



1-1-1993

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Recommended Citation

Barbara Eckert Buchanan, Comment, *New Limits, New Licenses: The Impact of Adams v. Murakami on the California Punitive Damages System*, 33 SANTA CLARA L. REV. 735 (1993).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol33/iss3/6>

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NEW LIMITS, NEW LICENSES? THE IMPACT OF ADAMS v. MURAKAMI ON THE CALIFORNIA PUNITIVE DAMAGES SYSTEM

I. INTRODUCTION

Punitive damages¹ have never enjoyed unquestioned acceptance. This doctrine has its staunch supporters and its vehement critics. Although the debate over punitive damages is not new, there is a growing trend to limit the amounts awarded.

One major criticism of punitive damages is the essentially unbridled freedom of the jury to award amounts solely within their discretion.² In particular, recent attacks have taken the form of appellate challenges to punitive damages awards that exceed the defendant's ability to pay.³ The awards "seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint."⁴ Accordingly, the financial condition or wealth⁵ of the defendant has become an issue of increased importance in civil trials involving punitive damages claims.⁶

The California Supreme Court recently dealt with the issue of a defendant's wealth in *Adams v. Murakami*⁷. The court held that evidence of a defendant's financial condition is a prerequisite to a punitive damages award⁸ and that the plaintiff bears the burden of production and proof of such evidence.⁹ The court determined this

1. In California, punitive damages are "damages other than compensatory damages which may be awarded against a person to punish him for outrageous conduct." *Wetherbee v. United Ins. Co. of America*, 95 Cal. Rptr. 678, 680 (Ct. App. 1971).

2. *See, e.g.*, *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988).

3. *See, e.g.*, *Adams v. Murakami*, 813 P.2d 1348 (Cal. 1991); *Neal v. Farmers Ins. Exch.*, 582 P.2d 980 (Cal. 1978); *Dumas v. Stocker*, 262 Cal. Rptr. 311 (Ct. App. 1989).

4. *OKI America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring).

5. In *Adams*, the California Supreme Court declined to set forth the proper measurement of a defendant's financial condition, noting that one measurement may not always be appropriate. *Adams*, 813 P.2d at 1355 n.7. The terms "financial condition" and "wealth," therefore, will be used interchangeably to refer to such measurements as net worth, net income or profits from the alleged wrongdoing.

6. *See, e.g.*, TOM RILEY, *PROVING PUNITIVE DAMAGES: THE COMPLETE HANDBOOK* (1981) (the author's text is a guide to proving punitive damages, with detailed strategies for trial counsel).

7. *Adams v. Murakami*, 813 P.2d 1348 (Cal. 1991).

8. *Id.* at 1349.

9. *Id.* at 1357.

evidence was necessary for appellate review of the award when a defendant claims the award is excessive.¹⁰

This comment explores the conflict *Adams* has created with the punitive damages system currently in place under the California Civil Code.¹¹ The author argues that although the California Supreme Court's opinion suggests that requiring evidence of defendant's financial condition may *limit* punitive damages,¹² in fact the presentation of such evidence could actually have the opposite effect: namely, inflating otherwise sufficient awards.

The comment begins in Part II.A with a brief description of the status of punitive damages in the United States, describing several criticisms of the doctrine and some limits which various jurisdictions have placed on the doctrine. The author discusses the California punitive damages system in Parts II.B and C, including the purpose of punitive damages and the procedure for obtaining a punitive damages award. In Part II.D, the author discusses the California appellate courts' split of authority as to the necessity of evidence of a defendant's financial condition. The author also addresses the practical impact of placing the burdens of production and proof on the plaintiff in light of the California Supreme Court's objective of placing financial evidence in the trial record for subsequent review of punitive damage awards. Finally, in Part IV, the author proposes amending the California Civil Code to provide trifurcation in trials involving punitive damages in order to preserve the purpose of punitive damages in this state. In addition, the author suggests the defendant bear the burden of proof on the financial condition issue and that the standard California punitive damages jury instruction be adjusted to reflect the proposed changes in the Civil Code.

10. *Id.* at 1355.

11. CAL. CIV. CODE § 3295 (West 1993); see discussion *infra* parts II.F.2, III. Although the facts of *Adams* are quite interesting, the question before the California Supreme Court was a legal one. This comment, therefore, does not present a factual summary of the case. For a detailed description of the *Adams* facts, see the case as reported by the Court of Appeal pending the Supreme Court's disposition. *Adams v. Murakami*, 268 Cal. Rptr. 467, 468-70 (Ct. App. 1990), *rev'd in part*, 813 P.2d 1348 (1991). In general, the facts underlying the cases discussed in this comment are not relevant to what are largely legal issues. The author refers the reader to the cases themselves for factual information.

12. See *Wollersheim v. Church of Scientology*, 6 Cal. Rptr.2d 532, 540 (Ct. App. 1992). "As [the California] Supreme Court has pointed out, the defendant's financial condition is an essential *limitation* on the jury's discretion in this state." *Id.*

II. BACKGROUND

A. Criticism, Challenges and Limits

Punitive damages have incited fierce debate since they were first awarded in the United States. In 1873, Justice Foster of the New Hampshire Supreme Court referred to the doctrine of punitive damages as a "monstrous heresy . . . an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."¹³ Criticism of punitive damages continues to the present. They are disapproved as punishment in a civil system of law that is meant to be compensatory.¹⁴ They have been called a "windfall" to the plaintiff.¹⁵

Punitive damages have also been attacked by way of several constitutional arguments, including double jeopardy, the Excessive Fines Clause, cruel and unusual punishment, and due process violations.¹⁶ The double jeopardy argument contends that where a defendant's conduct could subject it to both civil and criminal liability, the defendant is exposed to both punitive damages and criminal fines in violation of the Constitution.¹⁷ The United States Supreme Court has rejected that argument, however, concluding that for the double jeopardy prohibition to apply, the case must be "essentially criminal."¹⁸

Litigants have also used the Eighth Amendment of the United States Constitution to support an argument that punitive damages are unconstitutional. For example, one litigant suggested that punitive damages violate the Excessive Fines Clause of the Eighth Amendment.¹⁹ The Court concluded that the clause was not implicated, but left open the possibility that an excessive fines argument could apply in other cases involving government rather than private parties.²⁰ Other litigants have used the Eighth Amendment to argue that the imposition of punitive damages constitutes cruel and un-

13. *Fay v. Parker*, 53 N.H. 342, 382 (1873).

14. JAMES D. GHIARDI & JOHN J. KIRCHER, *PUNITIVE DAMAGES: LAW AND PRACTICE* § 2, at 4 (4th ed. 1985).

15. See generally Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900 (1992).

16. See *infra* text accompanying notes 17-29.

17. See *Breed v. Jones*, 421 U.S. 519, 528 (1975); U.S. CONST. amend. V.

18. *Breed*, 421 U.S. at 528.

19. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259 (1989).

20. *Id.* at 268; see also James D. Ghiardi, *Punitive Damages: State Extraction Practice Is Subject to Eighth Amendment Limitations*, 26 TORT & INS. L.J. 119 (1990).

usual punishment.²¹ This argument has been rejected because punitive damages are civil, and the Eighth Amendment only places restrictions on criminal actions.²²

Critics have also attacked the punitive damages doctrine as punishment without control in violation of the Due Process Clause.²³ A United States Supreme Court Justice suggested that the "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."²⁴ This is an equitable argument, suggesting that a defendant subjected to punitive damages often is treated more harshly than a defendant convicted of a crime.²⁵ The United States Supreme Court has stated that "[t]here is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme."²⁶ The Court recently reviewed a due process challenge to the Alabama common law procedures for scrutinizing punitive damages awards in *Pacific Mutual Life Insurance Co. v. Haslip*.²⁷ In upholding the procedures, the Supreme Court concluded that they "ensure[d] meaningful and adequate review . . . whenever a jury has fixed the punitive damages."²⁸ In the same case, however, the Supreme Court expressed concern about punitive damages that "run wild."²⁹

In addition to constitutional challenges, litigants, courts, and legislatures have attempted to limit punitive damages in various ways. A complete elimination of punitive damages is the most obvious limit. Nebraska, for example, does not recognize the doctrine and does not permit recovery of punitive damages.³⁰ Other states place

21. *Daugherty v. Firestone Tire & Rubber Co.*, 85 F.R.D. 693 (N.D. Ga. 1980).

22. *See Palmer v. A.H. Robins Co.*, 684 P.2d 187, 217 (Colo. 1984).

23. *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043 (1991).

24. *Bankers Life*, 486 U.S. at 88 (O'Connor, J., concurring).

25. *GHIARDI & KIRCHER, supra* note 14, § 2, at 26 (noting the disparate treatment argument is based on procedural and substantive safeguards present in criminal law, but absent from civil law).

26. *Haslip*, 111 S. Ct. at 1039 (quoting *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)).

27. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). Under Alabama law, the jury's punitive damages verdict is subjected to post-trial scrutiny at the trial and appellate levels. The criteria used in the evaluation includes the degree of reprehensibility of the defendant's conduct, profits from wrongdoing, and the "financial position" of the defendant. *Id.* at 1044-45.

28. *Id.* at 1044.

29. *Id.* at 1043.

30. *Abel v. Conover*, 104 N.W.2d 684, 688 (Neb. 1960) (stating that punitive, vindictive or exemplary damages are not allowed in Nebraska).

sharp limits on the recovery of punitive damages, such as permitting recovery only where expressly authorized by statute. For example, Louisiana prohibits punitive damages "unless it be for some particular wrong for which a statute expressly authorizes . . . such penalty."³¹ Massachusetts, New Hampshire and Washington also follow this approach.³²

Still other states treat punitive damages as compensatory damages. Connecticut, for example, permits what it calls punitive damages, but the damages are limited to the plaintiff's litigation expenses less any taxable costs.³³ Michigan also limits punitive damages to compensatory functions only, such as injury to feelings or humiliation.³⁴ Georgia follows this approach as well, permitting damages for deterrence or compensation, but not for both.³⁵

Punitive damage awards may also be limited by specifying a particular dollar amount for an award. Maximum dollar amounts or a specific ratio of compensatory damages to punitive damages are examples of such statutory limits.³⁶ Colorado sets a maximum dollar amount for punitive damages by requiring that they not exceed the

31. *McCoy v. Arkansas Natural Gas Co.*, 143 So. 383, 385-86 (La. 1932), *cert. denied*, 287 U.S. 661 (1932); *see also* *Banner Chevrolet, Inc. v. Kelt*, 402 So. 2d 747, 752 (La. App. 1981).

32. Massachusetts permits recovery of punitive damages only where authorized by statute. *See* *Pine v. Rust*, 535 N.E.2d 1247, 1249 (Mass. 1989); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 47 N.E.2d 265, 272 (Mass. 1943). New Hampshire's legislature recently enacted a statute which prohibits punitive damages except where the law specifically provides for them. N.H. REV. STAT. ANN. § 507:16 (1992) (effective July 1, 1986). Prior to adopting this approach, New Hampshire permitted punitive damages, but such damages had only a compensatory function. *Crowley v. Global Realty, Inc.*, 474 A.2d 1056, 1058 (N.H. 1984). Washington also permits punitive damages only when authorized by statute. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 726 P.2d 8, 23 (Wash. 1986) (punitive damages not permitted unless expressly authorized by statute); *see also* *Barr v. Interbay Citizens Bank*, 635 P.2d 441, 444 (Wash. 1981), *modified*, 649 P.2d 827 (Wash. 1982).

33. *See* *Triangle Sheet Metal Works, Inc. v. Silver*, 222 A.2d 220, 225 (Conn. 1966); *Sullivan v. Hopkins*, 485 A.2d 942, 943 (Conn. Super. Ct. 1984).

34. *See* *Kewin v. Massachusetts Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) (embarrassment and injured feelings); *Willett v. Ford Motor Co.*, 253 N.W.2d 111, 113 (Mich. 1977) ("humiliation, sense of outrage, and indignity").

35. *See* *Westview Cemetery, Inc. v. Blanchard*, 216 S.E.2d 776, 779 (Ga. 1975).

36. Several states have placed some form of maximum on the amount that may be recovered as punitive damages. *E.g.*, ALA. CODE § 6-11-21 (Supp. 1992) (maximum dollar amounts); COLO. REV. STAT. § 13-21-102 (1989) (maximum dollar amounts); FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 1993) (specific ratio); GA. CODE ANN. § 51-12-5.1(g) (Harrison 1990) (maximum dollar amounts); KAN. STAT. ANN. § 60.3701(e) (Supp. 1992) (maximum dollar amounts); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (maximum dollar amounts); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (West Supp. 1993) (maximum dollar amounts or specific ratio); VA. CODE ANN. § 8.01-38.1 (Michie 1992) (maximum dollar amounts).

amount of "actual damages awarded to the injured party."³⁷ Alabama limits punitive damages to \$250,000 unless the defendant's conduct is part of a pattern of intentional wrongs, involves actual malice, or is libel, slander, or defamation.³⁸ Florida limits punitive awards to no more than three times the amount of compensatory damages.³⁹ Texas permits a ratio of four times the actual damages or \$200,000, whichever is greater.⁴⁰ Accordingly, limitation mechanisms for punitive damage awards vary widely by state.

B. *Punitive Damages in California*

1. *Purpose*

Punitive damages, also called exemplary damages, are essentially a form of punishment.⁴¹ California's punitive damages system is based on a punishment and deterrence rationale. The purpose of punitive damages in California is simply "for the sake of example and by way of punishing the defendant."⁴² In *Neal v. Farmers Insurance Exchange*,⁴³ the California Supreme Court reiterated the public goal of punitive damages as a societal interest in "punish[ing] wrongdoing and thereby protect[ing] itself from future misconduct, either by the same defendant or other potential wrongdoers."⁴⁴ Thus, in California, punitive damages are not compensatory,⁴⁵ since the court directs the jury to "determine whether you should award punitive damages against defendant . . . for the *sake of example* and by way of *punishment*."⁴⁶ Therefore, although the plaintiff seeks, and may be awarded, punitive damages, it is incorrect to categorize a

37. COLO. REV. STAT. § 13-21-102(1)(a) (1989).

38. ALA. CODE § 6-11-21 (Supp. 1992).

39. FLA. STAT ANN. § 768.73(1)(a) (West Supp. 1993).

40. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (West Supp. 1993)

41. Punitive is defined as "[r]elating to punishment; having the character of punishment or penalty." BLACK'S LAW DICTIONARY 1234 (6th ed. 1990).

42. CAL. CIV. CODE § 3294(a). See *infra* text accompanying note 48 for the text of this section.

In 1934, the California Supreme Court held that the purpose of punitive damages under California law was "to punish the wrongdoer . . . and to deter him from the commission of like wrongs." *Evans v. Gibson*, 31 P.2d 389, 395 (Cal. 1934); see also *Wetherbee v. United Ins. Co. of America*, 95 Cal. Rptr. 678, 680 (Ct. App. 1971) (stating that punitive damages are "damages other than compensatory damages, which may be awarded against a person to punish him for outrageous conduct").

43. *Neal v. Farmers Ins. Exch.*, 582 P.2d 980 (Cal. 1978).

44. *Id.* at 990.

45. See CALIFORNIA JURY INSTRUCTIONS CIVIL, BAJI 14.72.2 (1989 Re-Revision) (7th ed. Supp. 1993).

46. *Id.* (emphasis added).

claim for such damages as a claim for relief. Punitive damages go beyond mere compensation to the plaintiff for the actual harm incurred. "Damages which are given merely as a punishment to deter the wrongdoer from a repetition of the offense clearly have no reference to compensation for the wrong inflicted."⁴⁷ Accordingly, it is the assessment of punitive damages against the defendant, rather than their receipt by the plaintiff, that furthers the public goal of punishment and deterrence.

2. *Liability and Procedure*

In California, liability for punitive damages arises when the defendant has acted with oppression, fraud or malice. The California Civil Code provides:

In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant.⁴⁸

However, punitive damages are not awarded automatically. Even though the jury might conclude that the defendant is guilty of oppression, fraud or malice, it may choose not to impose punitive damages.⁴⁹ The jury similarly has discretion to determine the amount of the punitive damages award,⁵⁰ but its discretion does not go wholly unchecked. Two features of California punitive damages law limit the jury's control over punitive damages awards. First, at the trial level, the court gives the jury factors to assist it in assessing the amount of the award. The standard jury instruction directs the jury to consider the following:

(1) The reprehensibility of the conduct of the defendant. (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition. [(3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff.]⁵¹

47. *Evans v. Gibson*, 31 P.2d 389, 390 (Cal. 1934).

48. CAL. CIV. CODE § 3294 (West Supp. 1993).

49. See CALIFORNIA JURY INSTRUCTIONS CIVIL, *supra* note 45, BAJI 14.72.2 (1989 Re-Revision).

50. *Id.*

51. *Id.* "Paragraph number 3 is in brackets and must be given if requested by the defendant." *Id.* use note.

Judicial review serves as the second potential limit on a punitive damage award.⁵² In the traditional approach to awarding punitive damages, the jury determines the amount of punitive damages, and the award may then be subjected to trial and appellate review "to ensure that it is reasonable."⁵³ California follows this approach.⁵⁴

C. *Evaluation of Punitive Damages Awards in California*

Although the jury lacks unlimited discretion in awarding punitive damages, its verdict is nonetheless accorded "great weight [on appeal]. [The court] may not tamper with it unless [the court] can say, as a matter of law, that the jury acted from passion or prejudice."⁵⁵ *Neal v. Farmers Insurance Exchange*⁵⁶ set forth this "passion or prejudice" standard which has become the traditional California analysis for evaluating a punitive damages award.

The *Adams* court emphasized that because of the public goal of punitive damages, in evaluating an award, "[t]he essential question . . . in every case must be whether the amount of damages awarded substantially serves the societal interest."⁵⁷ *Adams* explained that in answering that question, the California Supreme Court in *Neal v. Farmers Insurance Exchange* advanced three factors to be used in determining whether an award raises a presumption that it is the product of passion or prejudice and is thus excessive as a matter of law: 1) the nature of the defendant's conduct in light of the entire record; 2) the amount of compensatory damages; and 3) the wealth of the defendant.⁵⁸ The California Supreme Court stated in *Neal* that the defendant's wealth was a *factor*; however, the court did not hold that evidence of the defendant's wealth was *required*.⁵⁹

The *Neal* court also clearly indicated that there must be some

52. See *infra* part II.2.C.

53. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1042 (1991); see *Adams v. Murakami*, 813 P.2d 1348, 1350 (1991) (stating that the appellate function is to determine whether a punitive damages award is excessive as a matter of law or is presumptively a product of passion or prejudice); CALIFORNIA JURY INSTRUCTIONS CIVIL, *supra* note 45, BAJI 14.72.2 (1989 Re-Revision).

54. See *Adams*, 813 P.2d at 1350.

55. *Pistorius v. Prudential Ins. Co. of America*, 176 Cal. Rptr. 660, 668 (Ct. App. 1981).

56. *Neal v. Farmers Ins. Exch.*, 582 P.2d 980 (Cal. 1978). Specifically, the standard is whether the "award as a matter of law appears excessive, or . . . raise[s] a presumption that it is the result of passion or prejudice." *Id.* at 990 (quoting *Schroeder v. Auto Driveaway Co.*, 523 P.2d 662, 669 (Cal. 1974)).

57. *Adams*, 813 P.2d at 1350.

58. *Neal*, 582 P.2d at 990.

59. See *id.*

limit to punitive damage awards. The court stated that excessive awards frustrate the purpose of punitive damages because "the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter."⁶⁰ In California, then, punitive damages are excessive as a matter of law if they exceed the defendant's ability to pay.⁶¹ Moreover, even if an award satisfies the court with regard to the other *Neal* factors, it will be overturned if it is excessive.⁶²

D. *Development of a Split of Authority*

Prior to *Adams*, there was a split of authority in the California Courts of Appeal as to whether evidence of a defendant's financial condition was required to support a punitive damages award.⁶³ Some courts required financial evidence while others simply permitted it. The 1963 case of *Hanley v. Lund*⁶⁴ was an initial "permissive" authority. In *Hanley*, the defendant did not claim that the punitive damages were excessive during post-trial motions or the appeal.⁶⁵ However, he argued on appeal that the plaintiff was required to demonstrate the defendant's wealth in order to request punitive damages.⁶⁶ The court of appeal ruled that the defendant's claim had no merit since there was no authority to support such a requirement.⁶⁷ The court noted that the cases upon which the defendant relied to support his argument dealt with the *admissibility* rather than the *necessity* of evidence of defendant's wealth.⁶⁸

Evidence of the defendant's wealth has been admissible in punitive damages cases in California for almost one hundred years.⁶⁹ In *Barkly v. Copeland*, a slander case, the court admitted financial condition evidence in order to "graduate the punishment."⁷⁰ In fact, the court admitted the evidence because it concluded that the degree of

60. *Id.*

61. *Adams*, 813 P.2d at 1351.

62. *Id.* "[T]he award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone.*" *Id.*

63. *See id.* 1353-54.

64. *Hanley v. Lund*, 32 Cal. Rptr. 733, 740 (Ct. App. 1963).

65. *Id.*

66. *Id.* at 740.

67. *Id.*

68. *Id.*

69. *Barkly v. Copeland*, 15 P. 307, 310 (Cal. 1903).

70. *Id.*

plaintiff's injury was correlated to the defendant's wealth.⁷¹ Later courts followed the *Barkly* example, concluding that financial condition evidence was admissible to determine the proper level of the defendant's punishment.⁷² However, these cases did not go so far as to *require* presentation of the evidence.⁷³ Even after *Hanley*, the courts held that a plaintiff could *choose* to introduce evidence of the defendant's financial condition, but was not *required* to do so.⁷⁴ Moreover, even after *Neal v. Farmers Insurance Exchange*⁷⁵ designated the defendant's wealth as a factor to consider in evaluating a punitive damages award,⁷⁶ some appellate courts were reluctant to require the plaintiff to present financial condition evidence.

For example, the trial court in *Vossler v. Richards Manufacturing Co.*⁷⁷ held that the plaintiff was not required to introduce evidence of the defendant's financial condition to support a claim for punitive damages.⁷⁸ On appeal, the defendant relied on *Neal*⁷⁹ to support his argument that punitive damages could not be awarded unless the plaintiff produced evidence of the defendant's wealth or profits due to the wrongful conduct.⁸⁰ The *Vossler* court responded that although *Neal* held that the wealth of the defendant should be considered in determining whether a punitive damages award was excessive as a matter of law, a plaintiff's claim for punitive damages was not dependent upon introduction of such evidence.⁸¹ The court

71. *Id.* "[T]he defendant's wealth is an element in [his] social rank and influence, and therefore tends to show the extent of the injury suffered from the defendant's words . . ." *Id.*

72. *See, e.g.,* *Marriott v. Williams*, 93 P. 875, 877 (Cal. 1908); *Greeneberg v. Western Turf Ass'n*, 73 P. 1050, 1052 (Cal. 1903).

73. *See Marriott*, 93 P. at 877; *Greeneberg*, 73 P. at 1052.

74. *See Fletcher v. Western Nat'l Life Ins. Co.*, 89 Cal. Rptr. 78 (Ct. App. 1970) (holding that financial condition evidence was not necessary to support a punitive damages award); *see also Fenlon v. Brock*, 265 Cal. Rptr. 324, 327 (Ct. App. 1989); *Vossler v. Richards Mfg. Co.*, 192 Cal. Rptr. 219, 226 (Ct. App. 1983). A plaintiff might *choose* to present financial condition evidence as a matter of strategy, attempting to gain a greater award by demonstrating the wealth of the defendant. *See GUY O. KORNBLUM ET AL., CALIFORNIA PRACTICE GUIDE: BAD FAITH* 11-66.1 (1990). "Regardless of the burden of proof, it is better for the plaintiff to introduce evidence of the [defendant's] finances, to show the defendant is capable of absorbing a substantial penalty." *Id.*

75. *Neal v. Farmers Ins. Exch.*, 582 P.2d 980 (Cal. 1978).

76. *Neal*, 582 P.2d at 990; *see supra* text accompanying note 58.

77. *Vossler v. Richards Mfg. Co.*, 192 Cal. Rptr. 219 (Ct. App. 1983).

78. *Id.* at 226.

79. *See supra* part II.C. for a discussion of *Neal*.

80. *Vossler*, 192 Cal. Rptr. at 224.

81. *Id.* Other courts have also followed this approach. In *Fenlon v. Brock*, 265 Cal. Rptr. 324 (Ct. App. 1989), the defendants failed to claim that the punitive damages awarded against them were excessive at trial but appealed, arguing that the award could not be upheld absent evidence of their financial condition. *Id.* at 327. The *Fenlon* court rejected this conten-

recognized that the purpose of punitive damages was "to punish and deter wrongdoing by fashioning a monetary penalty tailored to the wealth of the defendant and to the reprehensibility of his conduct"⁸² and stated that a lack of financial condition evidence "impairs a rational effectuation of this purpose."⁸³ Nevertheless, the court concluded that because a plaintiff was not required to produce such evidence in order to support a claim for punitive damages, its decision was in accord with precedent and the "modern trend" to require the *defendant* to demonstrate that an award was excessive in light of his financial condition.⁸⁴

Other courts, however, came to the opposite conclusion. They expressed concern over the lack of evidence to support punitive damages claims⁸⁵ and looked to the plaintiff to provide the financial condition information.⁸⁶ In *Dumas v. Stocker*,⁸⁷ the court of appeal noted that there was no evidence of the defendant's net worth at trial and that the plaintiff made no effort to obtain this evidence "despite the statutory mechanism designed precisely to allow for discovery and production of such information for use at trial."⁸⁸

The *Dumas* court refers to the "statutory mechanism" of the California Civil Code section 3295(c).⁸⁹ The court concluded that without evidence of the defendant's net worth, the punitive damages award was unsupported by the evidence.⁹⁰ It concluded that reversal was appropriate because without evidence of the defendant's wealth, the court could not determine whether the award was "reasonable in light of [defendant's] resources."⁹¹ The *Dumas* court reasoned that permitting, but not requiring, financial condition evidence "frustrates

tion, stating that although *Neal* stated that the defendant's financial condition is one factor to consider, the evidence of financial condition was not a prerequisite to a punitive damages award. *Id. Fenlon* also noted that many cases had upheld punitive damages awards without evidence of the defendant's condition and that the "long standing" rule in California was that a plaintiff was permitted, but not required, to produce such evidence. *Id.*

82. *Vossler*, 192 Cal. Rptr. at 226.

83. *Id.*

84. *Id.*

85. *Forte v. Nolfi*, 102 Cal. Rptr. 455, 476 (Ct. App. 1972) (overturning a punitive damages award because of some uncertainty as to the compensatory damages and concern about a lack of evidence to sustain a punitive damages claim); see also *Barragan v. Banco BCH*, 232 Cal. Rptr. 758 (Ct. App. 1986); *Alhino v. Starr*, 169 Cal. Rptr. 136 (Ct. App. 1980).

86. See *infra* text accompanying notes 87-95.

87. *Dumas v. Stocker*, 262 Cal. Rptr. 311 (Ct. App. 1989).

88. *Id.* at 315.

89. CAL. CIV. CODE § 3295(c) (West Supp. 1993); see discussion *infra* part II.F.2.

90. *Dumas*, 262 Cal. Rptr. at 315.

91. *Id.*

meaningful appellate review of punitive damage awards, [because] the absence of evidence of net worth precludes an appellate court from deciding whether an award might, for example, bankrupt the defendant."⁹²

The *Dumas* court also justified its holding in terms of the burden of proof. It stated that a permissive rule would obviate both the traditional burden of proof (by shifting the burden to the defendant) and "the rule precluding recovery based on speculative . . . evidence."⁹³ The court thus rejected *Vossler's* suggestion that it would be appropriate to shift the traditional burden of proof since the defendant knows his financial situation better than the plaintiff.⁹⁴ The *Dumas* court concluded that this shifting argument "ignores . . . the discovery and subpoena provisions [in Civil Code section 3295(c)] which enable plaintiff to have financial evidence under his control at trial."⁹⁵

Fenlon v. Brock also rejected the appellate review and the burden-shifting arguments.⁹⁶ The *Fenlon* court reasoned that even though financial condition evidence was not required, the defendant had the best access to this evidence and could always choose to introduce it in order to demonstrate an award was excessive.⁹⁷ Also, the court noted that the defendant should not be permitted to rely on the plaintiff to introduce evidence in order to preserve an appeal.⁹⁸ "It is not the duty of a litigant to create a record for an opponent's potential appeal."⁹⁹

In *Vossler v. Richards Manufacturing Co.*, the court rejected the contention that requiring a defendant to present financial condition evidence was "manifestly" unfair.¹⁰⁰ The defendant in *Vossler* argued that such a requirement "would be, for all intents and purposes, requiring the defendant to make a tacit admission that some award of punitive damages is appropriate."¹⁰¹ In response, the court declared that the defendants were completely capable of introducing the required evidence without sacrificing themselves to the jury.¹⁰²

92. *Id.* at 316.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Fenlon v. Brock*, 265 Cal. Rptr. 324, 328 (Ct. App. 1989).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Vossler v. Richards Mfg. Co.*, 192 Cal. Rptr. 219, 226 (Ct. App. 1983).

101. *Id.*

102. *Id.*

The court analogized the presentation of financial evidence to a situation in which the defendant tries to reduce his exposure to personal injury damages. It noted that personal injury defendants "regularly introduce evidence tending to show that plaintiff's injuries are less than claimed;" therefore, defendants have the ability to introduce mitigating evidence "without diminishing the force of their contest as to liability."¹⁰³

However, the *Fenlon* court concluded that requiring the plaintiff to produce financial evidence actually could be both unfair to the defendant and a waste of time. The court reasoned that if a plaintiff is required to prove defendant's financial condition, the defendant loses his option to remain silent and hope that without this evidence, the resulting award will be small.¹⁰⁴ In the absence of financial evidence, "[p]resumably the award will be low and the defendant [retains] the option to contend it is excessive."¹⁰⁵ Also, the plaintiff's access to financial evidence is restricted until after he presents a prima facie case for punitive damages, so the trial may be interrupted to allow the plaintiff to obtain discovery of the required information.¹⁰⁶ "[A] plaintiff who believes the subpoenaed information is inaccurate, incomplete or misleading will be forced to request a continuance . . . to obtain accurate information which he was barred from obtaining earlier."¹⁰⁷ The court concluded that this problem could be avoided if the plaintiff could choose not to introduce evidence of the defendant's financial condition.¹⁰⁸

F. *Limits on Access to and Use of Financial Condition Evidence*

1. *Constitutional Limits*

California recognizes a constitutional right to privacy as it relates to financial information.¹⁰⁹ Although a punitive damages claim will subject the defendant's financial status to discovery,¹¹⁰ the dis-

103. *Id.*

104. *Fenlon*, 265 Cal. Rptr. at 328.

105. *Id.* at 328-29.

106. *Id.* at 329.

107. *Id.*

108. *Id.*

109. *Richards v. Superior Court*, 150 Cal. Rptr. 77, 81 (Ct. App. 1978) (noting that the California Constitution provides at least a limited privacy right relating to financial information); see also *City of Carmel-by-the-Sea v. Young*, 466 P.2d 225, 231-32 (Cal. 1970) (noting that privacy in financial affairs is protected by the U.S. Constitution).

110. *Coy v. Superior Court*, 373 P.2d 457, 463 (Cal. 1962).

covery permitted will be that which is the least intrusive to the defendant's privacy right. The defendant need only disclose financial information when there is some public purpose for which the information is relevant such as judicial dispute resolution.¹¹¹ The privacy concern is given great weight in that disclosure can be limited by "a properly fashioned protective order."¹¹² "[E]ven when the balance tips in favor of disclosure, constitutional concerns require a strict circumscription of the scope of disclosure."¹¹³

2. Civil Code Section 3295

In addition to the California Constitution, Civil Code section 3295 also governs a plaintiff's access to and use of information relating to the defendant's financial condition.¹¹⁴ Adopted in 1979, this section provides protection for a civil defendant in the form of protective orders,¹¹⁵ limits on discovery¹¹⁶ and trial bifurcation¹¹⁷ if he

111. *Richards*, 150 Cal. Rptr. at 81.

112. *Id.*

113. *Cutter v. Brownbridge*, 228 Cal. Rptr. 545, 549 (Ct. App. 1986).

114. CAL. CIV. CODE § 3295 (West Supp. 1993).

115. *Id.* § 3295(a). This section states in part:

(a) The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294, prior to the introduction of evidence of:

- (1) The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence.
- (2) The financial condition of the defendant.

Id.

116. *Id.* § 3295(c). This section states in part:

(c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. However, the plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing profits or financial condition referred to in subdivision (a) . . . Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds . . . that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294.

Id.

117. *Id.* § 3295(d). This section states:

(d) The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition

wishes to keep his financial condition from being a major focus at the trial.¹¹⁸

The courts and the legislature are serious about protecting the defendant from discovery abuse involving his financial position.¹¹⁹ In *Rawnsley v. Superior Court*, the Court of Appeal stated:

These [Civil Code] safeguards were designed to protect the defendant from a specific type of discovery abuse: a situation in which the plaintiff puts forth an easily alleged cause of action for punitive damages, thus requiring a defendant to expend the time and money "necessary to the compilation of a complex mass of information unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damages which may never be awarded."¹²⁰

The anti-abuse policy is so strong that there is a presumption in favor of the defendant when the plaintiff seeks discovery of financial information.¹²¹ One court stated:

where the only reason for seeking such financial information is to 'give a tactical edge to the party who has obtained discovery of the information by allowing that party the benefit of pressure in settlement negotiations by threat or implication of disclosure,' [the defendant] should be afforded the full benefit [of the Civil Code protections].¹²²

Thus, unrestricted discovery encourages "game playing" whereby the plaintiff, in alleging a punitive damages claim, forces a defendant to settle because the defendant wishes to preserve the confidentiality of his financial circumstances.¹²³

shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.

Id.

118. *See id.* § 3295. "At trial, for good cause shown, the court may require a plaintiff to produce evidence of a prima facie case of 'oppression, fraud or malice *before* introducing evidence as to defendant's financial condition or the profits allegedly derived by its wrongful course of conduct." GUY O. KORNBLUM ET AL., CALIFORNIA PRACTICE GUIDE: BAD FAITH 11-66 (1990).

119. *See supra* part II.F.1.

120. *Rawnsley v. Superior Court*, 227 Cal. Rptr. 806, 809 (Ct. App. 1986) (emphasis omitted) (citation omitted).

121. *See Richards v. Superior Court*, 150 Cal. Rptr. 77, 81 (Ct. App. 1978).

122. *Rawnsley*, 227 Cal. Rptr. at 809 (citations omitted).

123. *Id.* at 808.

G. *The Adams v. Murakami Decision*

*Adams v. Murakami*¹²⁴ held that a plaintiff in a punitive damages case must present evidence of a defendant's financial condition in order to obtain a punitive damages award.¹²⁵ The California Supreme Court stated that "[w]ithout such evidence, reviewing courts will be unduly restricted in their attempts to assess whether awards of punitive damages are excessive."¹²⁶ *Adams* was decided five months after the United States Supreme Court decided *Pacific Mutual Life Insurance Co. v. Haslip*,¹²⁷ which presented a due process challenge to an Alabama punitive damages award.¹²⁸ The *Adams* majority was clearly aware of the *Haslip* message that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."¹²⁹ In fact, *Adams* noted that the United States Supreme Court had remanded several California cases "apparently to determine whether the California 'passion and prejudice' standard of review is constitutionally sufficient."¹³⁰ The *Adams* court emphasized that its decision was one of state law, yet it devoted an entire section in the opinion to a discussion of the U.S. Supreme Court's decision in *Haslip*.¹³¹ The court noted that appellate review of punitive damages awards "has recently acquired a federal constitutional dimension, which although not dispositive, weighs strongly in favor of requiring evidence of a defendant's financial condition."¹³²

In his dissent, Justice Mosk reasoned that the *Haslip* decision indicated the Supreme Court believed that the defendant's wealth should *not* be emphasized.¹³³ He cited the *Haslip* defendant's argument that considering wealth "only insures that multi-million dollar awards will happen," and he noted the Supreme Court's observation

124. *Adams v. Murakami*, 813 P.2d 1348 (Cal. 1991).

125. *Id.* at 1349, 1357; *see also* text accompanying notes 7-10.

126. *Adams*, 813 P.2d at 1355.

127. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). *Adams* was decided August 15, 1991, and *Haslip* was decided March 4, 1991.

128. *See supra* notes 27-29 and accompanying text.

129. *Haslip*, 111 S. Ct. at 1043. The *Haslip* court continued: "We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." *Id.*

130. *Adams*, 813 P.2d at 1357 n.9. *Adams* specifically left open the question of whether the California standard of passion and prejudice is constitutionally sufficient after *Haslip*. *Id.* at 1356 n.9.

131. *Id.* at 1355-56.

132. *Id.* at 1355.

133. *Id.* at 1364 (Mosk, J., dissenting); *Haslip*, 111 S. Ct. at 1045.

that "the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."¹³⁴

The *Adams* decision also relied heavily on *Neal v. Farmers Insurance Exchange*.¹³⁵ All three *Neal* factors—the nature of the defendant's conduct in light of the entire record, the amount of compensatory damages, and the wealth of the defendant—were considered necessary by *Adams*: "The *Neal* court set forth *three* factors, explaining the importance of each. Nothing in *Neal* suggests that any of the three is dispensable."¹³⁶ The *Adams* court stated that the most important issue "is whether the amount of punitive damages will have a deterrent effect—without being excessive."¹³⁷ The court noted that the "well-established rule [is] that a punitive damages award is excessive if it is disproportionate to the defendant's ability to pay."¹³⁸ In stressing the public purpose of punitive damages,¹³⁹ the court stated that the principle of proportionality would be violated because the reviewing court could not evaluate a punitive damages award absent evidence of the defendant's wealth.¹⁴⁰ Thus, *Adams* concluded that evidence of the defendant's financial condition is imperative.

The *Adams* majority concluded by holding that the statutory punitive damages scheme, including Civil Code section 3295,¹⁴¹ should be interpreted according to the traditional burden of proof,¹⁴² with the plaintiff having the burden of proving the elements of a punitive damages claim. The "very nature of punitive damages points to this conclusion."¹⁴³ The court also cited the *Legislative Counsel's Digest* in support of its argument, which read: "In general, the application of this provision is governed by case law which generally provides that the plaintiff has the burden of proof . . ."¹⁴⁴

134. *Adams*, 813 P.2d at 1364 (Mosk, J., dissenting) (emphasis omitted) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991)).

135. *Adams*, 813 P.2d at 1350-52; *Neal v. Farmers Ins. Exch.*, 582 P.2d 980 (Cal. 1978); see *supra* part II.C. for a discussion of *Neal*.

136. *Adams*, 813 P.2d at 1351.

137. *Id.*

138. *Id.* at 1352.

139. *Id.* at 1350 (The "purpose [of punitive damages] is a purely *public* one.").

140. *Id.* at 1352.

141. CAL. CIV. CODE § 3295 (West Supp. 1993).

142. *Adams*, 813 P.2d at 1357-59. "The apparent legislative intent underlying the punitive damages statutes is also consonant with having plaintiff assume [the burden of proof]." *Id.* at 1359.

143. *Id.* at 1357.

144. *Id.* at 1359 (emphasis omitted) (quoting *Legis. Council's Digest*, ch. 778, 4 Cal.

The court further held that nothing in section 3295 suggests a burden for *defendants* to produce financial condition evidence.¹⁴⁵ Justice Mosk, in his dissent, however, disagreed with the majority's characterization and interpretation. Justice Mosk argued instead that Civil Code section 3295 is correctly interpreted as an attempt to "protect defendants by limiting the plaintiff's pretrial discovery of [financial condition evidence]."¹⁴⁶

The *Adams* majority relied on section 500 of the California Evidence Code for its burden of proof conclusion: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence of which is essential to the claim for relief or defense that he is asserting."¹⁴⁷ This section "mandated" that the plaintiff be responsible for proving defendant's financial condition.¹⁴⁸ Therefore, the court concluded that "Evidence Code section 500 and considerations of fundamental fairness lead to the conclusion that a plaintiff who seeks to recover punitive damages must bear the burden of establishing the defendant's financial condition."¹⁴⁹

In dissent, Justice Mosk argued that the current statutory scheme did not require the plaintiff to prove the defendant's financial condition.¹⁵⁰ He agreed with the *Hanley* line of cases which concluded that "to require the plaintiff to introduce evidence of the defendant's financial condition to preserve meaningful appellate review *for the defendant* is unprecedented."¹⁵¹

Furthermore, Justice Mosk argued that the "'burden of proof' is not relevant in considering the relationship between a defendant's financial condition and the amount of the punitive damages award."¹⁵² He also contended that the majority misread the *Legislative Counsel's Digest*.¹⁵³ He argued instead that the legislature, in discussing the burden of proof, was referring to the plaintiff's burden of proving oppression, fraud or malice, rather than the defendant's

Stat. 227 (1979)).

145. *Id.* at 1360.

146. *Id.* at 1364 (Mosk, J., dissenting) (emphasis omitted).

147. CAL. EVID. CODE § 500 (West 1978).

148. *Adams*, 813 P.2d at 1357.

149. *Id.* at 1360.

150. *See id.* at 1364 (Mosk, J., dissenting). Specifically, Justice Mosk contends that neither the California statutory punitive damages scheme nor the Supreme Court's opinion in *Haslip* require evidence of defendant's financial condition. Therefore, he contends that no one is responsible for upholding a burden of proof on this issue. *Id.*; *see Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991).

151. *Adams*, 813 P.2d at 1363 (Mosk, J., dissenting).

152. *Id.* at 1364 (Mosk, J., dissenting).

153. *See supra* text accompanying note 144.

financial condition.¹⁵⁴

III. ANALYSIS

The *Adams* court addressed a challenge to a punitive damages award in which the challenger argued the award could not stand absent evidence of the defendant's financial condition.¹⁵⁵ The court concluded that such evidence is a prerequisite for a punitive damages award and that the plaintiff was to bear both the burdens of production and proof.¹⁵⁶ In California, the jury decides whether to impose punitive damages and if so, how much.¹⁵⁷ Also, the *Adams* decision did not purport to alter the jury's traditional role in assessing punitive damages in the first place. Rather, the court was concerned with judicial review of jury verdicts.¹⁵⁸

The *Adams* decision, however, is not in agreement with the punitive damages scheme currently in place in California. Although *Adams* appears to be a victory for the defendant, limiting punitive damages awards, such a victory actually may be a pyrrhic one. Requiring the plaintiff to be responsible for presenting the defendant's financial condition to the jury may actually inflate the potential reward. Also, the demands *Adams* places on the plaintiff directly conflict with the protective system the Civil Code provides for the defendant. If the financial evidence requirement overcomes the protective policy of Civil Code section 3295, the defendant is subjected to discovery of his financial matters, with the extreme result being a threat to his constitutional rights to privacy. Conversely, if the discovery protection is taken to their logical end, the plaintiff

154. *Adams*, 813 P.2d at 1364 (Mosk, J., dissenting).

155. See discussion *supra* parts I, II.G.

156. See discussion *supra* parts I, II.G. Justice Mosk questions the *Adams* majority's conclusion that evidence of wealth *must* be presented. *Adams*, 813 P.2d at 1362-64 (Mosk, J., dissenting).

In fact, there are other possible punitive damages procedures in which such evidence is never put before the jury. The Alabama punitive damages procedure recently approved by the United States Supreme Court in *Haslip* involves a post-verdict appellate review of the jury's punitive damages verdict. See generally *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). The jury never hears evidence of the defendant's financial condition. *Id.* 111 S. Ct. at 1044. One source suggests that the jury could determine damages as a percentage of financial condition without revealing actual dollar figures of the defendant's assets, net worth or financial status. KENNETH H. YORK ET AL., *REMEDIES* 134 (1992). In her dissenting opinion in *Haslip*, Justice O'Connor suggested that "[o]ther procedural safeguards might prove equally effective. For example, state legislatures could establish fixed monetary limits for awards of punitive damages involving particular kinds of conduct." *Haslip*, 111 S. Ct. at 1064 (O'Connor, J., dissenting)

157. See *supra* part II.B.2.

158. *Adams*, 813 P.2d at 1356.

may be precluded from obtaining an otherwise justified award of punitive damages.¹⁵⁹

On its face, Civil Code section 3295 does not compel production of financial condition evidence.¹⁶⁰ Thus the section addresses a situation where a plaintiff *chooses* to present financial condition evidence. However, after *Adams*, the section may severely restrict the plaintiff's ability to obtain punitive damages even when justified. On the one hand, the plaintiff is compelled to produce evidence of defendant's financial condition in order to sustain a punitive damages award.¹⁶¹ Yet at the same time, in order to prevent abuse of the defendant, the plaintiff must demonstrate a "substantial probability" of prevailing on the punitive damages claim¹⁶² to obtain court orders permitting discovery of financial information.¹⁶³ The irony is that the plaintiff must obtain *permission* through a court order to conduct *required* trial procedures.

The plaintiff faces a difficult uphill battle to overcome the presumptions favoring the defendant in both the discovery and presentation stages of the trial. He is, therefore, left with two options. He either will have to accept the witnesses and documents that he is currently allowed to subpoena for use at the trial¹⁶⁴ or undertake additional discovery during the trial. But what if the defendant is particularly persuasive, convincing the trial court that some or all financial information is not discoverable? What if the trial court is not convinced that plaintiff has shown a substantial probability of prevailing on the punitive damages claim? If the plaintiff nevertheless prevails, recovering punitive damages which the defendant subsequently claims are excessive, is the defendant rewarded on appeal by having the damages set aside for insufficient evidence? The *Adams* court does not address these possibilities.

The *Adams* decision thus strongly encourages the defendant to concentrate his efforts to evade the plaintiff's discovery. This encouragement is in addition to an existing incentive to evade discovery: the defendant already wishes to keep his wealth from becoming a major focus at the trial. He does not want his financial circumstances to influence the jury's determination of liability and compensatory dam-

159. See *infra* text accompanying notes 160-68.

160. See CAL. CIV. CODE § 3295 (West Supp. 1993).

161. *Adams*, 813 P.2d at 1349, 1357.

162. § 3295(c).

163. *Id.*

164. *Id.*

ages.¹⁶⁵ Amendments to Civil Code section 3295 solved this tainting problem by allowing the defendant to bifurcate the trial, separating the issue of liability for compensatory damages from liability for punitive damages.¹⁶⁶ The *Adams* decision, however, recreates this same dilemma for the defendant at the punitive damages stage of the trial.

The defendant now has an even greater incentive to prevent the introduction of financial evidence. Because the stakes are so high, *Adams* will encourage evasive maneuvers and sharp tactics by the defendant to exclude financial evidence. If successful in persuading the court to exclude this evidence, the defendant accomplishes two things. First, he keeps evidence relating to his wealth from the jury, thus preventing his wealth from encouraging the jury to find for the plaintiff on the question of liability for punitive damages.¹⁶⁷ Second, even if the jury is allowed to hear financial condition evidence, the defendant may be able to exclude some of the evidence. He can then appeal, arguing that the punitive damages award cannot stand. The defendant could cite the necessity of evaluating the award in light of his ability to pay and then point to the trial record. If the defendant was reasonably successful in excluding some financial evidence, the record may be deemed insufficient for informed appellate review. The appellate court would be forced to set aside the verdict, and the defendant would escape an arguably deserved punishment because of procedural requirements. Thus, the defendant clearly has a strong incentive to concentrate his efforts to exclude financial evidence, which ultimately frustrates the *Adams* objective of informed appellate review.¹⁶⁸

The *Adams* decision also offers strategic opportunities for the plaintiff. If the trial court closely adheres to *Adams*, the protective nature of Civil Code section 3295 may well be ignored. Thus, the *Adams* decision encourages a plaintiff to take advantage of potential discovery opportunities. The trial court may deny defendant's motions for protective orders and allow the plaintiff increased access to the defendant's financial material, justifying this with the *Adams* ruling that this information is imperative for an informed assessment of punitive damages.

165. *Adams*, 813 P.2d at 1358-59.

166. § 3295(d); see *supra* note 117 for the text of this section.

167. See *Adams*, 813 P.2d at 1358-59 (noting that prejudice is likely when the jury decides liability for punitive damages at the same time it determines the amount). Civil Code § 3295(d) allows the jury to determine whether to impose punitive damages and the amount at the same time. See *supra* note 117 for the text of this section.

168. *Adams*, 813 P.2d at 1351.

Moreover, it is also possible that the trial court will unintentionally moderate the plaintiff's required preliminary showing, making it easier for the plaintiff to demonstrate a likelihood of prevailing on his punitive damages claim. It is unlikely that the court would expressly lower the substantial probability standard required for access to defendant's financial affairs.¹⁶⁹ However, the trial court generally wishes to avoid having the appellate court remand due to a less than complete record. The trial court, therefore, may grant greater deference in evaluating the probability that plaintiff will prevail on the punitive damages award. If this threshold is lowered, even unintentionally, plaintiff's resulting access to defendant's financial matters assures the trial court that the record will be sufficient. The problem is that plaintiffs with otherwise questionable capacity to prevail on their punitive damages claims would be able to obtain substantial discovery of defendant's financial circumstances. Not only is this a waste of time, it is also an unnecessary invasion of the defendant's privacy.

Adams states that "[u]nlike the defendant, the plaintiff faces no risk" in introducing evidence of the defendant's wealth.¹⁷⁰ Although he may face no risk, the plaintiff should not be given the opportunity to squeeze a large award out of the jury by flaunting the defendant's wealth. The purpose of punitive damages is not to *remedy* the plaintiff with huge punitive damages awards. However, the *Adams* decision creates precisely this risk. By demanding that the plaintiff present defendant's financial circumstances, *Adams* gives "a green light [to] plaintiffs to get in and muck around with all kinds of private financial information that [is] none of their business."¹⁷¹

Plaintiffs will seek to introduce evidence of defendants' financial condition, not only to preserve a trial record, but also as a trial strategy.¹⁷² One trial attorney stated in his book about punitive damages techniques that "it . . . helps immensely with the jury to show the income and wealth of the defendant."¹⁷³ The reality is that a plaintiff will likely present evidence that suggests to the jury that the defendant can withstand a large punitive damages award. Control of

169. § 3295(c); see *supra* note 116 for the text of this section.

170. *Adams*, 813 P.2d at 1359.

171. *Court Takes Hit at Punitives*, NAT'L L. J., Sept. 2, 1991, at 1, 37.

172. RILEY, *supra* note 6, § 9.11, at 98 (1981)); see *Adams*, 813 P.2d at 1359. Riley directs plaintiff's counsel to discover defendant's wealth, suggesting that counsel both investigate a corporate defendant with investor services, and review advertising campaigns. RILEY, *supra* note 6, § 9.13 - .14, at 100-01.

173. RILEY, *supra* note 6, § 9.11, at 98.

the presentation of this evidence by the plaintiff can lead to a manipulation in order to gain a greater punitive damages award. This practice, though perhaps widespread,¹⁷⁴ is contrary to the policy of punitive damages, which the California courts have reiterated is a public one.¹⁷⁵ Attempting to gain a larger award for the sake of a larger award violates the punishment and deterrence rationale of punitive damages. Allowing such attempts tends toward permitting punitive damages to remedy the plaintiff, which is not the purpose of these types of damages.¹⁷⁶

The alternative is to require the defendant to produce evidence of his own financial position. The *Adams* court argues that this is unfair in light of the realities of trial practice because it forces the defendant to "bid against himself."¹⁷⁷ The court, however, exaggerates the defendant's plight. The defendant is not likely to remain silent about his financial position while the plaintiff presents financial evidence that the defendant believes is ambiguous. Nor will the defendant remain silent while plaintiff presents evidence that is skewed to make the defendant appear excessively wealthy. In practice, the plaintiff will take advantage of every opportunity to increase the amount of punitive damages. The defendant is going to rebut evidence perceived as promoting larger punitive damages awards. Thus, having the defendant produce financial evidence is no more burdensome for the defendant than routinely countering the plaintiff's case.

It is not unfair for the defendant to bear the responsibility for placing financial evidence in the trial record. First, as the court recognized in *Vossler*, defendants can skillfully present mitigating evidence in other trial contexts such as refuting liability.¹⁷⁸ There is no reason to treat the punitive damages situation differently. Second, given the expense of conducting a trial, creating a record for potential appellate review should be conducted efficiently. The defendant is uniquely situated to present his own financial circumstances. By definition, the defendant has the information required by *Adams*. It is extremely inefficient to compel the plaintiff to request and obtain

174. *Id.* at 101-02. "Plaintiff's counsel has everything to gain and nothing to lose by utilizing the rule that permits (and if the verdict is high) compels introduction of the defendant's wealth." *Id.*

175. See *supra* parts II.B.1, II.C.

176. See *supra* part II.B.1 for a discussion of the purpose of punitive damages in California.

177. *Adams*, 813 P.2d at 1358.

178. See *supra* text accompanying notes 100-103.

permission, conduct discovery, and then present the results while the defendant is opposing each request. The defendant could simply present the evidence himself, which would avoid the waste of time and resources that occurs when the plaintiff is filing motions and conducting discovery mid-trial.

Although it does not address the issue of efficiency, the *Adams* majority attempts to justify its decision by arguing that the roles of the plaintiff and defendant are in keeping with the legislative intent regarding burden of proof. Traditionally, the plaintiff bears the burden of proving the elements of his cause of action. He is required to prove the defendant's liability for punitive damages by the California standard. He must show by clear and convincing evidence that the defendant is guilty of fraud, oppression or malice.¹⁷⁹ However, evidence of the defendant's financial condition is not an *element* of a cause of action for punitive damages.¹⁸⁰

The *Adams* court stated that its decision was based on fundamental fairness and policy.¹⁸¹ However, if these are the important considerations, the *Adams* decision is backwards. To preserve the statutory protection in place for defendants, to be fair to plaintiffs, and to remain true to the purpose of punitive damages, the plaintiff should not be required to prove the defendant's wealth. This information would be better presented and proven by the defendant. Since the function of punitive damages is a public one, benefiting society by deterring harmful conduct,¹⁸² it is unfair for the plaintiff to shoulder the entire burden of ensuring that purpose is served, particularly since the information is specifically within the control of the defendant. Fairness and efficiency demonstrate this responsibility is properly placed on the defendant. Plaintiff's position is not harmed, as he will have the same ability to determine whether the defendant's statements of financial situation are accurate as he has under the current Civil Code. Furthermore, plaintiff will be relieved of the burden of proving an issue that is not an element of his claim for punitive damages.¹⁸³

179. CAL. CIV. CODE § 3294 (West Supp. 1993).

180. *See id.*

181. *Adams*, 813 P.2d at 1357.

182. *See supra* part II.B.1 for a discussion of the purpose of punitive damages in California.

183. *See* CAL. CIV. CODE § 3294 (West Supp. 1993). For the text of this section, see *supra* text accompanying note 48.

IV. PROPOSAL

A. *Reconsideration of Burdens of Production and Proof*

This comment proposes that the legislature consider the practical impact of the *Adams* decision. It is possible to achieve the *Adams* court's goal of meaningful appellate review and yet remain true to the purpose and policy of punitive damages in California. The legislature should focus on the defendant as the source for financial condition evidence. This will not frustrate the legislative intent to protect defendants since the defendant is more in control of what, when, and how this information is disclosed. Therefore, the privacy concerns of the defendant receive greater deference without forfeiting the placement of evidence in the trial record. Meaningful appellate review can be achieved by utilizing the party with the best access to the required information. The current Civil Code procedures can prevent the defendant from abusing the system by withholding or selectively presenting financial information because the plaintiff may use the available discovery procedures as a check on the defendant's presentation of evidence.¹⁸⁴

B. *Amendment of Civil Code Section 3295(d)*

Protecting the defendant from discovery abuse is a significant aspect of the California punitive damages scheme.¹⁸⁵ Also, the fairness of placing the burden on defendant to prove his financial condition is an important factor in *Adams*.¹⁸⁶ Accordingly, the Civil Code should be amended to return to this protective policy in the wake of the *Adams* decision. It is also important to respond to the court's contention that fairness requires the plaintiff to present evidence of the defendant's financial condition.¹⁸⁷ The *Adams* court stressed the importance of bifurcating issues to prevent prejudice, concluding that there was "a serious risk of prejudice to the defendant . . . if the defendant is required to prove his own finances."¹⁸⁸ This comment proposes that the risk for the defendant, if any, due to presenting evidence of his own wealth can be reduced drastically if not eliminated. As discussed above, current Civil Code section 3295(d) allows the defendant, upon application to the court, to bifurcate the trial

184. See *supra* part II.F for a discussion of the discovery procedures in a punitive damages case.

185. See *supra* part II.F.2.

186. *Adams*, 813 P.2d at 1357, 1358-60.

187. *Id.* at 1357; see *supra* text accompanying notes 147-49.

188. *Id.* at 1358-59.

between the issues of (1) liability for compensatory damages and (2) whether punitive damages should be imposed.¹⁸⁹ To alleviate prejudice in the second part of the trial, this comment proposes additional bifurcation of the trial. Bifurcating the trial once again will result in a trifurcation: a three-phase trial. The jury will first decide the defendant's liability for compensatory damages and whether he acted with oppression, malice or fraud. The jury next would consider whether punitive damages should be imposed. If the jury decides to impose such damages, it will determine the amount in the third stage, where the financial evidence will be admitted for the first time. This is simply an extension of the policy supporting Civil Code section 3295(d) that allows the defendant to separate liability from compensatory issues.

One potential criticism of the "trifurcation" proposal is the increased time and expense of a three-phased trial. However, if the jury concludes punitive damages will not be assessed, there will be no need to expend time and resources presenting financial evidence. If punitive damages are imposed, the defendant is better able to proceed with evidence of his financial condition than is the plaintiff. If the plaintiff were required to present the evidence, he would likely need to conduct discovery mid-trial to obtain access to information which was restricted earlier in the trial.

The defendant might request a continuance to prepare his presentation of the evidence. However, this is probably less time consuming than the plaintiff conducting discovery at mid-trial. A continuance for the defendant would require much less time because the financial information is already at the defendant's disposal. With the defendant producing the evidence, the plaintiff will be in the same position that he is under Civil Code section 3295. He may subpoena witnesses and documents for availability at trial, and can use this evidence as provided in Civil Code section 3294. He may use it to present arguments about the defendant's financial status but without any burden of proof. The plaintiff may still cross-examine the defendant in order to temper the defendant's version of his financial status, but there is less opportunity to abuse the purpose of punitive damages. The plaintiff will be unable to use the financial condition evidence to increase the punitive damages award by implying in the presentation that the defendant is extremely wealthy and hoping the jury will adopt a "rich defendants can afford it" attitude.

189. CAL. CIV. CODE § 3295(d) (West Supp. 1993); see *supra* note 117 for the text of this section.

As amended, Civil Code section 3295(d) should read:

(d) The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. *The court shall, on application of any defendant, further preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff that punitive damages will be awarded.* Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.¹⁹⁰

C. *Revision of California Jury Instructions*

Allowing the defendant to trifurcate the trial under the proposed Civil Code section 3295(d) necessitates jury instructions for the new second and third phases of the trial. In phase two of the trial, the jury will decide whether punitive damages are to be imposed. A proposed jury instruction follows:

BAJI 14.72.2

PUNITIVE DAMAGES - ASSESSMENT (TRIFURCATED TRIAL - SECOND PHASE)

You must now determine whether you should award punitive damages against defendant[s] [_____ only] for the sake of example and by way of punishment. Whether punitive damages should be imposed is left to your sound discretion, exercised without passion or prejudice.¹⁹¹

Once the jury has determined that punitive damages will be imposed, it will then decide the amount of the award. Separating the issue of *whether* to impose punitive damages from the question of *amount* prevents the jury from considering defendant's wealth in deciding whether it will award punitive damages at all.

Furthermore, this comment proposes a jury instruction regard-

190. The proposed amendments are indicated by italics.

191. This is simply a modification of the current jury instructions. See CALIFORNIA JURY INSTRUCTIONS CIVIL, *supra* note 45, BAJI 14.72.2 (1989 Re-Revision).

ing the purpose of punitive damages. This instruction warns that the presentation of financial condition evidence is not to be interpreted as an admission of liability when assessing the amount of the award. The jury should be aware that the defendant is required by law to present the evidence and that the fact of his presentation has no bearing on the amount of punitive damages awarded. A proposed jury instruction for the third phase follows:

**PUNITIVE DAMAGES - MEASUREMENT
(TRIFURCATED TRIAL - THIRD PHASE)**

You have determined that punitive damages should be awarded against defendant[s] [_____ only] for the sake of example and by way of punishment. BAJI 14.72.3

You must now determine the amount of punitive damages to be awarded. The amount of the award is left to your sound discretion, exercised without passion or prejudice.

In arriving at the amount of the punitive damages award, you must consider:

(1) The reprehensibility of the conduct of the defendant.

(2) The amount of punitive damages which will have a deterrent effect in light of the defendant's financial condition.

[(3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff.]¹⁹²

You have heard evidence of the defendant's financial condition. Defendant is required by law to present this evidence. The fact of presentation has no bearing on the amount of the award. The fact of defendant's presentation is not to be considered an admission of liability or a suggestion that any particular amount of punitive damages should or should not be awarded.

The purpose of the last paragraph is to guard against prejudice by preventing the jury from concluding the defendant simply is trying to "weasel out" of the award. This reduces the possibility that the jury will increase its award out of anger or annoyance with the presentation itself. Also, it prevents the jury from awarding large punitive damages simply because the defendant is wealthy.

V. CONCLUSION

The ultimate goal of providing evidence for the reviewing court

192. The use note for current California BAJI 14.72.2 indicates that the bracketed paragraph must be given if requested by the defendant. See CALIFORNIA JURY INSTRUCTIONS CIVIL, *supra* note 45, BAJI 14.72.2 (1989 Re-Revision).

to make a "reasonably informed decision"¹⁹³ regarding a punitive damages award can be achieved without increasing the plaintiff's burdens or sacrificing the legislative policy of protection for the defendant's financial circumstances. In his dissent, Justice Mosk criticized the *Adams* majority for "indulg[ing] in judicial legislating."¹⁹⁴ If the *Adams* decision reflects judicial legislating, the court either should have finished the job or deferred to the legislature. By requiring financial condition evidence without making corresponding changes in current civil procedure, the court creates contradictory and confusing punitive damages procedures. By compelling the plaintiff to prove the defendant's wealth, the court may actually be limiting the kind and quality of evidence placed in the trial record. This ultimately frustrates the objective of informed appellate review. If protecting the defendant from excessive punitive damages awards is to be accomplished by meaningful appellate review, it is the legislature's responsibility to incorporate procedures such as those discussed in this comment.

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193. *Adams*, 813 P.2d at 1352.

194. *Id.* at 1365 (Mosk, J., dissenting).

