckless or conscious disregard for the rights of others.” See id., slip op. at 63-65.

144. See Anderson v. International Harvester Co. of America, 104 Minn. 49, 52-53, 116 N.W. 101, 102 (1908) (assault). In Anderson, the court indicated that punitive damages are generally recoverable when the tort is committed with “cruelty, oppression, insult, or such gross negligence as to justify the inference of malice as a matter of law.” Id. Moreover, the court noted that these conditions need not concur for punitive damages to be awarded. See id.
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punitive damage award under Minnesota common law is that of reckless
disregard. Neither a showing of willful or wanton conduct nor a showing
of malice remain essential to an award of punitive damages. Conse-
sequently, the supreme court appears to have extended the availability of
punitive damage awards to instances of reckless or unintentional con-
duct. Whether the supreme court intended to extend punitive dam-
ages to such conduct, or whether the apparent extension is merely the
result of imprecise language, is not clear. Unfortunately, the court has
frequently adjusted the common-law standard in an apparent attempt to
apply it to a given fact situation with little or no explanation or analysis.

VI. THE STATUTORY PUNITIVE DAMAGES STANDARD: A
SUGGESTED INTERPRETATION

In an attempt to clarify the common-law standard, the Minnesota
Legislature recently enacted Minnesota Statutes section 549.20.146 Al-
though the bill that gave rise to this statute originally was designed solely
to govern punitive damages in products liability actions,147 through the
legislative hearings it was transformed into a bill covering punitive dam-
ages in all civil actions.148 The statute now provides in part that “puni-
tive damages shall be allowed in civil actions only upon clear and
convincing evidence that the acts of the defendant show a willful indif-
ference to the rights or safety of others.”149

145. For the distinction drawn between intentional conduct and reckless conduct, see
note 158 infra.

STAT. § 549.20 (1980)). This statute is reprinted in part at note 149 infra.

147. See Tape of Meeting on H.F 338 Before the Minnesota Senate Judiciary Subcommittee on

For a case discussing the burden the award of punitive damages places upon manu-
ufacturers, see notes 58-59 supra and accompanying text.

148. See Tape of Debate on H.F 338 Before the Minnesota Senate, 70th Minn. Legis., 1978
Sess. (Mar. 16, 1978); Tape of Meeting on H.F 338 Before the Minnesota Senate Judiciary Committee,
70th Minn. Legis., 1978 Sess. (Feb. 22, 1978); id. (Feb. 6, 1978); Tape of Meeting on H.F
338 Before the Minnesota Senate Judiciary Subcommittee on Judicial Administration, 70th Minn.

149. MINN. STAT. § 549.20(1) (1980). The remainder of Minnesota’s punitive dam-
ages statute provides that:

Subd. 2. Punitive damages can properly be awarded against a master or prin-
cipal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal was reckless in employing him,
or
(c) the agent was employed in a managerial capacity and was acting in the
scope of employment, or
(d) the principal or a managerial agent of the principal ratified or ap-
proved the act.

Subd. 3. Any award of punitive damages shall be measured by those factors
which justly bear upon the purpose of punitive damages, including the serious-
ness or the hazard to the public arising from the defendant’s misconduct, the
profitability of the misconduct to the defendant, the duration of the misconduct

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The clarity that this statutory punitive damages standard provides to the common-law punitive damages standard will depend largely upon the Minnesota Supreme Court's interpretation of "willful indifference." Although the court has not yet interpreted this element of the statute, it is apparent that the legal standard of willful indifference should be viewed as a standard requiring intentional conduct rather than the reckless conduct that apparently sufficed under Minnesota's common-law standard. As an intent standard, the threshold of willful indifference clearly would be exceeded if a manufacturer actually intended to injure consumers by marketing a defective product. In addition, however, to ensure that consumers are adequately protected from a manufacturer's misconduct, the willful indifference standard should also be satisfied by conduct demonstrating such a conscious and deliberate disregard of the rights and safety of others as to be tantamount to an intent to injure. The willful indifference standard thus could be extended to cover those products liability cases in which manufacturers fail to take even the most basic steps to discover product hazards, refuse to adopt feasible and inexpensive corrective measures, or deliberately conceal and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of the 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, and the severity of any criminal penalty to which the defendant may be subject.

Id. § 549.20(2)-(3).

150. See notes 152-54 infra and accompanying text. For a definition of intent, see note 128 supra.

151. See notes 121-44 supra and accompanying text. For the Minnesota Supreme Court's definition of reckless, see note 138 supra.

152. See note 153 infra.

153. Punitive damages generally are awarded only for intentional torts. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838 (2d Cir. 1967); note 68 supra. The remedy of punitive damages, however, has been extended to cases in which the defendant does not intend to injure the plaintiff. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 838. Consequently, punitive damages are often awarded when the defendant shows "such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton." Id. (citing W. Prosser, supra note 2, at 10). The Roginsky court, in conceding that this extension of punitive damages was a natural result, stated: [F]rom a moral standpoint there is not too much difference between the driver who heads his car into a plaintiff and the driver who takes the wheel knowing himself to be so drunk that he probably will hit someone and not caring whether he does or not; and it is as important to deter the latter type of conduct as the former.

Id.; accord, Maxey v. Freightliner Corp., 450 F. Supp. 955, 966 (N.D. Tex. 1978) (punitive damages denied because defendant's conduct didn't "approximat[e] a fixed purpose to bring about the injury of which plaintiff complains"), aff'd, 623 F.2d 395 (5th Cir. 1980); Rinker v. Ford Motor Co., 567 S.W.2d 655, 667 (Mo. Ct. App. 1978) (punitive damages are awardable if defendant's conduct "showed complete indifference to or conscious disregard for the safety of others").
substantial dangers simply to enhance the marketability and profitability of their products. 154

Although it has been suggested that the difference between the standards of willful conduct and of reckless conduct is practically indiscernible, 155 it is apparent that the two terms create a different standard of care. In *G.D. Searle & Co. v. Superior Court*, 156 a case in which a California Court of Appeal rejected a standard of reckless disregard in favor of a standard of conscious disregard, 157 the court stated:

"One is struck by the synonymity sometimes ascribed to non-synonymous terms. Typical is Toole v. Richardson-Merrell, supra. There the court declares that malice may be established by evidence of conduct which is "willful, intentional, and done in reckless disregard of its possible results." . . . According to dictionary definitions, willfulness and intent denote deliberation or design; recklessness, in contrast, connotes action which is insensate, heedless, or negligent. To apply these adjectives conjunctively to a single course of conduct is self-contradictory. "If conduct is negligent, it is not willful; if it is willful, it is not negligent." 158"

Thus, even though the distinction between a broadly interpreted intent standard and a standard of recklessness may be fine, it is nevertheless clear that willful indifference should be interpreted purely in terms of an intent standard rather than as a standard of recklessness. Only by interpreting and defining the punitive damages standard in this refined fashion will the court avoid the same imprecision and confusion that occurred by blending notions of reckless conduct and intentional conduct

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154. See Fulton, supra note 10, at 132-33; Owen, supra note 2, at 1362-63.
155. See Owen, supra note 2, at 1365 n.502. After noting that punitive damages may be recovered in most jurisdictions upon a showing of either conscious or reckless misconduct, Professor Owen concludes that the difference between notions of "conscious" or "reckless" or "wilful" and "wanton" disregard for the interests of others is practicably indiscernible in many contexts. Id. This, it is contended, is particularly true in products liability actions. See id. See also Restatement (Second) of Torts § 908, Comment b, at 465 (1979) ("Reckless indifference to the rights of others and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages.").
157. See id. at 32, 122 Cal. Rptr. at 224-25.
158. Id. at 31, 122 Cal. Rptr. at 224 (citation omitted). See Restatement (Second) of Torts § 500, Comment f (1965). The Restatement draws a specific distinction between intentional misconduct and reckless misconduct, stating:

"Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results."
within Minnesota's common-law punitive damages standard.\textsuperscript{159}

Several factors support the conclusion that willful indifference should be interpreted as an intent standard rather than as a lesser standard of recklessness. First, the legislation that evolved into Minnesota Statutes section 549.20 originally was designed to benefit Minnesota businesses for whom products liability insurance had become either too expensive or totally unavailable.\textsuperscript{160} The basic purpose of the initial legislation was to protect Minnesota businesses from the growing threat of devastating punitive damage awards by providing a consistent standard for punitive damage awards in the business context.\textsuperscript{161} It is apparent, therefore, that the legislature intended to prevent any broadening of the common-law punitive damages standard.

Second, the examples of willful indifference cited in the legislative history were of such an extreme nature that punitive damage awards against the manufacturer were clearly warranted.\textsuperscript{162} Moreover, the hypotheticals and terminology used by the drafters to define willful indifference were limited to intentional conduct.\textsuperscript{163}

\textsuperscript{159} See notes 121-44 supra and accompanying text. For a general discussion of the various punitive damages standards that different states have applied in awarding punitive damages in products liability actions and an analysis of how a lack of consistency in the standards applied has given rise to an "imprecise state of the law," see Fulton, supra note 10, at 128-32.

\textsuperscript{160} See Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297, 310-11 (Minn. 1980) (statute was enacted "in response to concerns which a variety of constituents expressed to the legislature about the awarding of punitive damages in products liability cases"); Heins, supra note 94, at 6; Tape of Meeting on H.F. 338 Before the Minnesota Senate Judiciary Subcommittee on Judicial Administration, 70th Minn. Legis., 1977 Sess. (May 3, 1977).

\textsuperscript{161} See Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297, 310-11 (Minn. 1980) ("the concern of the legislature was to limit the frequency and amounts of punitive damages awards"); Tape of Debate on H.F. 338 Before the Minnesota Senate, 70th Minn. Legis., 1978 Sess. (Mar. 16, 1978); Tape of Meeting on H.F. 338 Before the Minnesota Senate Judiciary Committee, 70th Minn. Legis., 1978 Sess. (Feb. 6, 1978); Tape of Meeting on H.F. 338 Before the Minnesota Senate Subcommittee on Judicial Administration, 70th Minn. Legis., 1978 Sess. (Feb. 1, 1978); Tape of Meeting on H.F. 338 Before the Minnesota Senate Judiciary Subcommittee on Judicial Administration, 70th Minn. Legis., 1977 Sess. (May 3, 1977).

\textsuperscript{162} See Tape of Meeting on H.F. 338 Before the Minnesota Senate Judiciary Committee, 70th Minn. Legis., 1978 Sess. (Feb. 22, 1978). The examples of willful indifference given by Senator Davies (senate author) included references to the "Pinto case," an apparent reference to Grimshaw v. Ford Motor Co., No. 1977-61 (Cal. Orange County Super. Ct. Feb. 6, 1978), appealed from, No. 4 Civil 20095 (Cal. 4th Dist. Ct. App. Apr. 26, 1978) (ruptured gas tank causing automobile to explode upon impact; $125,000,000 punitive damage award; reduced to $3,500,000 by trial judge on April 2, 1978 because award was excessive as a matter of law), and the Richardson-Merrell MER/29 cases; see notes 49-66 supra and accompanying text.

\textsuperscript{163} When Senator McCutcheon asked Senator Davies (senate author) what willful indifference meant, Senator Davies, referring to the MER/29 cases, stated that it would be willful indifference if a manufacturer failed to withdraw the product or pursue its inquiries after "the company had some consciousness of its ability to do horrendous evil." See
Third, the drafters of the statute increased the burden of proof from a preponderance of the evidence to clear and convincing evidence. This stricter standard of proof indicates that the drafters intended to make recovery of punitive damages more difficult under the statute than it had been under the common law.

Fourth, the drafters chose to use the standard of willful indifference rather than the standard of reckless disregard that often has been cited as a sufficient standard for punitive damages under Minnesota common law. Furthermore, Minnesota punitive damages case law indicates

Tape of Meeting on H.F. 338 Before the Minnesota Senate Judiciary Committee, 70th Minn. Legis., 1978 Sess. (Feb. 22, 1978). Senator Dieterich, in response to the same question, indicated that willful indifference is "intentionally disregarding a right or risk which you are aware of, which is known to you." Id. Similarly, Charles Hvass, Jr., speaking on behalf of the Minnesota Trial Lawyers Association, stated that in seeking to recover punitive damages "you're almost proving an intentional action by the manufacturer." Id.

164. See MINN. STAT. § 549.20(1) (1980). In his discussion of the statute prior to its enactment Senator Davies (senate author) noted that a burden of proof requiring clear and convincing evidence was appropriate in cases awarding punitive damages because such cases were almost quasi-criminal in nature. See Tape of Meeting on H.F. 338 Before the Minnesota Senate Judiciary Committee, 70th Minn. Legis., 1978 Sess. (Feb. 22, 1978).

Under the proposed Model Uniform Product Liability Act, a burden of proof requiring clear and convincing evidence was also adopted. See U.S. DEP'T OF COMMERCE, MODEL UNIFORM PRODUCT LIABILITY ACT § 120(A), reprinted in 44 Fed. Reg. 62,748 (1979). By adopting a standard of proof somewhere between the civil tests of a preponderance of the evidence and the criminal test of beyond a reasonable doubt, the drafters hoped to assuage the argument that punitive damages apply a criminal law sanction to a civil law case without providing the defendant with the constitutional safeguards normally available under the criminal law. See id. Analysis, reprinted in 44 Fed. Reg. 62,748-49 (1979). See also note 10 supra.

165. Prior to the enactment of MINN. STAT. § 549.20 (1980), a plaintiff could recover punitive damages through proof by a preponderance of the evidence. See, e.g., Wick v. Widdell, 276 Minn. 51, 53-54, 149 N.W.2d 20, 22 (1967) (in civil action, damages may be proven by preponderance of evidence); Carpenter v. Nelson, 257 Minn. 424, 427-28, 101 N.W.2d 918, 921 (1960) (damages in civil actions only require fair preponderance of evidence); Thoreson v. Northwestern Nat'l Ins. Co., 29 Minn. 107, 107-08, 12 N.W. 154, 154 (1882) (issues in civil actions need only be determined by fair preponderance of evidence).

Although the Minnesota Supreme Court has not defined clear and convincing evidence in a punitive damages context, Justice Peterson, in Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978) (paternity suit), defined clear and convincing proof, stating:

"Clear and convincing proof" means exactly what is suggested by the ordinary meanings of the terms making up the phrase. Satisfaction of this standard requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing proof will be shown where the truth of the facts asserted is "highly probable."

Id.; accord, Sabich v. Outboard Marine Corp., 131 Cal. Rptr. 703, 709 (1976) (clear and convincing defined as "highly probable" in products liability context).

166. See notes 138-44 supra and accompanying text. It should also be noted that the drafters of section 120 of the proposed Uniform Product Liability Act, who drew upon MINN. STAT. § 549.20 (1980) in drafting the Act, chose to use a standard of reckless disregard rather than the willful indifference standard contained in the Minnesota statute. See U.S. DEP'T OF COMMERCE MODEL UNIFORM PRODUCT LIABILITY ACT § 120, Analysis, reprinted in 44 Fed. Reg. 62,748-49 (1979). Accordingly, section 120(A) of the Act provides
that willful connotes intentional rather than reckless conduct.\textsuperscript{167} Thus, because the drafters selected the standard of willful indifference\textsuperscript{168} to limit the circumstances in which punitive damages are justified,\textsuperscript{169} and because punitive damages were limited to intentional misconduct under Minnesota's common-law standard,\textsuperscript{170} willful indifference should be interpreted to be an intent standard rather than as a standard of recklessness.

Additional support for the use of an intent standard exists. Because actions that constitute reckless conduct may be interpreted broadly,\textsuperscript{171} a jury may too easily confuse a standard based on reckless conduct with negligence or truly inadvertent conduct.\textsuperscript{172} Concern over the possibility of confusion has caused at least one jurisdiction to reject the reckless disregard standard.\textsuperscript{173} Furthermore, the danger of confusion, coupled with the strong likelihood of multiple punitive damage awards in products

that “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.” \textit{Id.} § 120(A), reprinted in 44 Fed. Reg. 62,748 (1979).

For a general analysis of section 120 of the proposed Uniform Product Liability Act, see Fulton, supra note 10, at 123-32.

\textsuperscript{167}. \textit{See} notes 125-27 supra and accompanying text.

\textsuperscript{168}. The Minnesota Supreme Court has not defined “indifference” in any of its case law. Professor Owen, however, who recommends the imposition of punitive damages for conduct “reflecting a flagrant indifference to the public safety,” see Owen, supra note 2, at 1368, states that the word indifference is essentially synonymous with the word disregard. \textit{See id.} at 1368 n.525. Owen also indicates that:

“Indifference” to the public safety conveys the idea that the manufacturer simply does not care whether or to what extent the public safety may be endangered by its product despite the availability of feasible means to reduce the danger substantially. It implies a basic disrespect and consequent disregard for the interests of others.

\textit{Id.} at 1368 (footnote omitted).

\textsuperscript{169}. \textit{See} notes 160-61 supra and accompanying text.

\textsuperscript{170}. \textit{See} note 18 supra.

\textsuperscript{171}. \textit{See} note 138 supra.

\textsuperscript{172}. \textit{See} Fulton, supra note 10, at 125; Owen, supra note 2, at 1366; cf. W. Prosser, supra note 2, § 2, at 10 (“mere negligence is not enough” for punitive damages); Restate-ment (Second) of Torts § 908, Comment b, at 765 (1979) (“[p]unitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence”).

\textsuperscript{173}. \textit{See} notes 156-58 supra and accompanying text. In G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975), the California court expressed concern over the “accretion of judicial definitions of malice” which for purposes of punitive damages had “pushed to the fore a number of imprecise verbal signals which—by color, nuance and suggestion—invite the jury to punish the defendant for violating the jurors' standards rather than the law’s.” \textit{Id.} at 31-32, 122 Cal. Rptr. at 224. Among the imprecise renditions of malice was reckless disregard. \textit{See id.} This standard was found to violate California's exemplary damages statute which required a showing of evil motive. \textit{See id.} Accordingly, the court concluded that “conscious disregard of safety” was the proper standard for exemplary damage awards in the cases of nondeliberate injury. \textit{See id.} at 32, 122 Cal. Rptr. at 225 (emphasis in original).
liability actions, could prove economically fatal to Minnesota businesses and manufacturers that are subjected to such awards. If businesses and manufacturers are to survive the growing number and size of punitive damage awards, they should be both apprised of, and permitted to rely on, a punitive damages standard that requires either an intent to injure or conduct that will be deemed the equivalent thereof before being subjected to potentially ruinous punitive damage awards. Similarly, consumers are entitled to know and rely upon a standard that will fairly and adequately protect their rights.

To ensure the development of a predictable punitive damages standard, the standard must be made as precise as possible. To aid courts in establishing reasonable precision, the drafters of the Minnesota Statute set forth a standard for determining whether punitive damages are appropriate and eight specific factors to be considered by juries in measuring an award of punitive damages. These factors, which were derived from misconduct found in past products liability lawsuits, were designed to promote fairness in future products liability cases. Factors to be considered are the seriousness of the hazard to the public, the profitability of a defendant's misconduct, the duration of the misconduct, any concealment of the misconduct, a defendant's awareness of the hazard and its excessiveness, a defendant's attitude and conduct upon the discovery of the misconduct, and the number and level of employees causing or concealing the misconduct. Conversely, to prevent Minnesota businesses from suffering undue financial hardship, an award of punitive damages takes into account a defendant's financial condition and the total effect of punishment against a defendant through other civil or criminal sanctions.

Only by considering these factors can the danger of multiple punitive

damage awards resulting in bankruptcy or excessive punishment be reduced or eliminated.182 Further, these same factors should aid courts and juries in determining whether punitive damages are appropriate in a particular case.183 Thus, these statutory factors should be considered both as a means of determining the amount of a punitive damage award and as guidelines to determine whether a business or manufacturer acted with sufficient intent to warrant a finding of such willful indifference to justify an award of punitive damages.184

VII. Conclusion

Although the Minnesota Supreme Court willingly awarded punitive damages in *Gryc*, the court did so with little analysis of several highly debated issues involved in awarding punitive damages in products liability actions. This was not necessarily an unreasonable approach because *Gryc* was an extreme case clearly warranting an award of punitive damages. Not only did the defendant in *Gryc* know that its cotton flannelette was highly flammable, it failed to use readily available flame retardants or feasible warnings that would have significantly reduced the garment's danger to consumers. Moreover, motivated purely by its own financial well-being, the defendant knowingly failed to use these safeguards and failed to withdraw the product from the market once it learned of the danger. Such extreme conduct, however, may not be present in future products liability lawsuits in which punitive damages are sought. Consequently, such issues as the injustice of multiple damage awards, the incompatibility of punitive damages with products liability actions, how properly to limit punitive damage awards, and the ability of manufacturers to insure against punitive damage awards are bound to arise in future cases.

One issue that will inevitably arise is the proper standard for punitive damages in products liability actions. The standard that the Minnesota Supreme Court eventually employs will bear heavily upon many of the issues addressed and left unaddressed by the *Gryc* court. For example, the danger imposed by multiple punitive damage awards will be directly affected by the standard that the court ultimately develops. If the standard is too lenient, or too easily confused with inadvertent conduct, many businesses and manufacturers may be seriously threatened with financial ruin. Yet the court must also guard against establishing a standard that would permit businesses and manufacturers to continue unchecked in their quest for higher profits at the expense of the rights and safety of consumers. Accordingly, the Minnesota Supreme Court should

182. *See* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 48 (Alaska 1979) (recognizing that application of Professor Owen's eight similar factors, mentioned in note 31 *supra*, can partially dispel spectres of bankruptcy and excessive punishment).

183. *See* note 31 *supra* and accompanying text.

184. *See* id.
view the statutory standard of willful indifference as requiring, through clear and convincing evidence, a showing of a conscious or deliberate disregard of the rights and safety of others and not merely a showing of reckless conduct. By interpreting willful indifference in this fashion the standard should provide a sufficient threshold in the minds of jurors to prevent inappropriate punitive damage awards against manufacturers. At the same time, however, this interpretation of the standard is lenient enough to encompass those manufacturers who fail to take basic steps to discover product hazards, correct defects or remove unreasonably dangerous products from the marketplace. Furthermore, by developing and strictly adhering to a precise standard of conduct the Minnesota Supreme Court can eliminate the inconsistency and confusion surrounding the common-law punitive damages standard. Moreover, the court can ensure a uniform standard, as contemplated by Minnesota's punitive damages statute, that will consider and minimize the dangers and conflicts involved in awarding punitive damages in various civil actions. If the court interprets the statute accordingly, there should be little reason why punitive damages cannot serve as an effective and just form of punishment and deterrence in all civil actions.