

1707.2 PUNITIVE DAMAGES: PRODUCTS LIABILITY

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

A person's acts are malicious when they are the result of hatred, ill will, desire for revenge, or inflicted under circumstances where insult or injury is intended.

A person acts in an intentional disregard of the rights of the plaintiff if the person acts with the purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. Before you can find an intentional disregard of the rights of the plaintiff, you must be satisfied that the defendant's act or course of conduct was:

- (1) deliberate;
- (2) an actual disregard of the plaintiff's right to safety, health, or life, a property right, or some other right; and
- (3) sufficiently aggravated to warrant punishment by punitive damages.

A defendant's conduct giving rise to punitive damages need not be directed at the plaintiff seeking punitive damages. There is no requirement that the defendant intended to cause harm or injury to the plaintiff.

The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously or in an intentional disregard of the plaintiff's rights, you do not have to award punitive

damages. Punitive damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct. Factors you should consider in answering question _____ include:

1. the seriousness of the hazard to the public;
2. the profitability of the misconduct;
3. the attitude and conduct on discovery of the misconduct;
4. the degree of the manufacturer's awareness of the hazard and of its excessiveness;
5. the employees involved in causing or concealing the misconduct;
6. the duration of both the improper behavior and its concealment;
7. the financial condition of the manufacturer and the probable effect on the manufacturer of a particular judgment; and
8. the total punishment the manufacturer will probably receive from other sources.

(Burden of Proof, Middle Burden, use Wis JI-Civil 205)

SPECIAL VERDICT

If you answered "yes" to question ____,* answer this question:

Did (defendant) act maliciously toward (plaintiff) or in an intentional disregard of the rights of (plaintiff)?

Answer: _____

Yes or No

*This blank refers to the question(s) to which a "yes" answer would support an award of punitive damages.

If you answered the preceding question "yes," answer this question:

What sum, if any, do you award against (defendant) as punitive damages?

Answer: \$ _____

COMMENT

This instruction and comment were approved in 1995 and revised in 2005. See comment to Wis JI-Civil 1707.1.

The frame of mind of the alleged wrongdoer is a necessary consideration in determining whether punitive damages may be imposed. Some type of knowledge is a necessary component to the imposition of punitive damages because an alleged wrongdoer who is not aware of a product's defect cannot be recklessly disregarding the rights of another person. Sharp v. Case Corp. 227 Wis.2d 1, ¶44, 595 N.W.2d 380 (1999). In Sharp, the court stated:

In a products liability case, a manufacturer may be found to have acted in reckless disregard if, after having gained specific knowledge of a product's defect and its potential harm, the manufacturer fails to take some action that the defect demands, such as adequate testing procedures, effective quality control, sufficient warnings or adequate remedial procedures such as product recalls or post-sale warnings. Walter, 121 Wis. 2d at 227-28.

Harm to Third Parties. In February 2007, the United States Supreme Court issued a decision in an Oregon case involving the constitutional procedural limitations on punitive damage awards in state courts. Philip Morris USA v. Williams, 549 U.S. _____, 127 S. CT. 1057, 166 L.Ed.2d 940 (2007). The court, in a 5-4 decision, held that the Due Process Clause requires state courts to adopt procedures that ensure that juries in tort cases involving punitive damages do not punish defendants for causing injury to individuals not a party to the lawsuit.

The Oregon case involved a claim brought by the widow of a smoker. The jury awarded punitive damages of \$79.5 million, roughly 97 times the amount of compensatory damages. The Supreme Court held that juries cannot punish defendants for harm caused to nonparties, but said that juries can consider harm to nonparties when determining the reprehensibility of the defendant's conduct.

The Supreme Court in Philip Morris USA v. Williams held that a jury may not use a punitive damage award to punish defendants for harm caused to nonparties to the lawsuit. The court did recognize that Aevidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.

The committee recommends instructing the jury as follows in a case involving evidence of harm to nonparties:

Suggested Language:

You may not use punitive damages to punish (defendant) for harming others. Evidence of actual harm to nonparties may help to show that the (defendant)'s conduct that harmed (plaintiff) also posed a substantial risk to the general public, and so was particularly reprehensible, however, you may not use punitive damages to punish (defendant) directly for harm to those nonparties.