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Punitive Damages and the Drunken Driver

A discussion of the history and theory of punitive damages which results in advocating their application in a drunk driving context after giving due consideration to the pros and cons of such a sanction.

An analysis of case law will reveal the underlying rationale that has motivated certain jurisdictions in applying this severe penal approach in an attempt to deter and curtail the senseless destruction on our nation's highways as well as exploring the impetus behind those other jurisdictions that do not utilize the remedy of punitive damages. The culminating focus is on California's position in this regard.

Finally, there is an apropos discussion of the behind the scene, but pervasive, role that policy considerations regarding insurance coverage play in the question of subjecting insured drunk drivers to the liability of punitive damages.

I. INTRODUCTION

Charles Taylor, an exuberant and handsome eighteen year old college student, climbed into his Volkswagen van to go to work. When Taylor, an honors student and varsity athlete, was only a short distance from his destination, an event took place that irreversibly altered his life. An oncoming car suddenly swerved into his lane and collided with him head-on. The brutal force of the impact thrust the Volkswagen's steering wheel into Taylor's face with gruesome results. The steering wheel rim tore into his mouth, shattered his teeth, severed his tongue, and literally amputated his lower jaw.1 Today, Charles Taylor is a grossly disfig-

1. Facts from the case of Taylor v. Sup. Ct. of Los Angeles County, 24 Cal. 3d 890, 598 P.2d 853, 157 Cal. Rptr. 693 (1979), as described in an address by Jerome Jackson, counsel for the plaintiff, to the legal fraternity of Phi Delta Phi, initiation banquet, Pepperdine University School of Law (Sept. 13, 1979). Taylor is dis-
ured dental cripple who will never experience such simple and normal pleasures as a loved one's kiss or a savory meal. On that fateful day, Charles Taylor became a statistic—one of thousands of Americans who annually are killed or maimed by the drunken driver.3

The incalculable cost of the slaughter, destruction and anguish caused by the drunken driver has given vent to a public outcry of
cussed at length in Section III. C. Unfortunately, these facts are not altogether un-


3. For the purpose of this comment, "drunken driver" may be defined as one who is voluntarily intoxicated to the extent that his or her blood-alcohol (or drug) level is sufficient to warrant their arrest in the jurisdiction where the accident occurs. Normally, a blood-alcohol level of .10% is sufficient. See, e.g., CAL. VEH. CODE § 23126(a) (3) (West 1971).

"Voluntary intoxication," as described above, refers not only to intoxication resulting from excessive use of alcoholic beverages, but also to that intoxication resulting from the use of drugs and narcotics. Thus, the psycho-biological issue of whether alcohol and drugs are truly "voluntary" is overlooked for the purpose of this comment. See generally, DRINKING, supra note 2, at 122-25; Cramton, Driver Behavior and Legal Sanctions, 67 MICH. L. REV. 421, 437-38 (1969); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS 14 (1967).

It should also be noted that this comment is limited to cases in which the defendant motorist was, in fact, intoxicated at the time of the accident, and does not include cases in which a claim for punitive damages was rejected for the reason that the evidence failed to establish the intoxication of the defendant motorist. However, certain cases will be analyzed from jurisdictions refusing to assess punitive damages against drunken drivers even though a possible reason for doing so was inconclusive evidence; the court's language in these cases nevertheless warrants discussion.

The above-mentioned definitions are certainly an improvement over the rough and ready classification described in a recent California case: "Not drunk is he who from the floor Can rise alone and still drink more; But drunk is he who pro-

concern and outrage. Society has responded in a variety of ways in its efforts to curb the senseless carnage attributable to drunken driving. Such responses have included the institution of rehabilitative programs,5 legislation of increasingly severe penal laws6 and in surprisingly few jurisdictions, the imposition of punitive damages in civil actions.7

This comment will focus exclusively on the last of these responses and will be limited to an evaluation of punitive damages


6. Many states are reacting to the increase in alcohol-automobile related deaths and injuries by increasing fines and revoking driver's licenses. Other states, however, have taken an even less lenient approach. Misner, Severe Penalties for Driving Offenses: A Deterrence Analysis, 1975 Ariz. St. L.J. 677. See, e.g., Note, Criminal Law: Murder by Auto, Kentucky's Hard Line Stance Against Drunken Drivers, 5 N. Ky. L. Rev. 279 (1978).

within the context of drunken driving. Before this evaluation can be thoroughly understood and appreciated, a fundamental knowledge of punitive damages is required. Therefore, the nature and purposes of punitive damages will be discussed. Next, case law will be analyzed from those states that have confronted the issue of whether, and under what circumstances, punitive damages may be properly assessed against drunken drivers. Special emphasis will be given to California's approach to this issue. Finally, there will be a brief examination of the concurrent issue of insurance and its impact on punitive damages.

II. THE DOCTRINE OF PUNITIVE DAMAGES

Punitive damages, also known as exemplary, vindictive damages or "smart money," have been defined as a class of monetary damages awarded in tort actions that traverse the concept of fully compensating an injured plaintiff for harm actually caused. The punitive aspect, which grants damages in excess of what the

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10. By "tort actions" it must be remembered that the major emphasis is placed on actions involving personal injuries. Many states, including California, do not allow punitive damages in wrongful death actions. This is also true of actions brought under the Employer's Liability Act, 45 U.S.C. §§ 51-60 (1976). For further information on this topic, including those jurisdictions that allow punitive damages in death actions, see C. McCormick, Handbook on the Law of Damages § 103, at 356 (1935) [hereinafter cited as C. McCormick]. It must also be remembered that punitive damages are not allowed in contract cases, unless certain tort aspects are present. D. Dobbs, Remedies § 3.9, at 206-07 (1973) [hereinafter cited as D. Dobbs].

It is indeed possible that in some states, one may be held liable in punitive damages for acts that cause great bodily harm, but that the identical behavior is sanctified with immunity from punitive damages should the hapless victim die. This is the converse of the criminal law wherein the severity of the penalty corresponds with the severity of the act. Sadly enough, a drunken driver who kills a family may not be held liable for punitive damages, while another drunken driver may be held liable for breaking a limb.

11. The Restatement (Second) of Torts (1979), defines punitive damages as follows:

§ 908 Punitive Damages

(1) 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.
injuries actually merit, is an anomaly in tort law, which is viewed as primarily compensatory in nature. The incongruity of punitive damages, which is more closely aligned with the criminal law rather than the civil law, has led some courts to sharp criticism and others to high praise. The Supreme Court of New Hampshire said: "The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry and body of the law." The Supreme Court of Wisconsin, on the other hand, noted, "The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law." The doctrine of punitive damages continues to be the subject of heated, often vitriolic, debate among legal scholars as well.

A. The Historical Development of Punitive Damages

The doctrine of punitive damages has been an integral aspect of the canon laws of numerous religions for centuries. The doctrine has been found as early as 2000 B.C. in The Code of Hammurabi, and 1400 B.C. in the Hittite Laws. The Hindu Code of Manu, written in 200 B.C., makes reference to exemplary damages as does the Judeo-Christian and Hebrew law. Classic Roman law is also

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

13. Id. at 7.
15. Luther v. Shaw, 157 Wis. 234, 238, 147 N.W. 18, 20 (1914).
replete with punitive provisions beginning with the *Twelve Tables*, which have been dated to 450 B.C. Similarly, punitive damages were also extant in the writings of ancient Greek scholars.\(^{18}\) The fact that punitive damages may be found in the writings of literally every ancient civilization of note, attests to both the doctrine’s durability as well as its controversial nature.

Early English common law initially makes statutory reference to the concept of punitive damages in the sixty-five English Acts of parliament, with judicial recognition arising in the case of *Huckle v. Money*.\(^{19}\) It has been suggested that *Huckle* was the result of the inability of courts of the period to set aside jury awards.\(^{20}\) However, by the time *Huckle* came to the fore, courts had begun to set aside verdicts they considered excessive.\(^{21}\) However, despite this relatively new found authority, the court in *Huckle* upheld the jury’s award,\(^{22}\) reasoning that the defendant’s onerous conduct\(^{23}\) gave the jury ample justification to award punitive damages, despite only the slight injury suffered by the plaintiff.\(^{24}\) In recent years, however, England has placed considerable restrictions on the use of punitive damages.\(^{25}\)

Twenty one years following the decision of *Huckle*, punitive damages became an aspect of American common law.\(^{26}\) Later, the doctrine survived constitutional attack in *Day v. Worth*\(^{27}\) where the defendant’s conduct was “wanton and malicious, or gross and outrageous.”\(^{28}\) Since 1851, the vast majority of American states\(^{29}\)

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\(^{19}\) 95 Eng. Rep. 768 (K.B. 1763).


\(^{21}\) Id.

\(^{22}\) In *Huckle*, Lord Camden wrote, “[T]he small injury done to the plaintiff... did not appear to the jury... The great point of law... they saw a magistrate... exercising arbitrary power... and I think they have done right in giving exemplary damages.” 95 Eng. Rep. at 769.

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) England has abolished punitive damages except where they could serve a “useful purpose,” by penalizing oppressive and arbitrary action by government servants, or tortious conduct calculated to make a profit for the actor and the like. *See Rookes v. Barnard*, [1964] A.C. 1129.

\(^{26}\) Genay v. Norris, 1 S.C.L. (1 May) 6 (1784).

\(^{27}\) 54 U.S. (13 How.) 363 (1851).

\(^{28}\) Id.

\(^{29}\) California accepted the doctrine of punitive damages in 1872 by enacting Civil Code § 3294, which provided for the award of punitive damages “where the defendant has been guilty of oppression, fraud, or malice.” Cal. Civ. Code § 3294 (West 1970). The earliest reported case in which the California Supreme Court had the opportunity to review the validity of the doctrine of punitive damages was *Russell v. Dennison*, 45 Cal. 337 (1873). California decisions addressing the possible juxtaposition of punitive damages and drunken driving will be discussed in section III. C.
and the federal government\textsuperscript{30} have adopted the doctrine of punitive damages, with only a handful of states modifying\textsuperscript{31} or rejecting\textsuperscript{32} the doctrine.

\textbf{B. The Nature and Purpose of Punitive Damages}

Superficially, punitive damages are a response to a defendant’s flagrant and outrageous misconduct.\textsuperscript{33} There are several justifications for punitive damages. The most commonly cited objectives are the punishment of the defendant, the deterrence of the defendant from further offense, the deterrence of others from similar conduct and the vindication of society.\textsuperscript{34} Yet another objective is reimbursement for the plaintiff’s noncompensable injuries.\textsuperscript{35} Whatever justification is advanced, the general consensus is that punitive damages constitute a windfall to the plaintiff, and are not a matter of right. Instead, courts with such views construe the award of punitive damages as lying wholly as a matter within the discretion of the trier of fact.\textsuperscript{36} Moreover, even the jury’s predilections are bridled by the prerequisite that compensatory damages

\textsuperscript{30} Scott v. Donald, 165 U.S. 58, 86 (1896).
\textsuperscript{31} Several states view punitive damages as serving a compensatory function; Michigan (Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922)); New Hampshire (Bixby v. Dunlop, 56 N.H. 486 (1876)). Connecticut limits punitive damages to the expenses of litigation, which must be proved. Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941).
\textsuperscript{32} The punitive damages doctrine has been rejected in several states; Massachusetts (Boott Mills v. Boston & Me. R. Co., 218 Mass. 582, 106 N.E. 680 (1914)); Nebraska (Wilfong v. Omaha & Council Bluffs St. R. Co., 129 Neb. 600, 262 N.W. 537 (1935)); Washington (Anderson v. Dalton, 40 Wash. 2d 894, 246 P.2d 853 (1952)). Louisiana is occasionally listed in this category, and it is true that Louisiana decisions sometimes say that punitive damages are not awarded in the absence of statute, see Post v. Rodigue, 205 So. 2d 67 (La. App. 1967); but a good imitation of punitive damages is granted, if not the genuine thing, on the theory that they are compensatory in some fashion, even though based upon wrongs “aggravated by circumstances of violence, oppression, malice, fraud or wanton and wicked conduct . . .” Loeblich v. Garnier, 113 So. 2d 95 (La. App. 1959). Presumably a thorn by any other name will hurt as much.
\textsuperscript{33} See Note, Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose, 9 Pac. L.J. 823, 828 (1978).
\textsuperscript{34} Punitive damages have been held to serve a compensatory purpose as well. See generally cases cited note 32 supra.
\textsuperscript{35} W. PROSSER, § 2, supra note 12, at 9. Many writers are extremely critical of this, arguing that if the compensatory damages system in American jurisprudence is deficient, it should be directly remedied, and not be supplemented by twisting punitive damages into serving a purpose for which they were not intended. See section IV. A. and note 74 infra and accompanying text.
\textsuperscript{36} W. PROSSER, supra note 12, at 13; C. MCCORMICK, supra note 10, § 84, at 256.
must exist before punitive damages may be imposed.  

Punitive damages are parasitic in nature and courts will not award them in the absence of compensatory damages. This concept is complex in its application. The rule's intricacy has so perplexed those seeking punitive damages that one notable author was moved to comment that there is "a conspicuous amount of confusion and of conflict, some apparent and some real, . . . on the subject of . . . compensatory damages as a prerequisite to an award of exemplary damages." Thus, while it is understood that compensatory damages are required before punitive damages can be assessed, there remains considerable speculation as to how this requirement is fulfilled. One expert astutely capsulized the dilemma:

The problem derives in part from the ambiguity of the word "damages." Sometimes the term has meant pecuniary loss; at other times it has included substantial non-pecuniary losses, as where the plaintiff's good name is injured by libel without costing him his job or any other measurable advantage; and sometimes it has included purely nominal damages, where neither pecuniary nor substantial dignitary losses have occurred. The problem also derives in part from the fact that in some instances, the plaintiff has no valid claim at all, that is, none for any kind of damages, unless he can show a measurable injury, while in other cases, the defendant's act gives rise to a cause of action for at least nominal damages even if the plaintiff has suffered no harm at all.

This uncertainty as to what constitutes damages adds a considerable measure of difficulty to many cases in which punitive damages are sought. Perhaps nowhere is this quagmire so acutely apparent as in cases where nominal damages are the sole compensation a plaintiff receives. Ironically, instances where nominal damages are the only compensation awarded are the instances where punitive damages become most desirable.

Differences

37. D. Dobbs, supra note 10, § 3.9, at 208. There are other limitations on the assessment of punitive damages, which will not be addressed here: punitive damages must be commensurate with the amount of compensatory damages, as well as the defendant's wealth and equity will not entertain claims for punitive damages. See generally Note, Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose, 9 Pac. L.J. 823 (1978); D. Dobbs, supra note 10, § 3.9, at 211-14.

38. C. McCormick, supra note 10 § 83, at 293. Another description of this parasitic nature is "that the allowance of exemplary damages does not widen the range of actionable wrongs." Id.

39. Id.

40. D. Dobbs, supra note 10, § 3.9, at 208 (footnote omitted) (emphasis in original).

41. See text accompanying notes 67-72 infra. See also, W. Prosser, supra note 12, § 2, at 14. While it may be argued that the large compensatory awards that many drunken drivers could be held liable for is a sufficient incentive alone, there could be instances where actual damages are minimal, and in those instances punitive damages would prove a viable incentive. Additionally, punitive damages are not insurable, and thus arguably would provide a strong deterrent to drinking and driving. This will be discussed further in section IV.
exist among the various jurisdictions regarding whether or not ex-
emplary damages may be imposed in nominal damages cases. Some jurisdictions clearly favor them,\textsuperscript{42} and others disallow them completely.\textsuperscript{43}

Unfortunately, this confusion has extended itself into the jury
room as well. In those instances where a jury is instructed on
both compensatory and punitive damages, it is quite possible that
the jury will blur the two, particularly where damages are
vague,\textsuperscript{44} and award nominal damages and a large punitive award
—a punitive award that is largely compensatory under the evi-
dence.\textsuperscript{45} Therefore, many attorneys are understandably reluctant
to request an instruction on punitive damages.\textsuperscript{46}

Another important consideration, perhaps the most significant
in terms of the drunken driver, is the defendant's state of mind at
the time the tort is committed. One must establish that a defend-
ant motorist, while under the influence of alcohol, nevertheless
manifested a state of mind justifying the imposition of punitive
damages.\textsuperscript{47} The discussion of case law in the subsequent sections
will demonstrate that this is the greatest hurdle facing the plain-
tiff's attorney.

Professor Prosser concisely emphasized the need for a requisite
state of mind when he stated that "something more than the mere
commission of a tort is always required for punitive damages"\textsuperscript{48}
and that "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{49} One's motives or state of
mind and the subsequent conduct exhibited in furtherance of that
mental posture are, for the most part, literally inseparable, and
any attempts to distinguish them are essentially academic. It is a
rare instance when an individual's state of mind can be examined
in a vacuum, without a simultaneous examination of the conduct
which is the physical manifestation of the particular thought proc-

\textsuperscript{42} Maring-Crawford Motor Co. v. Smith, 285 Ala. 477, 233 So. 2d 484 (1970);
Landum v. Livingston, 394 S.W.2d 573 (Mo. App. 1965).
\textsuperscript{43} Stacy v. Portland Pub. Co., 68 Me. 279 (1878). "If all the individual injury is
merely technical and theoretical, what is the punishment to be inflicted for?" \textit{Id}.
\textsuperscript{44} D. Dobbs, \textit{supra} note 10, § 3.9, at 209.
\textsuperscript{45} \textit{Id}.
\textsuperscript{46} \textit{Id}.
\textsuperscript{47} See note 57 \textit{supra} and accompanying text. See also Clarkson, \textit{Drunken-
ness, Constructive Manslaughter and Specific Intent}, 41 \textit{Mod. L. Rev.} 478 (1978).
\textsuperscript{48} W. Prosser, \textit{supra} note 12, § 2, at 7.
\textsuperscript{49} \textit{Id}., at 11 (emphasis added).
ess. Usually, a state of mind is imputed to a defendant based on his conduct and the circumstances underlying that specific behavior. In effect, one's mental state is determined on the basis of circumstantial evidence. It will subsequently be demonstrated that disagreement exists among the numerous states that have addressed these considerations, with states currently opposing the imposition of punitive damages demanding that the requisite state of mind be established independently of the defendant's conduct, and states favoring the imposition of punitive damages concentrating primarily on the conduct under scrutiny.\(^5\)

When considering an award of exemplary damages many terms have evolved from repeated judicial attempts to precisely define the imperative mental state\(^5\) and accompanying conduct. Such attempts have included such words as “malicious,”\(^5\) “oppressive,” “evil,” “wicked,” “wanton,” “morally culpable” and “conscious disregard.”\(^5\) While jurisdictions differ in their preferences for these descriptive words and the burden of proof attached to each, it is generally agreed that the defendant’s actions must fall somewhere among these adjectives before the question of punitive damages may be submitted to a jury.\(^5\) In addition,

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50. See notes 95-142 infra and accompanying text.
51. D. Dobbs, supra note 10, § 3.9, at 205; W. Prosser, supra note 12, § 2, at 10.
52. Since these damages are assessed for punishment and not for reparation, a positive element of conscious wrongdoing is always required. It must be shown either that the defendant was actuated by ill will, malice, or evil motive (which may appear by direct evidence of such motive, or from the inherent character of the tort itself, or from the oppressive character of his conduct, sometimes called “circumstances of aggravation”), or by fraudulent purposes, or that he was so wanton and reckless as to evince a conscious disregard of the rights of others.

C. McCormick, supra note 10, at 280.
53. W. Prosser, supra note 12, § 2, at 9-10. Malice has also been defined as:

The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. A condition of mind which prompts a person to do a wrongful act willfully, that is, on purpose to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse. A conscious violation of the law (or the prompting of the mind to commit it) which operates to the prejudice of another person. A condition of the mind showing a heart regardless of social duty and fatally bent on mischief. Cockrell v. State, 135 Tex. Cr. R. 218, 117 S.W.2d 1105, 1109, 1110.

54. Conscious disregard may be defined in terms of the definition of the word “reckless.” One is reckless or in conscious disregard of the rights and safety of others when he or she performs an act or fails to perform an act which he or she knows or has reason to know will unreasonably increase the risk of physical harm to another. Restatement (Second) of Torts § 500 (1965); W. Prosser, supra note 12, § 34, at 185.
55. See Smith v. Glemmons, 216 Ala. 52, 112 So. 442 (1927), where the court defined reckless as “very negligent,” but when discussing punitive damages the court speaks of reckless and wanton acts. In Bailey v. Smith, 132 S.C. 212, 128 S.E. 423 (1925), the court said:
Punitive Damages are not recoverable where a certain course of action is pursued innocently or on the advice of counsel.\(^5\)

Just as confusion exists with respect to the issue of damages, it also exists with regard to the defendant's state of mind and the phraseology used to describe it. Many courts have employed the ambiguous and unfortunate expression "gross negligence" in describing the mental state and conduct warranting the assessment of punitive damages.\(^5\) Most authorities, however, feel this term easily implies more than simply a high degree of negligence, but rather, is negligence that is manifested through behavior so callous, careless or indifferent as to amount to a conscious disregard of the rights of others.\(^5\)

While much has been written on the issue,\(^5\) courts have relied primarily on the terms "malice" and "conscious disregard" in addressing the question of whether or not a drunken driver should be held liable for exemplary damages. As the jurisdictional analysis of case law in the pages to follow will show, states presently allowing the assessment of punitive damages in drunken driving cases favor the term "conscious disregard" to describe the defendant's conduct, while states disallowing the imposition of punitive damages have taken an affinity to the term "malice" and the stricter more conservative application the term normally engenders.\(^6\)

\[^{56}\text{D. Dobbs, supra note }10, \S 3.9, \text{at } 205; \text{W. Prosser, supra note }12, \S 2, \text{at } 10.\]

\[^{57}\text{E.g., Santiesteban v. Goodyear Tire \& Rubber Co., }306\text{ F.2d }9\text{ (5th Cir. }1962\text{) ("malice" under Florida privacy law); Anderson v. Knox, }297\text{ F.2d }702\text{ (9th Cir. }1961\text{) (Hawaii uses the terms "willful, oppressive, or wanton commission of a tort "spirit of mischief or criminal indifference to civil obligations"); State Farm Mut. Ins. Co. v. St. Joseph's Hospital, }107\text{ Ariz. }498, 489\text{ P.2d }837\text{ (1971) ("reckless acts of spite or ill will"); Nance v. Cook, }240\text{ Ark. }336, 399\text{ S.W.2d }262\text{ (1966) ("wanton disregard of the rights and safety of others"); Cotton v. Fisheries Products Co., }181\text{ N.C. }151, 106\text{ S.E. }487\text{ (1921) ("malicious, wanton, and reckless manner," "reckless and criminal indifference to plaintiff's rights"); Cooperative Ref. Assn. v. Young, }393\text{ P.2d }537\text{ (Okla. }1964\text{) ("fraud, malice or oppression," "evil intent").}\]

\[^{58}\text{D. Dobbs, supra note }10, \S 3.9, \text{at } 205-6.\]

\[^{59}\text{See note }7\text{ supra.}\]

\[^{60}\text{See generally cases cited note }7\text{ supra.}\]
C. The Advantages of Punitive Damages

Legal scholars who have embroiled themselves in the ongoing controversy surrounding the use of exemplary damages have isolated what they perceive to be the doctrine’s strengths and weaknesses.\(^6\) While the determination of what is an advantage or disadvantage to the use of punitive damages is clearly a subjective matter, with certain aspects of the doctrine sharing both descriptions positive and negative qualities, it can be safely stated that punitive damages do not present any strengths or weaknesses unique to drunken driving. Nevertheless, an analysis of the perceived advantages and disadvantages of punitive damages will show the benefit that the public can expect to gain as well as the risks that the tortfeasor may expect to encounter.

The most commonly noted advantage to the utilization of punitive damages has been that of deterrence.\(^6\) The doctrine’s opponents also cite deterrence, or the lack thereof, as its principal disadvantage.\(^6\) Proponents of punitive damages suggest that the average juror is aware of the theory of punitive damages.\(^6\) Critics, to the contrary, argue that most people are ignorant of punitive damages; they argue that the public has undergone a sociological orientation to enjoy liquor and then drive. Critics believe the high incidence of undetected drunk driving and the drunken driver’s inability to rationally choose to drive once he has become intoxicated effectively undermine the argument that punitive damages deter.\(^6\)

In order to resolve this debate, a strong analogy may be drawn between punitive damages and penal laws. Based on the recidivism rates of offenders, many argue that our penal laws fail to deter criminal conduct. Similarly, critics urge that the high incidence of drunken driving clearly establishes that punitive damages lack any deterrence value. The counter argument is that such conclusions are erroneous or, at a minimum, biased and incomplete. One can not focus on a minority’s failure to abide by a certain rule and use this as a basis to conclude that the majority also is not deterred by existing sanctions.\(^6\)

\(^{61}\) See note 25 supra.

\(^{62}\) C. McCormick, supra note 8, § 77, at 276. D. Dobbs, supra, note 10, § 3.9, at 205, 220.

\(^{63}\) D. Dobbs, supra note 10, § 3.9, at 220. See also, Defense Research Institute, The Case Against Punitive Damages (D. Hirsch & J. Pouros eds. 1969).


\(^{65}\) See generally, Drinking, supra note 2.

\(^{66}\) There is simply no statistical method of ferreting out those who are deterred by criminal sanctions or punitive damages; this section of the population is
Another argument is that punitive damages have no greater deterrent value than actual or compensatory damages. However, this overlooks the fact that punitive damages probably serve as a greater deterrent because they can not be absolved through bankruptcy, and in many states are uninsurable. Another principal advantage inherent in the use of punitive damages that relates directly to drunken driving is that they punish wrongs rarely prosecuted. Punitive damages are best suited for those wrongs that are theoretically punishable, but which in actuality go unnoticed or are ignored by prosecutors who are preoccupied with more serious crimes. Until recently, drunken driving was not as diligently prosecuted as other crimes, and the defendant was often given only a suspended sentence or sent to traffic school. Obviously, where a drunken driver is involved in an accident involving serious injury or death, prosecution usually results. Punitive damages, however, provide a would-be plaintiff with far more incentive to bring suit in the minor case, such as where a collision occurs involving only slight property damage. An innocuous result, such as a bent fender, does not and should not immunize the drunken driver from being punished for his wrongful conduct.

Other advantages routinely espoused in support of punitive damages include the following: that they combine public law enforcement with private vengeance, thus discouraging the lawlessness of self-help; they cover actual expenses not covered by undetectable and therefore immeasurable. Since this large but statistically elusive portion of the population is an indispensable factor to any analysis attempting to determine the validity or invalidity of the deterrent value of exemplary damages or penal laws, such an analysis is necessarily incomplete. Consequently, any conclusions drawn from that partial analysis are conjectural. Both the doctrine's critics and supporters argue that the other should prove either the viability or non-viability of the doctrine's deterrent value. Whoever is forced to carry this burden of proof will fail.

68. See, e.g., CAL. INS. CODE § 533 (West 1972).
69. C. MCCORMICK, supra note 10, § 77, at 276; W. PROSSER, supra note 12, § 2, at 11.
70. Id.
71. Supra note 2.
72. Of course, the prerequisite of compensatory damages must still be met.
73. D. DODDS, supra note 10, § 3.9, at 205. C. MCCORMICK, supra note 10, § 77, at 277; Note, Insurance for Punitive Damages: A Re-evaluation, 28 HASTINGS L.J. 431, 533 (1976). This has been labeled the "private attorney general" argument.
compensatory damages such as attorney’s fees and court costs; and they allow the caprice of the jury to be reduced and its anger vented.

D. The Disadvantages of Punitive Damages

Of the numerous criticisms that have been levied against the doctrine of punitive damages, perhaps the most strongly voiced has been that punitive damages contravene the rule against double jeopardy and violate the spirit if not the letter of the Constitution. A defendant may be held liable for punitive damages irrespective of any prior or subsequent criminal proceeding, thereby moving some critics to claim that the defendant is punished twice for the same offense. Proponents of punitive damages counter this criticism by noting that, while constitutional immunity from double jeopardy is not limited solely to threats to life or limb, it does seem clearly limited to criminal proceedings. Proponents further point out that the prohibition against double jeopardy was taken from English law, which allowed punitive damages. This occurred before the United States Constitution was adopted in 1789.

A second disadvantage cited by critics of punitive damages is that such damages ignore significant procedural safeguards such as proof of guilt beyond a reasonable doubt and the privilege against self-incrimination. Supporters of punitive damages attempt to circumvent the deprivation of these particular procedural safeguards by enumerating the safeguards that are available to a defendant. Proponents urge that “the verdict may be twice submitted by the complaining defendant to the common sense of trained judicial minds, once on motion for new trial and again on appeal, and it must be a rare instance when an unjustifiable

75. D. Dobbs, supra note 10, § 3.9, at 220.
76. U.S. Const. amend. V.
77. C. McCormick, supra note 10, § 77, at 276; W. Prosser, supra note 12, § 2, at 11.
78. The doctrine of punitive damages has nevertheless been held to be constitutional. See note 27, supra and accompanying text.
79. In other words, the constitutional guarantee against double jeopardy guards against even trivial prosecutions, such as receiving two parking tickets for the same violation.
80. C. McCormick, supra note 10, § 77, at 277.
81. Id.
82. Id.; W. Prosser, supra note 12, § 2, at 11.
award escapes corrections." Therefore, it is readily apparent that the drunken driver is in a considerably stronger position procedurally within a civil context, than he is within a criminal one.

Other criticisms directed against the doctrine of punitive damages have been that they are limited solely by the passion, prejudice, and caprice of the jury; damages are an undeserved windfall; twisted to buttress an inadequate compensatory damages system; and finally, as alluded to earlier, punitive damages serve no deterrent function.

Whatever one's opinion may be respecting punitive damages the odds are remote, based on their widespread popularity and use, that they will be abolished in the foreseeable future. The practitioner is simply advised to develop a sufficient grasp of punitive damages in order that he may best represent his client, either by pursuing or defending against such damages. With this background on punitive damages in mind, case law from the various states that have addressed the issue of whether, and under what circumstances, a drunken driver may be held liable for punitive damages, will now be scrutinized.

III. AN ANALYSIS OF CASE LAW

Of the twenty-five jurisdictions that have addressed the issue of whether or not a drunken driver may be held liable for punitive damages, eighteen have either expressly ruled without reservation in favor of punishing drunken drivers, or have done so subject to certain restrictions. The remaining seven jurisdictions

83. C. McCORMICK, supra note 10, § 77, at 278.
84. Id., at 276; D. DOBBS, supra note 10, § 3.9, at 219; W. PROSSER, supra note 12, § 2, at 11.
85. C. McCORMICK, supra note 10, § 77 at 276; D. DOBBS, supra note 10, § 3.9, at 219; W. PROSSER, supra note 12, § 2, at 11.
87. D. DOBBS, supra note 10, § 3.9, at 220.
88. See note 7 supra.
89. The eighteen states that have allowed the imposition of punitive damages against drunken drivers are: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kentucky, Mississippi, New Mexico, New York, Ohio, Oregon, Pennsylvania, Tennessee, and Wisconsin.
90. Two of the eighteen states have very liberal views on punishing drunken drivers with punitive damages. They are Florida (Ingram v. Petit, 340 So. 2d 922 (Fla. 1976) and New Mexico (Svejcara v. Whitman, 82 N.M. 739, 487 P.2d 167 (1971)).
91. The principal restriction alluded to is that there exists the traditional pre-
have not ruled, as a matter of law, that punitive damages may not be assessed against drunken drivers, but have imposed such a strict burden of proof upon those requesting exemplary damages that, for all practical purposes, they are effectively precluded. Decisions from those states allowing the imposition of punitive damages will be scrutinized in order to determine the underlying reasons those courts have ruled as they have. This analysis will be followed by a study of cases from states that, in light of practical considerations, have denied punitive damages. Finally, the recent California decision of *Taylor v. Superior Court* will be examined.

A. Jurisdictions Approving the Assessment of Punitive Damages Against Drunken Drivers

Unfortunately, judicial reasoning given for holding drunken drivers liable for punitive damages has not been entirely consistent. Older decisions summarily granted punitive damages without analysis and on the apparent assumption that the facts alone justified their imposition. Other more recent decisions have adopted an extreme position and maintained that evidence of intoxication alone is conclusive proof of the conduct which justifies the application of punitive damages. The majority of decisions, however, have followed a more moderate approach and have allowed the imposition of exemplary damages by emphasizing the “conscious disregard” element, to the almost virtual exclusion of requisites to the assessment of punitive damages, particularly that of causation; a nexus must be established between the defendant's wrongful conduct and his intoxication.

The seven jurisdictions that consist of the minority are: District of Columbia, Kansas, Maryland, North Carolina, Oklahoma, Texas, and Virginia. The District of Columbia case that addressed the issue is *Giddings v. Zellan*, 160 F.2d 585 (D.C. Cir. 1947). *Giddings* applied Maryland law as a result of a conflict in that particular case. Thus, it is clear that the District of Columbia in future cases would apply the opposite rules where applicable.

It will be subsequently established that the primary cause of this increased burden of proof upon plaintiffs requesting damages is the terminology and the problems that are concurrent with that terminology. Minority jurisdictions favor the term “malice” which requires the implication of a highly particularized state of mind.


See cases cited note 90 supra.
other terms.\textsuperscript{97}

The first of these latter cases was \textit{Miller v. Blanton}.\textsuperscript{98} The Arkansas court, in discounting the need for malice or wilfulness, implicitly stated that all of the traditional prerequisites to punitive damages were not collectively required, but that any one element or a combination thereof would suffice.\textsuperscript{99} The \textit{Miller} court enunciated the sole element it considered important when it espoused the following:

When Miller imbibed alcoholic liquor he knew he was taking into his stomach a substance that would stupify his senses, retard his muscle and nervous reaction, and impair, if not destroy, the perfect co-ordination of eye, brain and muscles that is essential to safe driving. After Miller voluntarily rendered himself unfit to operate a car properly he undertook to drive his automobile, a potentially lethal machine, down a well traveled highway. His conduct in doing that was distinctly anti-social, and the jury was amply authorized in saying by their verdict that he was exhibiting a "wanton disregard of the rights and safety of others."\textsuperscript{100}

Thus, \textit{Miller} is clearly of that genre of cases that place primary emphasis on the defendant's conduct, and which subsequently impute a state of mind they believe to be consistent with that conduct. Here, the court concentrated on Miller's actions of drinking until he was physically unfit to drive and subsequently driving with impaired faculties. The court concluded he had voluntarily made himself an extremely dangerous person to the potential harm of everyone. This conduct became the foundation upon which the court placed its finding that Miller acted in wanton disregard to the rights and safety of the general public. Most jurisdictions which allow punitive damages have followed these same reasons.\textsuperscript{101} While few dispute the soundness of these decisions, they are, in a sense, incomplete and potentially confusing.

The majority of these decisions have implicitly accepted the requirement of causation. It must be remembered that punitive damages may be imposed only after establishing that the defendant's intoxication was the cause of the accident.\textsuperscript{102} To allow the

\begin{itemize}
\item \textsuperscript{97} See notes 7, 89 \textit{supra}.
\item \textsuperscript{98} 213 Ark. 246, 210 S.W.2d 293 (1948).
\item \textsuperscript{99} \textit{Id}. at 248-49, 210 S.W.2d at 294.
\item \textsuperscript{100} \textit{Id}. at 249, 210 S.W.2d at 294-95.
\item \textsuperscript{101} See note 89 \textit{supra}.
\item \textsuperscript{102} This is not necessarily as easy to accomplish as may appear at first glance. It would be possible for a drunken driver to commit a negligent act in such a manner as to not indicate intoxication. For example, a drunken driver could be well within the speed limit, drive a straight line and have a rear-end collision with a car stopped at an intersection. Rear-end collisions are very common and are mostly due to inattention, not intoxication. In such an instance, it is extremely unlikely
\end{itemize}

\textbf{133}
assessment of exemplary damages on the evidence of intoxication alone would be arguably unconstitutional as it would be punishing the defendant simply because he was drunk. Admittedly, causality will usually be so obvious that an analysis of it may be summarily conducted. Nevertheless, it is essential to force the plaintiff to present a prima facie case. The causality requirement would play a prominent role in those rare instances where a defendant's intoxication has a nominal or completely immaterial impact on the causation of an accident.

The Wisconsin decision of Ayala v. Farmer's Mut. Auto. Ins., Co. gave a definitive explanation of the balance that must be struck between evidence of intoxication and proof that such intoxication had a marked effect in producing a given accident.

Intoxication, standing by itself, does not constitute either gross negligence or ordinary negligence. While a person's driving of a motor vehicle when intoxicated is prohibited by statute, and is a criminal offense, nevertheless, an intoxicated driver of a motor vehicle may become involved in a collision and yet be free from negligence, and, therefore, not liable to respond in damages. However, when there is concurrence of intoxication and causal negligence as to items such as speed, management and control, position of the highway, lookout, etc., the same constitutes gross negligence.

According to this explanation, intoxication may become the basis for exemplary damages if the evidence of intoxication additionally manifests itself circumstantially through the one could get punitive damages and it is arguable that one should not. See Zylman, Hostile Drivers and Alcohol Don't Mix, TRIAL, Oct. 1976, at 60.

103. To assess punitive damages against a drunken driver without having established a causal connection between the collision and the defendant's intoxication would be tantamount to punishing the defendant because he was drunk, which arguably would make him a status offender. Under the United States Supreme Court's ruling in Robinson v. California, 370 U.S. 660 (1962), it is unconstitutional to punish a person solely for being an alcoholic. DRINKING, supra note 2, at 317. However, as recognized by the Supreme Court in Powell v. Texas, 392 U.S. 514 (1968), the fact that a person is an alcoholic does not absolve him or her from liability for criminal acts while in an intoxicated state. Appellant was convicted not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in Robinson; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. Id. at 532. For a general discussion of both the Robinson and Powell decisions, see DRINKING, supra note 2, at 316-20.

104. Supra, note 102.

105. 272 Wis. 629, 76 N.W.2d 563 (1956).

106. Id. at 640, 76 N.W.2d at 570 (citation omitted).

107. Direct evidence as opposed to circumstantial evidence, that would establish intoxication is the various chemical tests that law enforcement officials administer, such as breathanalyzer tests. Most jurisdictions hold that a blood-alcohol content of .10% is legal, and most states also hold that violation of that statute is negligence per se. See e.g., CAL. VEH. CODE 23126(a)(3) (West 1971).
defendant’s erratic or abnormal driving. In effect, the Ayala court, as well as others, rely on the logical syllogism that intoxication impairs the senses; impaired senses lead to irregular and dangerous driving; irregular and dangerous driving leads to collisions. This is fundamentally sound logic that achieves two distinct objectives. First, it forces the plaintiff to present a prima facie case, which will not always be easily accomplished. Second, it serves as a protective measure in those instances where a drunken driver is innocent of any causation respecting a collision. An example of this would occur where a drunken driver reacts to an impending collision as a negligent non-intoxicated driver would react. This second point prevents a drunken driver and his insurer from being held strictly liable for a collision simply because of intoxication.

A more recent decision to echo this same concern is Focht v. Rabada. In Focht, the Supreme Court of Pennsylvania indicated that, “driving while under the influence of intoxicating liquor with its very great potential for harm and serious injury may under certain circumstances be deemed ‘outrageous conduct’ and a ‘reckless indifference to the interest of others’ sufficient to allow the imposition of punitive damages.” Therefore, this court also recognized that despite a defendant’s intoxication, circumstances would have to be present which warranted submission of the punitive damages issue to a jury.

The Focht court similarly reflected concerns expressed by other courts as well. It proposed that a defendant’s “misconduct may be established without reference to motive or intent” in deter-

108. However, legal intoxication, as prescribed by statute, may not necessarily indicate that the defendant motorist had so dulled his senses as to be incapable of driving competently. Some alcoholics have such a high resistance to alcohol that they remain essentially unimpaired, even though their blood-alcohol content may be considerably higher than .10%. See Zylman, Hostile Drivers and Alcohol Don’t Mix. TRIAL Oct. 1976, at 60. The alcoholic should not be given the benefit of the doubt, however, and should be found negligent if violation of the applicable statute is viewed as negligence per se.

But, in the context of actual and punitive damages, one should not be liable because his blood-alcohol content is higher than that allowed by statute; rather, the plaintiff should be required to demonstrate that the defendant’s negligent conduct was a direct result of his drinking. In the vast majority of cases this will be easily accomplished.


110. 217 Pa. Sup. Ct. at 40, 268 A.2d at 158.

111. Id. at 41, 268 A.2d at 161.
mining whether or not he acted with reckless indifference. Again, the implication is clear that many of the courts within majority jurisdictions are willing to examine only the defendant's conduct and ignore his mental state in order to determine the propriety of imposing exemplary damages. However, the court took a moderate position when it noted that "malice" was still an element that necessarily involved the requisite mental state, and the "conscious disregard" test was the applicable standard.

A few of the jurisdictions that presently allow the imposition of exemplary damages against drunken drivers have engaged in reasoning so liberal that they may be considered extreme in the positions that they have taken. A recent case that best exemplifies this is the Florida decision of *Ingram v. Petit*. In a somewhat haphazard opinion the *Ingram* court held that a drunken driver could be held liable for punitive damages:

> [W]ithout regard to external proof of carelessness or abnormal driving, provided always the traditional elements for punitive liability are proved, including proximate causation and an underlying award of compensatory damages. We do not hold that intoxication coupled with negligence will always justify an award of punitive damages. We affirmatively hold that the voluntary act of driving "while intoxicated" evinces, without more a sufficiently reckless attitude for a jury to be asked to provide an award of punitive damages if it determines liability exists for compensatory damages.

This statement, replete with inherent contradictions and inconsistencies, indicates the *Ingram* Court was marching to two different drummers. On the one hand, the court emphasizes the need for causation, but on the other hand, says proof of intoxication

112. Id.
113. Malice is the term minority jurisdictions have emphasized. See note 51 supra.
115. Justice Sundberg, in his dissent, stated, "I suggest that the law of torts as it has been carefully developed over the years permits an award of punitive damages in personal injury cases involving vehicles where reckless conduct is involved, not reckless attitude." 340 So. 2d at 927 (emphasis in original).
116. Id. at 924 (emphasis added).
117. Based on the facts of *Ingram*, it is clear what drummer the majority is marching to. The facts, as stated by the court, were:

The record in this case indicates that Ingram's car was hit by Pettit from the rear while standing at an intersection in a well-lit area. Pettit's car had not been moving at an excessive rate of speed, and it had not been seen to swerve or veer outside the marked lines of traffic. In fact, except for conflicting evidence as to whether Pettit applied his brakes before his vehicle struck Ingram's, there was no indication that the operation of Pettit's car up to the time of the accident was other than normal. This accident is before us solely because Pettit submitted to a breathalyzer test which showed his blood-alcohol content to be .26% on a scale where the legal presumption of intoxication arises at .10%.

Id. at 923.
"without more" is a sufficient justification for imposing exemplary damages. Since the defendant's negligence in Ingram was never attributed to his intoxication, and was of the same character that a non-intoxicated driver may have exhibited, evidently the court's real intention was to deter the drunken driver at any cost, including holding him strictly accountable for any mishap in which he is involved.

The scathing dissent in Ingram was quick to point out the legal contortions the majority had performed. Justice Sundberg correctly indicated that the majority was holding a defendant motorist strictly liable based solely on evidence of his intoxication. He further added that, "[t]he intoxicated driver becomes an insurer, to the full extent of punitive damages, irrespective of any showing that his conduct in the operation of the automobile fell below that standard of care which is expected of a reasonable, prudent man under similar circumstances." Justice Sundberg

This is identical to the hypothetical given earlier exemplifying a situation where punitive damages probably should not be given. See note 108 supra. Thus, it seems that in Florida, intoxication alone is sufficient.

118. 340 So. 2d at 923.
119. Id.
120. The Ingram court felt that the Florida Legislature "evolved the notion that drunk drivers menace the public safety and are to be discouraged by punishment." Id. at 924.
121. Id. at 926 (Sundberg, J., dissenting).
122. Id. accord, Smith v. Chapman, 115 Ariz. 211, 564 P.2d 900 (1977). In Smith, the Arizona Supreme Court stated:

We disagree, however, with that court's legal opinion that "intoxication plus negligent driving equals reckless disregard for the safety and rights of others," under all circumstances. The law of torts does not permit such a sweeping inference; it eliminates the necessity of showing proximate cause and makes a driver, who has had some alcoholic beverage previous to driving, an insurer in strict liability for punitive damages, whether or not the consumption of alcohol has anything whatever to do with a subsequent accident.

115 Ariz. at 214, 564 P.2d at 903.
123. 340 So. 2d at 924 (emphasis in original). Justice Sundberg also noted:

The majority opinion extends the strict liability concept to the recovery of punitive damages, but says that the traditional elements such as proximate causation and an underlying award of compensatory damages must still be proved. But what does this mean—that the accident caused injury or that the intoxication, without more, caused the accident to occur? If the latter, then the position is untenable in a situation such as we have at bar where there is no evidence at all that the intoxication caused any irregularities in the operation of the vehicle. If the former, then notwithstanding the lip service paid to it, the concept of proximate causation has gone by the boards.

Id. at 926 (Sundberg, J., dissenting).
carefully discussed the ultimate purpose of tort law,\textsuperscript{124} and concluded that the majority had twisted this purpose and had "eliminated even the necessity for a single separate act of simple negligence where evidence of intoxication is present."\textsuperscript{125}

This sampling of cases from those jurisdictions that permit the assessment of punitive damages against drunken drivers establishes a predilection for such terms as "conscious disregard," to the literal exclusion of other descriptive terms. The term chosen by the majority of the states does not carry an easy burden of presenting a prima facie case, but those courts have liberalized the term's application. Their willingness to exclusively limit themselves to an examination of the defendant's conduct, de-emphasized direct evidence of the defendant's state of mind. The majority view avoids other definitions such as "malicious\textsuperscript{126}" or "wicked,\textsuperscript{127}" which, most would agree, carry the requisite state of mind, and which are distinctly favored by the minority jurisdictions. Based on the foregoing analysis, practitioners seeking exemplary damages would be well advised to use the appropriate language and plead every feasible factual argument that fulfills the syllogism that the majority viewpoint implicitly relies upon.

B. Jurisdiction Disapproving\textsuperscript{128} the Assessment of Punitive Damages Against Drunken Drivers

Of the states that have addressed the issue of whether punitive damages may be applied against drunken drivers, only seven to date have responded in the negative.\textsuperscript{129} These states have not refused to impose exemplary damages on ideological grounds. Rather, their refusal has been predicated upon an extremely strict definitional framework which has been imposed on those seeking punitive damages. As indicated earlier, the minority of states have placed great credence in the term "malice" and the concurrent burden of proof the term carries. These states require

\textsuperscript{124} Classically, in the law of torts, it is substandard conduct in the performance or nonperformance of an act which subjects the actor to liability for compensatory damages. If the conduct of an individual in operating an automobile is not otherwise substandard, evidence of intoxication on the part of that individual, in and of itself, logically cannot convert the conduct into a category which will permit recovery of punitive damages without totally emasculating the principle of proximate causation.

\textit{Id.}

\textsuperscript{125} \textit{Id.} at 927.

\textsuperscript{126} See note 52 supra.

\textsuperscript{127} See note 90 supra.

\textsuperscript{128} This term is used for lack of a better term. These jurisdictions have not conclusively disapproved the assessment of punitive damages against drunken drivers in their respective states. Rather, the term is meant to imply that no case has yet been filed wherein "malice" exists to the court's satisfaction.

\textsuperscript{129} See note 92 supra.
that the plaintiff plead and prove the requisite state of mind malice implies, independent of the defendant's conduct. Even under a more traditional setting and circumstances, this is an onerous burden of proof. But modern considerations such as those involved in drunk driving do not fit easily, if at all, under the anachronistic framework set forth by the term "malice." Proving malice outside the context of conduct is almost futile in drunken driving cases, thus the burden of proof will rarely be met. Therefore, from a practical standpoint, punitive damages are effectively precluded by these minority jurisdictions.

This fondness for the term "malice" and the requirements accompanying it, were outlined by the Virginia high court in the decision of *Baker v. Marcus.* The court mentioned several common law descriptions that have traditionally been the basis for the imposition of punitive damages, but demonstrated its inclination toward the term malice when it stated:

One who knowingly drives his automobile on the highway under the influence of intoxicants, in violation of statute, is, of course, negligent. It is a wrong, reckless and unlawful thing to do; but it is not necessarily a malicious act. Evidence may be offered to show the negligence of a driver; but in the absence of proof of one or more of the elements necessary to justify an award of punitive damages, it may not be used to enlarge an award of damages beyond that which will fairly compensate the plaintiff for the injury suffered.

The *Baker* court reflected its concern for the defendant's mental state when they indicated she had shown "no motive" to injure the plaintiff nor demonstrated any "ill will" toward him. Most decisions from the minority viewpoint have decided the issue of punitive damages in drunk driving cases in a similar manner to that of the *Baker* court.

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130. See note 92, 93 supra and accompanying text.
131. 201 Va. 905, 114 S.E.2d 617 (1960). It must be noted that factual proof of the defendant's intoxication in this case was weak and very probably played a role in the court's decision. *Id.* at 114 S.E.2d at 906. Nevertheless, it is submitted that the court would have ruled as it did even if the evidence had been stronger based on the court's substantive position on the issue.
132. *Id.* at 909, 114 S.E.2d at 620-21.
133. *Id.* at 910, 114 S.E.2d at 621 (emphasis added).
134. See note 131 supra.
135. See note 89 supra. Cf., *Brake v. Harper,* 8 N.C. App. 327, 174 S.E.2d 74 (1970). In *Brake* the term "recklessness" implied intentional, and inferred that punitive damages were only recoverable where there was an intent to injure. Under this view, one would not wish to seek punitive damages because in the event they were proved, the defendant's carrier would be able to absolve itself of any financial responsibility, based on the common public policy of refusing to insure
The Kansas decision of *Gesslein v. Britton*\(^\text{136}\) also summarized the considerable burden placed on plaintiffs seeking punitive damages in these minority jurisdictions. The court initially made reference to the numerous adjectives used to describe the conduct that is a prerequisite to the imposition of punitive damages and correctly pointed out that they were mere conclusions that must be proven by the facts of the case.\(^\text{137}\) The *Gesslein* court then engaged in a sophistic attack on the plaintiff’s pleadings by arguing:

> [N]o one condones the act of driving an automobile while under the influence of intoxicating liquor, but, that is not the question here. Nowhere does plaintiff allege that the defendant’s being under the influence of intoxicating liquor caused him to drive on the wrong side of the road, caused him to fail to give a warning or signal his intention to turn, and caused him not to have his vehicle under proper control.\(^\text{138}\)

The court’s statement has two principal weaknesses. First, it seems abundantly clear the defendant’s intoxication caused him to drive in the erratic manner the court described; it is rare when a non-intoxicated individual will drive in the manner described. Second, even excluding evidence of intoxication, the defendant’s conduct alone, such as driving on the wrong side of the road, surely justifies being labeled reckless and in conscious disregard of the rights and safety of others. Even licensed drivers of low intellect and little common sense are aware of the dangers posed by such driving. The dissent in *Gesslein* found it difficult to conceive of a better case where there were facts of wanton, reckless behavior.\(^\text{139}\)


\(^\text{137}\) *Id.* at 664, 266 P.2d at 265.

\(^\text{138}\) *Id.* The plaintiff in *Gesslein* plead four counts of negligence, the fourth of which was the defendant’s intoxication. The court criticized the plaintiff’s complaint and said he had failed to connect the defendant’s conduct with his intoxication. This is not quite true as the plaintiff’s fourth allegation indicates:

4. Defendant was guilty of negligence in the operation of said automobile as follows:

(a) While under the influence of intoxicating liquor, defendant at said time and place drove his automobile in violation of and contrary to G.S. 1949, 8-530.

(b) In failing to drive said automobile on the right or East half of said highway as provided by G.S. 1949, 8-537 and in violation of said statute.

(c) In failing to give a signal of intention to turn left continuously for 100 feet prior to the turning of his automobile as provided by G.S. 1949, 8-547 and in violation of said statute.

(d) In failing to have said automobile under proper control so as to have avoided turning said automobile to the left to the wrong side of the highway and into the path of and into the automobile in which plaintiff was riding.

*Id.* at 662, 266 P.2d at 264. It seems clear that the courts disgruntlement with this particular case runs much deeper than a mere dissatisfaction with the pleadings.

\(^\text{139}\) *Id.* at 666, 266 P.2d at 266-67 (Smith, J., dissenting).
Despite the conduct in *Gesslein* being of such a reckless character, with or without evidence of intoxication, the majority of the court immersed itself in an incredibly technical and literally spurious discussion of what a plaintiff must plead and prove before submitting the issue of exemplary damage to the jury. Therefore, it again seems clear punitive damages will rarely be given in these minority of jurisdictions.

The examination of these selected cases, representative of minority states, outlines the tremendous uphill battle facing plaintiff's attorneys in their quest for exemplary damages. Where possible, they should attempt to prove actual malice, even though the minority decisions state in dictum that malice can be implied by a wrongful act. Moreover, the practitioner should carefully cultivate in his pleadings every conceivable factual nexus between the defendant's intoxication and his driving. Lastly, in the minority states, the practitioner is cautioned to use terms that imply intent very wisely, and sparingly because should he successfully prove the defendant intentionally caused the plaintiff's injuries, he may find himself without the insurance that normally covers compensatory damages.

### C. California's Position

Punitive damages in California are a creature of statute. Historically, the courts have been extremely conservative in their application of the statutory language controlling exemplary damages, and for many years this class of money damages was not feasible against drunken drivers. Recently, the California

141. See definition of legal malice, id. at 806.
142. *Cal. Civ. Code* § 3294 (West 1970) which provides that: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant." See note 29 supra.
143. In California, the issue of whether or not a drunken driver could be held liable to an injured party for punitive damages was first addressed in the case of *Strauss v. Buckley*, 20 Cal. App. 2d 7, 65 P.2d 1352 (1937). Twenty-one years following the *Strauss* decision, the case of *Gombos v. Ahse*, 158 Cal. App. 2d 517, 322 P.2d 933 (1958) was decided. Agreeing with the position taken by a minority of jurisdictions, *Gombos* held:

[T]he mere characterization of the conduct challenged as wilful, reckless, wrongful and unlawful is not in itself sufficient to charge the malice in fact required to sustain a cause of action for punitive damages... (158 Cal. App. 2d at 529, 322 P.2d at 940) . . . . One who becomes intoxicated, know-
Supreme Court removed this barrier in the case of Taylor v. Superior Court, holding that, under certain circumstances, a drunken driver may be held liable for punitive damages.

Justice Richardson, who wrote the majority opinion, defined the issue before the court as "whether punitive damages (Civ. Code, § 3294) are recoverable in a personal injury action brought against the intoxicated driver." After noting the allegations charged against the defendant, the majority concentrated its efforts on defining and applying the "malice" element of section 3294 of the California Civil Code. The court defined malice, which is the only element of the statute remotely relevant to a drunk driving context, as a term which "implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others.

Following its discussion of section 3294, the majority jumped into the definitional fray surrounding the term "malice," which has caused extensive divisiveness among the states attempting to define and apply it. The court noted that the defendant's success-

For an interesting but limited discussion of the case law that led up to the decision in Taylor v. Superior Court, see Fernandez, Punitive Damages and the Intoxicated Driver: An Approach to Taylor v. Superior Court, 31 Hastings L.J. 307 (1979). This article is not helpful with the analysis of Taylor because it was published before that decision was announced.

The court did not grant punitive damages, but merely held the plaintiff's complaint sufficiently stated a cause of action for these damages.

The majority consisted of Justices Richardson, Tobriner, Mosk, and Manuel. Chief Justice Bird concurred in part and dissented in part, with Justices Newman and Clark concurring with her opinion. Justice Clark filed the sole dissenting opinion.

The allegations leveled against defendant Stille were:
1) That he had previously caused a serious automobile accident while driving under the influence of alcohol; 2) That he had been arrested and convicted for drunk driving on numerous prior occasions; 3) That at the time of the accident herein, Stille had recently completed a probationary period following a drunk driving conviction; 4) That one of the conditions of Stille's probation was that he refrain from consuming any alcoholic beverage at least six hours before driving; 5) That at the time the accident herein occurred, Stille was facing a pending criminal drunk driving charge; 6) That Stille accepted employment as a liquor salesman which required him to transport alcoholic beverages in his car to various commercial establishments; and 7) That at the time the accident occurred, Stille was transporting alcoholic beverages while intoxicated. Id. at 893, 598 P.2d at 855, 157 Cal. Rptr. at 695.

The court also noted malice in fact was sufficient, as opposed to the legal malice described and that this could also be established circumstantially.
ful demurrer to the plaintiff's complaint at the trial level requesting exemplary damages had been premised on the plaintiff's failure to plead an actual intent to harm others. The court quickly rejected the argument that actual intent is imperative to the imposition of punitive damages, recognizing that both respected legal scholars, and its own recent decisions have held such damages may be assessed where the defendant acted "with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights." The court further buttressed this point by concurring with the recent case of G.D. Searle & Co. v. Superior Court respecting that decision's treatment of "conscious disregard" which stated that, "in order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences."

This passage in Taylor is especially significant because it precisely states the court's position on the crucial issue of the defendant's state of mind. Under this definition of "conscious disregard," one need not engage in the potentially self-defeating effort of establishing actual intent to injure on the part of the defendant and also need not be hampered by the cumbersome burden of proof peculiar to the term "malice." In compelling the defendant to demonstrate a state of mind wherein the defendant possessed an awareness of the probable consequences of his conduct, the majority in Taylor created a moderating influence between the majority decisions which have suggested intoxication, in itself, is sufficient for punitive damages and those opposite cases in minority jurisdictions that would burden plaintiffs with

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149. id. at 895, 598 P.2d at 856, 157 Cal. Rptr. at 696.
153. "The phrase conscious disregard is sometimes used to describe the highly culpable state of mind which justifies an exemplary award. ... We suggest conscious disregard of safety as an appropriate description of the animus malus which may justify an exemplary award when non-deliberate injury is alleged." Id. at 32, 122 Cal. Rptr. at 225 (emphasis in original).
154. 24 Cal. 3d at 895-96, 598 P.2d at 856, 157 Cal. Rptr. at 696.
the cross of an anachronistic definition. To be sure, the majority in *Taylor* did not urge that the defendant's state of mind must be established independent of his conduct; but rather, that the plaintiff must plead and prove the requisite mental state, and that he may do so circumstantially through conduct if necessary.\(^{155}\) This modifying approach taken by the majority in *Taylor* assures justice to both litigants in a drunk driving case. The plaintiff is not crushed with an impossible burden of proof, and the defendant is protected because the plaintiff must establish that he knew of the dangerous circumstances his conduct created, a burden not easily achieved.

The majority in *Taylor* noticed the factual similarity with its predecessor *Gombos v. Ashe*,\(^{156}\) which held against punitive damages. The plaintiff in *Taylor* tried to distinguish that similarity.\(^{157}\) The majority agreed with the plaintiff and imposed punitive damages, but cautioned that all of the plaintiff's factual distinctions were not necessary because the court noted that "while a history of prior arrests, convictions and mishaps may heighten the probability and foreseeability of an accident, we do not deem these aggravating factors essential prerequisites to the assessment of punitive damages in drunk driving cases."\(^{158}\) After noting its agreement with the plaintiff, but before expressly overruling *Gombos*, the court respectfully pointed out *Gombos* had been decided twenty years earlier when conceptual difficulty existed as to whether or not a defendant could be held liable for exemplary damages based on a conscious disregard for the safety of others.\(^{159}\)

The majority next addressed the deterrent aspects\(^{160}\) of punitive damages concluding that, "[w]e discern no valid reason for
immunizing the driver himself from the exposure to punitive damages given the demonstrable and almost inevitable risk visited upon the innocent public by his voluntary conduct as alleged in the complaint.\footnote{161} After discussing the Legislature's posture\footnote{162} on drunken drivers and persuasive statistical data linking drunk drivers with a high incidence of collisions,\footnote{163} the court concluded:

It is crystal clear to us that courts in the formulation of rules on damages assessment and in weighing the deterrent function must recognize the severe threat to the public safety which is posed by the intoxicated driver. The lesson is self-evident and widely understood. Drunken drivers are extremely dangerous people.\footnote{164}

Chief Justice Bird concurred with the judgment, but dissented respecting the majority's reasoning at arriving at its conclusions.\footnote{165} The Chief Justice emphasized the element of malice,\footnote{166}

\footnote{161} 24 Cal. 3d at 897-98, 598 P.2d at 858, 157 Cal. Rptr. at 697.
\footnote{162} 24 Cal. 3d at 898, 598 P.2d at 858, 157 Cal. Rptr. at 698.

\[\text{"[T]he Legislature has expressly acknowledged that '[t]he consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.' (Civ. Code, § 1714, subd. (b))."} \text{Id.} \text{This raises an interesting question as to whether and to what extent a legislature may usurp the evidentiary and causation requirements of a substantive area of law, in this case the law of torts.}\]

\footnote{163} \text{Id.}
\footnote{164} 24 Cal. 3d at 899, 598 P.2d at 859, 157 Cal. Rptr. at 698. The court placed special emphasis on a recent report submitted by the Secretary of Health, Education and Welfare to the Congress. The court quoted at length the following passage:

Traffic accidents are the greatest cause of violent death in the United States, and approximately one-third of the ensuing injuries and one-half of the fatalities are alcohol related. In 1975, as many as 22,926 traffic deaths involved alcohol. Experimental studies have demonstrated that alcohol causes degeneration of driving skills and impairment of judgment. However, the full extent to which alcohol use results in traffic accidents due to these impairments is unknown. General research trends seem to support the following facts concerning the relationships of alcohol and traffic crashes: (1) As many as 25 percent of drivers in non-fatal crashes and 59 percent of drivers in fatal crashes had blood alcohol concentrations (BAC's) of 0.10 percent or higher. (2) Up to 29 percent of passengers in fatal accidents showed BAC levels in the legally impaired range. (3) Alcohol could be involved in up to 83 percent of pedestrian fatalities. (4) As many as 72 percent of drivers in single-vehicle fatalities and 51 percent of drivers in multi-vehicle fatalities had BAC's of 0.10 percent or higher. (5) Of the drivers in multi-vehicle fatal crashes with BAC's in the high range, 44 percent were judged by researchers to be responsible for the crashes, compared to 12 percent judged not responsible. Data on alcohol involvement in crashes based on police reports indicate that the proportion of drivers who were drinking at the time of a crash increases in relationship to the severity of the crash . . . . In general, the relative probabilities of crash involvement and causation increase dramatically as the driver's BAC increases.

\text{Id.} at 898, 598 P.2d at 858, 157 Cal. Rptr. at 698 (emphasis added by the court).

\footnote{165} 24 Cal. 3d at 899, 598 P.2d at 859, 157 Cal. Rptr. at 698 (Bird, C.J., concurring and dissenting).
and agreed with the pronunciation given in Gombos on the issue.

She implicitly argued that drunk drivers cannot manifest a malicious state of mind when she likened malice "with the knowledge that harm to others was substantially certain or at least highly probable," but felt that, [p]ersons who drive while under the influence often lack a conscious appreciation of the high risk of harm they present to others. The Chief Justice, not oblivious to the persuasive facts in Taylor indicating the existence of a dangerous drunk who callously disregarded his own drinking problem and the threat it posed to society at large, believed that in this case "it may be possible for a jury to conclude that the 'second time was no accident.'" The Chief Justice then noted that one who had only a "few drinks" would not fit this category, and that to hold to the contrary would "open a Pandora's Box." The Chief Justice's opinion contains several inconsistencies that diminish the forcefulness of her arguments. It is clear that Chief Justice Bird would require the plaintiff to prove an enormous quantum of evidence. She indicated that there would only be a possibility of finding punitive damages, despite evidence that the defendant had been drunk at the time of the collision, had numerous previous drunk driving convictions, had a previous collision while drunk which caused serious injury, and had employment which required him to transport alcoholic beverages. Coincidentally, this large quantum of proof would indirectly satisfy the state of mind the Chief Justice views as necessary. Yet, a greater quantum of evidence showing repeated intoxications and deeper level of intoxication arguably enhances her logic that one who is under the influence to this extent lacks conscious awareness of his risk of harm to others. Obviously, the greater the influence of alcohol, the less awareness one may have.

Conversely, the Chief Justice urges that one who has consumed only a "few drinks" may not manifest the state of mind necessary

166. Id.
167. Id. The Gombos stance is identical to that taken in minority states. See note 143 supra.
168. 24 Cal. 3d at 900, 598 P.2d at 860, 157 Cal. Rptr. at 699 (Bird, C.J., concurring and dissenting). Ironically, Chief Justice Bird's definition of malice coincides with the majority's definition of conscious disregard.
169. Id. at 901, 598 P.2d at 860, 157 Cal. Rptr. at 700 (Bird, C.J., concurring and dissenting).
170. Id. (emphasis added).
171. Id.
172. Id.
173. Id.
for the imposition of punitive damages. But the question could be asked: would not an individual become less consciously aware of the dangerous and probable consequences of his drinking the more he drank? If this question is answered in the affirmative, as it must be, then it is logical that those who have consumed only a “few drinks” are surely more aware of their intoxication, the effect their intoxication has on their ability to drive safely and the consequences their conduct holds for the general public, than one who has consumed heavily and is under a strong influence of alcohol. By this logic it would be reasonable and appropriate to hold one who had consumed only a “few drinks” liable for exemplary damages, as long as he had not consumed enough to destroy his awareness of the risks his intoxication posed to society. In effect, under the Chief Justice’s reasoning, a plaintiff who satisfactorily brought forth the requisite large quantum of proof showing repeated massive intoxications would be inversely proving a lack of awareness on the defendant’s part, while proof of a few drinks, which may show awareness, nevertheless immunizes the defendant from punitive damages. The Chief Justice has founded her opinion on two distinct lines of logic, which are unfortunately in fundamental conflict. The better logic would be to recognize that the quantity of alcohol one has consumed should be immaterial to a determination of whether or not the defendant should be held liable for exemplary damages. Rather, the issue should be decided upon the degree of incapacitation\textsuperscript{174} one has brought upon oneself through consumption of alcohol, and what impact that incapacitation may have had on one’s awareness and conduct.

Justice Clark did not address himself to the issue framed by the majority, but instead used his lengthy dissent as a forum with which to express his general dissatisfaction with the doctrine of punitive damages.\textsuperscript{175} The majority of the Justice’s dissent involves a six-point indictment against the use of exemplary damages.\textsuperscript{176} Justice Clark’s first two objections to punitive damages are that they constitute unjust enrichment\textsuperscript{177} and that they are an

\textsuperscript{174} Such tests as a breathalyzer could determine the extent of incapacitation.
\textsuperscript{175} \textit{Id.} at 901-06, 598 P.2d at 860-63, 157 Cal. Rptr. at 700-03 (Clark, J., dissenting).
\textsuperscript{176} The six points that Justice Clark raises are simply a number of commonly cited disadvantages to the doctrine of punitive damages.
\textsuperscript{177} \textit{Id.} at 902, 598 P.2d at 860, 157 Cal. Rptr. at 700 (Clark, J., dissenting).
aberration infusing the criminal law into the civil.\textsuperscript{178} It was also noted that punitive damages are awarded at the jury's whim. This last remark did not address one problem: even without punitive damages, a jury will overcompensate a plaintiff with excessive compensatory damages where they are outraged by the defendant's conduct.

The third objection raised by the dissent is that a jury is informed of the defendant's financial status. However, this is allowed so that a jury may arrive at a figure that is fair to the defendant but will be one that will nevertheless deter and punish him.\textsuperscript{179} This financial information may certainly become a valid concern in some instances and a major issue at trial;\textsuperscript{180} still, it must be remembered that the trial judge has the authority to remit an excessive punitive damages award.\textsuperscript{181}

Justice Clark's fourth criticism of punitive damages involved the old argument that such damages serve no deterrent purpose.\textsuperscript{182} The dissent then became zealous in its attack on punitive damages, arguing that they were assessed on a purely fortuitous basis because, "[d]runk drivers not involved in accidents—comprising the vast majority—are not subject to the penalty [of punitive damages]."\textsuperscript{183} However, this argument overlooks the fact that selective enforcement is not limited to the imposition of punitive damages. Even traffic laws, for example, are enforced on a fortuitous basis because, while many drivers travel in excess of fifty-five miles per hour, law enforcement officials only issue tickets to those that are caught. Few, however, would agree this traffic law is unfairly applied,\textsuperscript{184} and that its enforcement should consequently cease. Nonetheless, Justice Clark attempted to further his argument by expressing the thought that those held lia-

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\textsuperscript{178} Id. at 902, 598 P.2d at 861, 157 Cal. Rptr. at 701 (Clark, J., dissenting). Justice Clark also noted the double jeopardy concern discussed earlier. Id.
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\textsuperscript{180} 24 Cal. 3d at 903, 598 P.2d at 861, 157 Cal. Rptr. at 701 (Clark, J., dissenting).
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\textsuperscript{181} See, e.g., CAL. CIV. PRO. CODE § 662.5 (West 1976).
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\textsuperscript{182} 24 Cal. 3d at 903, 598 P.2d at 861, 157 Cal. Rptr. at 701. (Clark, J., dissenting).
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\textsuperscript{183} Id.
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\textsuperscript{184} Some would surely argue that the 55 mile per hour speed limit is unfair. This analogy is meant to show the ludicrousness of advocating the elimination or non-use of a law or legal doctrine on the basis that it is selectively enforced. Even the criminal law, to which Justice Clark alludes, is dependent upon selective enforcement. The point emphasized is that no individual would urge society to release all murderers, rapists, and burglars because only a fraction of them have been caught. This is perilously close to the argument which Justice Clark urges us to accept with respect to the drunken driver.
\end{flushleft}
ble for punitive damages are "chosen by lot." While the Justice's allusions to The Common Law by Justice Holmes makes for very interesting argumentation, the argument leaves a lot to be desired because drunken drivers held liable for exemplary damages are not held so by lot or by the throwing of dice, but by the terrible devastation to human lives and property they have caused.

The dissent's fifth and sixth objections to the doctrine of exemplary damages are that they fail to take insurance into account and impair the implementation of the comparative negligence system. The latter objection is certainly a legitimate concern, whose end result may be viewed as either beneficial or detrimental, depending on one's point of view. From a practical standpoint, it appears that the situation Justice Clark envisions will occur with infrequency since accidents involving drunken drivers are almost invariably caused by them.

The remainder of Justice Clark's dissent involves a general discussion of malice and the deterrent effect of punitive damages. Justice Clark, following the line of thought found in the minority jurisdictions, believes that malice implies evil motive, and that this element "is not satisfied by conduct only unreasonably, negligent, grossly negligent or reckless." He further argued that in-

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185. 24 Cal. 3d at 904, 598 P.2d at 862, 157 Cal. Rptr. at 701 (Clark, J., dissenting).
186. Id.
187. Id. at 904, 598 P.2d at 862, 157 Cal. Rptr. at 702 (Clark, J., dissenting).
188. Id. at 906, 598 P.2d at 863, 157 Cal. Rptr. at 703 (Clark, J., dissenting).
189. The arguments for and against preventing a drunken driver from counterclaiming against a negligent plaintiff are many. For example, one could argue that in all fairness, a drunken driver, who displayed abhorrent behavior in conscious disregard of the rights and safety of others, should not be allowed to recover from an accident primarily his fault. On the other hand, one could argue that to deny a drunken driver the right to recover from a negligent plaintiff is grossly unfair in two respects: (1) it sets up the drunk driver as an insurer and is akin to imposing strict liability on the drunk driver. See note 122 and accompanying text; and (2) that, as it would be contributory negligence, the negligent plaintiff is completely absolved of any liability, even in those rare instances where he is primarily responsible for the accident. However, if the negligent plaintiff were entirely responsible for his injuries, no punitive damages could be assessed against the defendant because no compensatory damages, a prerequisite to punitive damages, would be paid by the drunken driver. In such an instance, the defendant's intoxication would not be of issues and he should be able to recover from a negligent plaintiff.
190. 24 Cal. 3d at 906-11, 598 P.2d at 866-69, 157 Cal. Rptr. at 703-05 (Clark, J., dissenting).
191. This is the position prevalent in minority states.
192. 24 Cal. 3d at 906, 598 P.2d at 863, 157 Cal. Rptr. at 703 (Clark, J., dissenting).
D. Properly Pleading the Case in California

Several practical considerations should be explored that directly result from the decision of Taylor. As will be discussed in section IV.A, the plaintiff in California should avoid using language that charges the defendant with intentional conduct because an insurer may seize upon this to attempt to deny coverage. It is instead suggested that the allegations be couched in the identical language used by the court in Taylor, i.e., that the defendant acted with intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. Also, the plaintiff may find it advisable to plead a cause of action for simple negligence, to obviate any coverage problems and to guard against a jury finding that the defendant's acts did not constitute anything more than negligence.

While it is questionable how beneficial Taylor will be in those instances where a defendant does not own appreciable assets outside insurance coverage, the case and its approval of punitive damages would seem to give the plaintiff's attorney considerable leverage during settlement negotiations. Although no cases have specifically held an insurance company is under an obligation to settle compensatory damage claims in order to avoid exposing its insured to punitive damages, it is likely an appellate court would do so.

Another possible benefit derived from Taylor is that it appears unlikely a defendant will be able to admit liability in an effort to prevent the jury from hearing the details of his reckless acts. Finally, based on the court's language in Taylor, the plaintiff's attorney should submit jury instructions that reflect more artful

193. Of course, the fact that many people are guilty of drunken driving does not mean that they lack malice, nor does it mean such action is any less dangerous or outrageous. See note 184 supra.
194. 24 Cal. 3d at 907, 598 P.2d at 864, 157 Cal. Rptr. at 704 (Clark, J., dissenting).
IV. INSURANCE FOR PUNITIVE DAMAGES

The issue of whether exemplary damages may be insured against has been the subject of extensive commentary and judicial decisions. One source has suggested the following as more appropriate jury instructions in light of Taylor:

You may award punitive damages against defendant for the sake of example and by way of punishment if you find by a preponderance of the evidence that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid these consequences.

Or, alternatively:

You may award punitive damages against defendant for the sake of example and by way of punishment if you find by a preponderance of the evidence that defendant became intoxicated and thereafter drove while in that condition and with knowledge of the safety hazard he created thereby.

Or, alternatively:

You may award punitive damages against defendant for the sake of example and by way of punishment if you find a preponderance of the evidence that defendant willfully (and voluntarily) consumed alcoholic beverages to the point of intoxication knowing (from the outset of his drinking) that he thereafter must operate a motor vehicle.


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cial opinions. Justice Clark, in his dissenting opinion in *Taylor v. Superior Court*, correctly stated that “the prevalence of punitive damages in accident cases, especially in the context of deterrence, must consider the insurance factor.” Therefore, this section will briefly highlight this concern in order to re-emphasize the importance of examining the pervasive effect insurance has in personal injury actions, particularly in drunk driving cases involving punitive damages.

The issue respecting the insurability of punitive damages is bifurcated into sub-issues. The first is whether the insurance contract actually covers exemplary damages. This issue is not within the scope of this article as it focuses exclusively on contractual interpretations. The second issue centers around public policy that directly involves the deterrence and punishment aspects of punitive damages.

The leading case prohibiting insurance coverage for punitive damages on public policy grounds was *Northwestern National Casualty Company v. McNulty*. This drunk driving case involved intoxication, high speed driving, and hit and run on the part of the insured. The plaintiff, McNulty, who suffered extensive personal injuries, including permanent brain damage, recovered $57,500 at trial, of which $20,000 had been awarded as punitive damages. In an extensive opinion, Judge Wisdom concluded that governing state law viewed the purpose of punitive damages as punishment and deterrence, and that those purposes would be lost if a defendant were allowed to shift the burden to his insurance carrier. Judge Wisdom stated:

> Considering the theory of punitive damages as punitory and as a deterrent and accepting as common knowledge the fact that death and injury by automobile is a problem far from solved by traffic regulations and criminal prosecutions, it appears to us that there are especially strong public policy reasons for not allowing socially irresponsible automobile drivers to escape the element of personal punishment in punitive damages when they are guilty of reckless slaughter or maiming on the highway . . . . To make that policy useful and effective the delinquent driver must not be allowed to receive a windfall at the expense of purchasers of insurance, transferring his responsibility for punitive damages to the very people—the driving public—to whom he is a menace.

204. 307 F.2d 432 (5th Cir. 1962).
205. *Id.* at 433.
206. *Id.* at 441-42. Judge Wisdom also argued that:

The argument that insurance against punitive damages would contravene public policy is sometimes said to rest on the doctrine that "no one shall be permitted to take advantage of his own wrong." Mr. Justice Cardozo in *Messersmith v. American Fidelity Co.,* 232 N.Y. 161, 133 N.E. 432, 19 A.L.R. 876 (1921). That doctrine is not necessarily applicable to cases of automobile liability insurance covering punitive damages. In such cases the public policy against coverage is not so much to prevent encouragement of wrong-doing by obstructing the hopes of profit; it is rather to make effective the discouragement of wrong-doing by the imposition of punishment. Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against
Most commentators that have written on the subject have agreed with Judge Wisdom's forceful arguments.\textsuperscript{207} The logic of the argument is certainly compelling. However, the court in \textit{Price v. Hartford Accident & Indemnity Co.}\textsuperscript{208} exemplifies the point made by various other courts that all deterrence is not lost because the effects of punitive damages are diminished by insurance. These courts have argued that a defendant will not escape punishment because there is the direct deterrence of criminal penalties and the indirect deterrence of having one's insurance rates soar.\textsuperscript{209} Notwithstanding this rebuttal, the underlying justifications for punitive damages, that of deterrence and punishment, are measurably eroded if not completely emasculated by insurance coverage.

The posture adopted by \textit{McNulty} on the issue of insurance and punitive damages poses problems for the plaintiff's attorney. First, even though exemplary damages would ordinarily enhance one's total recovery considerably, without insurance coverage these money damages almost assuredly will not be as readily collectible. Second, where both compensatory and punitive damages are requested, a jury may place a portion of a punitive award under the compensatory headings of pain, suffering and mental anguish, or include a portion of damages in a punitive award that are better placed under compensatory damages. The tactical complexities involved may lead some attorneys to dispense with punitive damages where insurance is a factor. In such an instance, \textit{McNulty} would certainly defeat its own purposes because punitive damages would be discarded simply because of their complexity.\textsuperscript{210}

The most prominent decision propounding the view contrary to that of \textit{McNulty} was \textit{Lazenby v. Universal Underwriters Insurance Co.}\textsuperscript{211} In \textit{Lazenby}, the plaintiff recovered a judgment of $1,087.97, including $1,087.00 in punitive damages.\textsuperscript{212} The court took issue with the \textit{McNulty} conclusion that punitive damages serve a deterrence purpose. Questioning the effectiveness of this sanction the court stated:

\begin{quote}
This State, in regard to the proper operation of motor vehicles, has a great many detailed criminal sanctions, which apparently have not deterred this
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\begin{footnotes}
\item[207] See note 200 supra.
\item[209] \textit{Id.} at 524.
\item[210] See text accompanying notes 204-06.
\item[211] 214 Tenn. 639, 383 S.W.2d 1 (1964).
\item[212] \textit{Id.} at 641, 383 S.W.2d at 2.
\end{footnotes}
slaughter on our highways and streets. Then to say the closing of the insurance market, in the payment of the punitive damages, would act to deter guilty drivers would in our opinion contain some element of speculation.213

The Lazenby court made several other arguments, but concluded with the argument that was perhaps most persuasive to the majority. The court reasoned that public policy should be the basis for a decision only when it is clear and unequivocal. Here the court believed there were competing public policies that were ambiguous, and therefore, concluded that the issues presented in the case should have been decided on the basis of interpreting and consulting the insurance contract.215

A. Are the Insurance Companies Required to Cover Punitive Damages?

Another problem facing the plaintiff who requests exemplary damages in a case involving insurance coverage, is that the insurance carrier will attempt to deny all coverage including coverage for compensatory damages, by urging that the conduct justifying the imposition of punitive damages is intentional and therefore the intentional tort exclusion to insurance coverage should apply. This potential occurrence has been the concern of some judges.216 This concern is more than likely misplaced because it would be highly inconsistent for a state to allow the assessment of punitive damages against drunken drivers on the one hand, and yet allow insurance companies to deny any coverage on the basis of an intentional tort exclusion on the other. Some states have expressly ruled on this point, as Missouri did in the case of Crull v. Gleb.217 The court there stated:

Wanton and reckless conduct may, and often does, include negligence. Intentional conduct does not. Therefore, wanton and reckless acts of the insured do not amount, in law, to intentional acts so as to permit the insurer to deny coverage under the provision of a clause, in a liability insurance policy, which provides that it does not provide coverage for injury intentionally caused by insured.218

213. Id. at 647, 383 S.W.2d at 5.
214. The court believed that in addition to the public policy behind punitive damages, there was a public policy behind contracts, particularly insurance contracts, that required that any ambiguity be interpreted against the writer of the policy.
215. 214 Tenn. at 648, 383 S.W.2d at 5.
216. 24 Cal. 3d at 904, 598 P.2d at 862, 157 Cal. Rptr. at 702.
217. 382 S.W.2d 17 (Mo. App. 1964).
218. Id. at 22 (citations omitted).
In addition to pleading a cause of action for simple negligence, a plaintiff could dissuade an insurance company from denying coverage by stipulating with the defendant, which the defendant would eagerly do, that the defendant's conduct was negligent or grossly negligent, but not intentional. If an insurance company persisted in refusing coverage, the defendant could either pursue alone, or assign, his cause of action against the insurance company for breach of good faith and fair dealing.

Based on the foregoing discussion, it is clear that the ramifications of insurance coverage should be carefully weighed and balanced in those instances where punitive damages are sought in drunk driving cases.

CONCLUSION

Drunken driving has become a social dilemma of epic proportion in the United States. Every time an individual travels upon the streets and highways of this country, he is exposed to the insidious and statistically great danger of being killed or maimed by a drunken driver. If this epidemic of social irresponsibility is ever to be thwarted, society must devise creative responses that maximize the punishment and deterrence that drunken drivers are subjected to.

The imposition of punitive damages against drunken drivers, under appropriate circumstances, is one such creative sanction. Based on the foregoing analysis and discussion, it is submitted that intoxicated drivers should be held liable for punitive damages, notwithstanding strong but unsubstantiated criticism that punitive damages are not a deterrent. Punitive damages should be used in conjunction with other sanctions in that they have a far greater impact than nominal fines and strike the drunken driver where he is most sensitive—his pocket book.

WILLIAM C. COOPER