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IMPOSING PUNITIVE DAMAGE LIABILITY ON THE INTOXICATED DRIVER

by

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I. INTRODUCTION

DRIVING WHILE UNDER the influence of intoxicants is, without question, a universally condemned practice. The spokesmen for the "if you drink, don't drive" message include not only such anti-drunk driving advocates as the Mothers against Drunk Driving (MADD), Students against Drunk Driving (SADD), and the Physicians against Drunk Driving (PADD),[1] but also the makers of Seagrams and Bacardi liquors and the liquor industry association, Distilled Spirits Council of the U.S. (DISCUS).[2]

The reasons for the unanimity are obvious. Study after study, has established a direct correlation between driving while intoxicated and the occurrence of traffic accidents with their resultant property damage, personal injury and death to both the drinking driver and others.[3]

In response to this problem, various solutions have been proposed and implemented. Most commonly, these solutions involve modification of law enforcement techniques in order to facilitate the apprehension of drinking drivers, increasingly severe criminal sanctions imposed against those who have been convicted, and public education programs.[4] In addition, however, a growing number of courts are permitting the recovery of punitive or exemplary damages in civil actions brought against the intoxicated driver. It is this expansion of civil liability with which this article deals.

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[1]For a partial listing of anti-drunk driving organizations, see N.Y. Times, Aug. 9, 1983, at A 12. *See also, How to Save Lives and Reduce Injuries: A Citizen's Guide to Effectively Fight Drunk Driving*, DEPARTMENT OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, APPENDIX A (Nov. 1982).

[2]Gay Jervey, *Spirit Marketers Get Word: 'Tis the Time for Caution*, Advertising Age, December 26, 1983, at 3.

[3]*See, e.g. Presidential Commission on Drunk Driving, Final Report* (Nov. 1983); *Alcohol and Highway Safety: A Review of the State of Knowledge — Summary Volume*, Department of Transportation, National Highway Traffic Safety Administration (1978).

[4]N.Y. Times, Feb. 6, 1984, at A 17; *See also Presidential Commission on Drunk Driving, Final Report* (Nov. 1983) whose recommendations include: programs to increase public awareness of both the danger of injury and apprehension; increased training of police and prosecutors; use of roadblocks; elimination of plea bargaining; mandatory sentencing; and so on.

It is important to keep in mind throughout this discussion that awareness and acknowledgement of the existence of a problem, even a very serious problem, should not make us overreact and thereby accept an unworkable solution in our zeal to do *something.* The imposition of punitive damages is, for the most part, just such an unworkable solution. More specifically, I will attempt to demonstrate that, with the possible exception of the case of the recidivist, non-alcoholic defendant, the imposition of punitive damages simply cannot be justified. That being the case, we must look elsewhere for a solution to an admittedly severe problem.

Section II will analyze the case law pertaining to the imposition of punitive damages for unintentional torts generally and for drunk driving specifically. Section III will discuss the various rationales commonly asserted for the imposition of punitive damages. Section VI will examine some of the major objections to and problems created by the imposition of punitive damage liability against the intoxicated driver, and section V will propose a standard.

II. An Analysis of the Cases

Anyone who attempts to read or analyze the cases involving the imposition of punitive damages in the unintentional conduct cases will immediately realize that little understanding is to be gained by focusing on the court's description of the defendant's conduct itself. Undeniably, there exists a class of conduct that is too extreme to be simply called negligence, but which, because of the tortfeasor's state of mind, does not rise to the level of intent required to establish assault or battery. Such conduct has, at various times, by various judicial bodies, been called wanton, reckless, willful, wrongful, unlawful, grossly negligent, outrageous, culpable, heedless, distinctly antisocial, showing a conscious and deliberate disregard for the interests of others, and justification for the belief of reckless indifference to the welfare of others, and so on.[5]

Frequently, judges seem to despair of finding any single descriptive word or phrase and attempt to string the adjectives together in order to adequately articulate a standard and express their outrage, e.g. "wanton, reckless, and grossly negligent,"[6] or "gross, wilful, and wanton negligence" satisfying the

[5]*See, e.g.* Ross v. Clark, 35 Ariz. 60, 274 P. 639 (1929) ("gross, wanton and culpable"); Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948) ("distinctly antisocial"); Hall v. Young, 218 Ark. 348, 236 S.W.2d 431 (1951) ("gross negligence"); Vogler v. O'Neal, 226 Ark. 1007, 295 S.W.2d 629 (1956) ("reckless and wanton"); Gombos v. Ashe, 158 Cal. App.2d 517,322 P.2d 933 (1958) (holding that allegations that the defendant's conduct was wilful, wrongful, reckless, and unlawful, did not charge malice, express or implied); Taylor v. Superior Court, 24 Cal.3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (disapproved Gombos v. Ashe, 158 Cal. App. 2d 517, 322 P.2d 933 (1958), and held that a "conscious and deliberate disregard of the interests of others may be called wilful or wanton."); Colligan v. Fera, 76 Misc.2d 22, 349 N.Y.S.2d 306 (1973) ("morally culpable"); Focht v. Rabada, 217 Pa.Super. 35 (1970) ("reckless indifference").

See also Dobbs, Handbook of the Law of Remedies 205 (1973) (noting that "[a]ll of these words refer to the same underlying state of mind. . . ."); Note, *The Drunken Driver and Punitive Damages: A Survey of the Case Law and the Feasibility of a Punitive Damage Award in North Dakota,* 59 N.D.L. Rev. 413, 419 (1983) (noting the variety of terms used). *See infra* note 14 and accompanying text.

[6]Sebastian v. Wood, 246 Iowa 94, 103, 66 N.W.2d 841, 846 (1954).

"morally culpable" test.[7]

Occasionally, a court will attempt to assign some rank to the different adjectives. Thus, in *Hinson v. Dawson*[8] the court explained that "'reckless' and 'heedless' would seem to import an uncertain degree of negligence somewhat short of "wantonness." Thus, while reckless conduct would not justify the award of punitive damages, wanton conduct would if, that is, the wantonness involved conduct which was "in conscious and intentional disregard of and indifference to the rights and safety of others."[9]

The other attempted distinction often utilized is that between malice in fact and malice in law.[10] The former includes those cases where the defendant's conduct is such that the trier of fact may infer that he actually harbored feelings of spite or ill will toward the plaintiff[11] or at least toward someone.[12] The latter cases are those where the defendant engaged in the type of behavior to which we just referred, i.e., extremes of behavior which will almost inevitably injure someone, probably sooner than later.[13]

Utilizing the wide variation of language employed by the courts will apparently lead to no clarification. Therefore, for our purposes here, it is sufficient to characterize conduct as "negligent," "extreme," or "intentional."[14]

Negligence is a concept with which all legally trained persons are sufficiently familiar to obviate the need for further definition.[15] "Intentional" as used here refers to the state of mind where there is an actual subjective intent

[7]Colligan v. Fera, 76 Misc. 22, 25, 349 N.Y.S.2d 306, 309-10 (1973).

[8]244 N.C. 23, 28, 92 S.E.2d 393, 396 (1956).

[9]*Id.* at 28, 92 S.E.2d at 397. *See also* Brake v. Harper, 8 N.C.App. 327, 329, 174 S.E.2d 74, 76 (1970), in which the North Carolina appellate court interpreted *Hinson* as allowing punitive damages in cases of wanton conduct, but said that "wantonness connotes intentional wrongdoing."

[10]*See generally*, 22 AM. JUR. 2d *Damages* § 250 (1975).

[11]*See* Childers v. San Jose Mercury Printing and Publishing Co., 105 Cal. 284, 288, 38 P. 903, 904 (1894) defining malice in fact as "a spiteful or rancorous disposition which causes an act to be done for mischief."

[12]*See, e.g.*, Chesapeake & O. Ry. Co. v. Robinett, 151 Ky. 778, 152 S.W. 976 (1913) (defendant's conductor assaulted plaintiff's father and in the course of the assault pushed him against the plaintiff. Under such circumstances, the plaintiff could recover punitive damages.)

[13]*See* Childers v. San Jose Mercury Printing and Publishing Co., 105 Cal. 284, 288, 38 P. 903, 904 (1894), defining malice in law as "a wrongful act done intentionally, without just cause or excuse." *But see* Seimon v. Southern Pacific Transp. Co., 67 Cal. App. 3d 600, 607-9, 136 Cal. Rptr. 787, 791-92 (1977) for the proposition that defendant's conduct was such to permit the jury to find that "defendant displayed a conscious and callous indifference to, or disregard of probable harm to motorists . . ." and that such "conscious disregard" was an "appropriate description of the *animus malus* requisite to an award of punitive damages." That is, "extreme conduct" is considered malice in fact rather than malice in law.

[14]*See also*, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 34-37 (1982) noting that "Terms such as 'wilful,' 'wanton,' 'conscious indifference,' 'reckless disregard,' and 'recklessness' are overlapping and to a substantial extent redundant. Accordingly, they will be referred to collectively as the recklessness group." *Compare* Comment, *Punitive Damages and the Drunken Driver*, 8 PEPPERDINE L. REV. 117, 126 (1980) [hereinafter cited as *Comment*] that asserts that "While jurisdictions differ in their preference 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 a question of punitive damages may be submitted to a jury."

[15]*See*, RESTATEMENT (SECOND) OF TORTS. § 908, comment b (1979).

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to injure.[16] "Extreme" will refer to that fuzzy middle area.

When one attempts to classify driving while intoxicated, problems arise. Generally, the defendant intended to drink (though not necessarily to excess) and intended to drive. The chances are, however, that he at no point intended to cause injury to anything or anyone. When he does cause injury, should the courts classify his conduct as negligent, extreme, or intentional?

It is submitted that the question cannot be answered without both examining the drinking behavior and the driving behavior. If the defendant is, for example, an alcoholic and has an inability or difficulty in controlling his drinking behavior, this fact bears directly on the degree of culpability to be assigned. If, on the other hand, the defendant has voluntarily consumed the intoxicant but the consumption did not result in any extreme driving behavior, it seems to be questionable policy to treat his behavior as anything more than negligence.

The characterization of the defendant's behavior is, of course, crucial to courts in determining whether it is of a sufficiently culpable quality to justify the imposition of punitive damages.

There is a distinct split in judicial opinion as to the availability of punitive damages in the drunk driving case.[17] First, let us consider those decisions which refuse to impose punitive damages. The approaches taken by the courts fall into essentially three categories. First, there are those cases where the intoxicated defendant's driving is not sufficiently extreme to distinguish it from that of any other negligent driver. In *Baker v. Marcus,*[18] for example, the parties were involved in a typical low speed, rear end collision. There was no question that the accident was caused by the defendant's inattention. Furthermore, the

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[16]*See, e.g.* Friedman v. Jordan 166 Va. 65, 184 S.E. 186 (1936) (Plaintiff and defendant had been having a disagreement over the existence of a debt. The defendant saw the plaintiff ride past on a bicycle. Defendant chased plaintiff in his car and, after running him over, went through his pockets looking for money. The court held punitive damages were appropriate.)

[17]A majority of jurisdictions that have considered the issue have permitted the imposition of punitive damages. *See, e.g.* Fritz v. Salva, 406 So.2d 884 (Ala. 1981); Ross v. Clark, 35 Ariz. 60, 274 P. 639 (1929); Miller v. Blanton, 213 Ark. 246, 210 S.W.2d. 293 (1948); Taylor v. Superior Court, 24 Cal.3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979); Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980); Infeld v. Sullivan, 151 Conn. 506, 199 A.2d 693 (1964); Walczak v. Healy, 280 A.2d 728 (Del. Super. Ct. 1971); Busser v. Sabatasso, 143 So.2d 532 (Fla. App. 1962); Chitwood v. Stoner, 60 Ga.App. 599, 4 S.E.2d 605 (1939); Madison v. Wigel, 18 Ill.App.2d 564, 153 N.E.2d 90 (1958); Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954); Wigginton's Adm'r v. Rickert, 186 Ky. 650, 217 S.W. 933 (1920); Southland Broadcasting Co. v. Tracy, 210 Miss. 836, 50 So.2d 572 (1951); Smith v. Sayles, 637 S.W.2d 714 (Mo. Ct. App 1982); Allers v. Willis, 197 Mont. 499, 643 P.2d 592 (1982); Svejcara v. Whitman, 82 N.M. 739, 487 P.2d 167 (1971); Colligan v. Fera, 76 Misc.2d 22, 349 N.Y.S.2d 306 (1973); Payne v. Daley, 51 Ohio Misc. 65, 367 N.E.2d 75 (1977); Dorn v. Wilmarth, 254 Or. 236, 458 P.2d 942 (1969); Focht v. Rabada, 217 Pa. Super. 35, 268 A.2d 157 (1970); Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (1945); Higginbotham v. O'Keefe, 340 S.W.2d 350 (Tex. Civ. App. 1960).

Several jurisdictions have, however, declined to permit the imposition of punitive damages. *See* Gesslein v. Britton, 175 Kan. 661, 266 P.2d 263 (1954); Giddings v. Zellan, 160 F.2d 585 (D.C. Cir. 1947) (applying Maryland law); Brake v. Harper, 8 N.C. App. 327, 174 S.E.2d 74 (1970); Ruther v. Tyra, 207 Okla. 112, 247 P.2d 964 (1952); Eubank v. Spencer, 203 Va. 923, 128 S.E.2d 299 (1962).

[18]201 Va. 905, 114 S.E.2d 617 (1960).

evidence showed that the defendant had been drinking.[19] The court, on these facts, declined to permit the imposition of punitive damages. It acknowledged that "[o]ne who knowingly drives his automobile on the highway under the influence of intoxicants . . . is, of course, negligent . . . ," and further acknowledged that evidence of intoxication was admissible to prove this negligence. Nevertheless, the court concluded that absent ". . . proof of one or more of the elements necessary to justify an award of punitive damages, [evidence of intoxication] may not be used to enlarge an award of damages beyond that which will fairly compensate the plaintiff . . ."[20] What the *Baker* court has done is to focus on the defendant's physical conduct, rather than on her state of mind.

Second, there are cases that, while also refusing to impose punitive damages, reach this result by focusing on the defendant's state of mind. They conclude that an intoxicated driver's state of mind is not sufficiently culpable to justify the imposition of punitive damages. Thus, for example, prior to 1979, California took the position that driving while intoxicated was not a malicious act and, therefore, the conduct involved was not sufficient to support a cause of action for punitive damages. In *Gombos v. Ashe*[21] the court held that "[o]ne who becomes intoxicated, knowing that he intends to drive his automobile on the highway, is of course negligent, and perhaps grossly negligent. It is a reckless and wrongful and illegal thing to do. But it is not a malicious act."[22]

Underlying the courts' decisions in both *Baker* and *Gombos* seems to be what is essentially a fairness/unjust enrichment notion. That is, in *Baker,* it would have been unfair to treat the defendant any differently than hundreds of other momentarily inattentive drivers and, at the same time, it would be inappropriate to permit the plaintiff to recover more than fair compensation for her injuries. This argument is somewhat less plausible in a case decided on a *Gombos* type rationale given the fact that by focusing on state of mind, greater extremes of driving behavior may be encompassed. Nevertheless, there is still a sense that it would be unfair to punish the defendant absent a sufficiently culpable state of mind. This idea is coupled with the notion that the defendant should not be rewarded, but only compensated.

The third category of cases denying punitive damages include those where the courts focus on the policies underlying the award of punitive damages,

[19] *Id.* at 907, 114 S.E.2d at 619. The *Baker* court explained that the defendant "testified that an hour before the accident . . . she had taken two drinks of vodka . . . . [T]he police, after a conference with respect to her intoxication, [had come] to the conclusion that it seemed to be a 'borderline case' and they charged her in a warrant with reckless driving only." *Id.*

When cases are presented where the defendant is inattentive or otherwise careless and also intoxicated, we frequently make the understandable but unjustifiable assumption that the intoxication was the "cause" of the inattention. Since we know that alcohol and certain other drugs impair judgment, slow reaction speed, etc., the assumption appears to be "proved." However, inasmuch as we know that inattention or carelessness while driving occurs frequently in the absence of alcohol use, all we can really say is that it can be demonstrated that statistically there is a higher probability that carelessness will occur if there has been alcohol use. In a particular case of garden variety carelessness, true causation is generally unprovable.

[20] Baker v. Marcus, 201 Va. at 910, 114 S.E.2d at 621.

[21] 158 Cal.App.2d 517, 322 P.2d 933 (1958).

[22] *Id.* at 527, 322 P.2d at 940.

rather than on the particular quality of the defendant's act or state of mind. When a court's analysis leads to the conclusion that the purported purposes of punitive damages would not be achieved, the damages are not allowed. This category includes both the cases where punitive damages are not permitted in the unintentional conduct cases as well as the cases where punitive damages are not permitted under any circumstances.

Thus, for example, in *Davis v. Gordon*[23] a Maryland court held that "[t]he rules of the road are far more effective than any inflammatory verdicts in making our streets and highways safe for travel. The fear of arrest is more of a deterrent than a verdict in a civil case for damages."[24] Additionally, the judicial decisions of at least three states do not recognize the availability of punitive damages even for intentional conduct.[25]

The decisions which permit the imposition of punitive damages fall into one of two categories.[26] Some courts permit the imposition of punitive damages in a *Baker* type case. That is, evidence of intoxication is, by itself, sufficient to justify the award. In *Taylor v. Superior Court*,[27] for example, the plaintiff's complaint alleged that the defendant Stille was "an alcoholic" with a "history" of driving while under the influence and that he was "aware of the dangerousness of his driving while intoxicated."[28]

> The Complaint further alleged that Stille had previously caused a serious automobile accident while driving under the influence of alcohol; that he had been arrested and convicted for drunken driving on numerous prior occasions; that at the time of the accident herein, Stille had recently completed a period of probation which followed a drunk driving conviction;

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[23]183 Md. 129, 36 A.2d 699 (1944).

[24]*Id.* at 133, 36 A.2d at 701. *See infra* note 57 and accompanying text.

[25]These states are New Hampshire, Nebraska, and Washington. *See*, Fay v. Parker, 53 N.H. 342 (1872); Vratsenes v. N.H. Auto Inc., 112 N.H. 71, 289 A.2d 66 (1972); Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (1975); Maki v. Aluminum Bldg. Prods., 73 Wash. 2d 23, 436 P.2d 186 (1968). New Hampshire and Washington permit penalty damages where expressly provided for by statute (*see, e.g.* N.H. REV. STAT. ANN. § 265:89-a (1982) permitting double damages against the recidivist drunk driver); Nebraska has held such statutory provisions to violate due process under the state constitution. See Abel v. Conover, 170 Neb. 926, 932, 104 N.W.2d 684, 689-90 (1960).

Connecticut limits punitive damages to the amount of actual litigation expenses minus taxable costs. See Triangle Sheet Metal Works Inc. v. Silver, 154 Conn. 116, 222 A.2d 220 (1966). Massachusetts limits recovery of punitive damages to cases where expressly authorized by statute. *See* Boott Mills v. Boston & Me. R.R. Co, 218 Mass. 582, 589, 106 N.E. 680, 683-84 (1914).

[26]For a similar analysis of the cases imposing punitive damages see Note, *The Drunken Driver and Punitive Damages: A Survey of the Case Law and the Feasibility of a Punitive Damage Award in North Dakota, supra*, note 5, at 422. *See also* cases collected at Annot., 65 A.L.R.3d 658.

[27]24 Cal.3d 890, 157 Cal.Rptr. 693, 598 P.2d 854 (1979).

[28]*Id.* at 894, 598 P.2d at 855, 157 Cal.Rptr. at 695.

that one of his probation conditions was that he refrain from driving for at least six hours after consuming any alcoholic beverage; and that at the time of the accident in question he was presently facing an additional drunk driving charge.[29]

Given these allegations, the court could have simply held that the plaintiff's complaint alleged facts which would, in sum, justify the award of punitive damages if proven at trial. The court did not so rule, however, choosing instead to allow a cause of action to be stated for punitive damages whenever a defendant who is under the influence of intoxicants causes an accident.[30]

The second group of cases which allow punitive damages are those where the focus is not solely on the issue of intoxication. These decisions view intoxication as one of the factors which can be considered in establishing sufficiently culpable conduct to justify the award, but require the totality of evidence to be sufficient to prove state of mind. For example, in *Sebastian v. Wood*[31] there was no question that the defendant was intoxicated at the time of the accident giving rise to the litigation. However, the court considered this factor together with the evidence that for nine miles prior to the accident the defendant had been repeatedly crossing the center line and had narrowly avoided another accident before hitting the plaintiff head on.[32]

In other words, these jurisdictions permit the imposition of punitive damages upon a showing of some form of "extreme" conduct. Alcohol usage is only one of the factors to be considered, and it is entirely possible that punitive damages will be awarded even though the defendant was not intoxicated.[33]

While there is clearly a distinction which can be made between the basis for decision in the *Taylor* type of case, on one hand, and the *Sebastian* type of case on the other, it should be noted that, as a practical matter the difference is probably not terribly significant, at least at the trial level. While obviously many factors can influence the jury's verdict, once it hears evidence of the defendant's intoxication, it would be no easy task for trial counsel to convince them that punitive damages would be inappropriate.[34]

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[29] *Id.*

[30] *Id.* at 898, 598 P.2d at 857, 157 Cal.Rptr. at 697. The court stated, "One who wilfully consumes alcoholic beverages to the point of intoxication, knowing he must thereafter operate a motor vehicle . . . reasonably may be held to exhibit a conscious disregard for the safety of others." *Id.*

[31] 246 Iowa 94, 66 N.W.2d 841 (1954).

[32] *Id.* at 106, 66 N.W.2d 848.

[33] *See, e.g.* Shirley v. Shirley, 261 Ala. 100, 73 So.2d 77 (1954) (driving at sundown on a curving road at speeds between 75 and 100 miles per hour supported an award of punitive damages); Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293, Annot. 3 A.L.R.2d 203 (1948) (evidence of intoxication coupled with driving on the wrong side of the road over a blind hill); Wigginton's Adm'r v. Rickert, 186 Ky. 650, 217 S.W. 933 (1920) (evidence of intoxication, but excessive speed alone would have justified a finding of extreme misconduct and hence punitive damages); See cases collected at Annot., 62 A.L.R. 2d 813.

[34] *See infra* p. 45 for a discussion of the prejudicial effect of evidence of intoxication.

Thus, it should be clear that several questions must be addressed. At the threshold is the question of whether or not the imposition of punitive damages serves any function when considered in the context of the case of the intoxicated driver. Assuming that there is some purpose to be served, should courts be willing to allow punitive damages simply upon proof of the defendant's voluntary intoxication or should intoxication be simply one of the factors to be considered in determining whether to classify the defendant's conduct as extreme? The following sections will address these issues.

III. POLICIES UNDERLYING PUNITIVE DAMAGES

All writers seeking to analyze the circumstances under which punitive damages may be awarded recognize at least three justifications for their imposition. These are: retribution; general deterrence; and special deterrence.[35] In addition, however, a number of lesser justifications or objectives have been mentioned. These include awarding punitive damages as a means of preserving the peace;[36] as a "bounty" offered to induce private law enforcement;[37] as a means of compensating the injured party for damages for which he would be otherwise uncompensated;[38] and to pay the injured party's costs and attorney's fees.[39] The three primary justifications merit serious consideration. The remainder shall be disposed of somewhat summarily.

A. *Some Weak Arguments*

The preservation of the peace idea was one of the original bases for the imposition of punitive damages in civil actions. For example, in *Merest v. Harvey,*[40] Justice Heath observed:

I remember a case where the jury gave £ 500 damages for merely knock-

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[35]*See, e.g.* DOBBS, *supra* note 5, at 205. J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW & PRACTICE, §§ 2.01-2.13; C. MCCORMICK, Handbook of the LAW OF DAMAGES 275-77 (1935); K. REDDEN, PUNITIVE DAMAGES 28-31 (1980); Ellis, *supra* note 14, at 3; Note, *The Drunken Driver and Punitive Damages: A Survey of the Case Law and Feasibility of a Punitive Damage Award in North Dakota, supra* note 5, at 413-17; Comment, *supra* note 14 at 123.

[36]*See,* REDDEN, *supra* note 35, at 33; ELLIS, *supra* note 14, at 3; and Comment, *supra* note 14, at 129.

[37]*See,* DOBBS, *supra* note 5, at 205 ("The punitive award is thus seen as a bounty, or as compensation as a kind of 'private attorney general.'"); MCCORMICK, *supra* note 35, at 277; GHIARDI & KIRCHER, *supra* note 35, at § 2.02; ELLIS, *supra* note 14, at 3; and Comment, *supra* note 14, at 129.

[38]*See,* DOBBS, *supra* note 5, at 205; MCCORMICK, *supra* note 35, at 276; REDDEN, *supra* note 35, at 28; Ellis, *supra* note 14, at 3; and Comment, *supra* note 14, at 123.

[39]*See,* GHIARDI AND KIRCHER, *supra* note 35, at § 2.11; MCCORMICK, *supra* note 35, at 277; REDDEN, *supra* note 35, at 33; Ellis, *supra* note 14, at 3; and Comment, *supra* note 14, at 129-30.

For authority utilizing essentially the same classifications as will be used here, see Ellis, *supra,* note 14, at 3. There is a substantial overlap within the categories mentioned above. For example, Professor Redden writes of the "revenge" justification, but also notes that permitting the victim to seek revenge would go to "prevent duelling." Thus, the "retribution" category would overlap to include both punishment and preservation of the peace. *See,* REDDEN, *supra,* note 35, at 31. Similarly, Professor McCormick refers to punitive damages as a means of giving the jurors a way to vent their indignation over the defendant's conduct. Such a reason involves both retribution and preservation of the peace.

[40]5 Taunt. 442, 128 Eng. Rep. 761 (1814).

ing a man's hat off; and the Court refused a new trial. There was not one country gentleman in a hundred, who would have behaved with a laudable and dignified coolness which this Plaintiff did. It goes to prevent the practice of duelling if juries are permitted to punish insults by exemplary damages.[41]

Although it seems unlikely that the peace keeping idea would be terribly effective today even in the intentional tort case, its present application in drunk driving cases seems even less credible. Thus, if a person strikes another in the face with a glove (saying whatever people say under such circumstances) we may want to claim that the battered person is less likely to challenge the other to a duel if he has the alternate remedy of suing for punitive damages. If, however, one gets drunk and dents another's fender, the idea of a duel in lieu of punitive damages is ludicrous.

The idea of private law enforcement, at least in the context of the intoxicated driver,[42] is somewhat more troublesome. It begins with the questionable assumption that prosecutors are exercising discretion so as to not prosecute drunk drivers in "minor" accident cases. The argument then continues:

> Punitive damages . . . 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.[43]

This argument presents a number of problems. First, it is necessary to consider why the prosecutor has chosen not to prosecute. If he feels that he has a weak case (perhaps a marginal blood alcohol level) and cannot prove guilt beyond a reasonable doubt, do we really want to punish this individual?[44]

Inherent in the foregoing is the issue of the appropriate standard of burden of proof needed to obtain "quasi-criminal" punitive damages in the civil action. Something of an anomaly is presented in this regard. Although some attorneys have argued that the trier of fact should not be able to find the requisite state of mind based on a mere preponderance, courts have generally re-

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[41] *Id.* at 444, 128 Eng.Rep. at 761.

[42] The private law enforcement claim is arguably somewhat more plausible in other contexts. *See, e.g.*, DOBBS, *supra* note 35, at 221. Professor Dobbs supports the "bounty" concept in the case of non-violent serious crimes such as treble damages under 15 U.S.C. § 15 for anti-trust violations. *See also* MCCORMICK, *supra* note 35, at 276. Professor McCormick argued that ". . . the principal advantage [of punitive damages] is that [they] bring punishment to a type of case of oppressive conduct . . . which are theoretically punishable, but which in actual practice go unnoticed by prosecutors occupied with more serious crimes." MCCORMICK, *supra* note 35, at 276. Driving while intoxicated is, of course, routinely prosecuted and, therefore the argument is not applicable in this context.

[43] Comment, *supra*, note 14, at 129.

[44] *See, e.g., Baker v. Marcus; See supra* notes 18 and 19 and accompanying text.

jected such arguments.[45]

The second possibility is that the prosecutor has chosen not to prosecute because his resources are limited, and other cases are judged to be more pressing. The problem with the private law enforcement argument is that it overlooks the fact that our prosecutor's problem of too many cases and not enough judges is really a sign of the times and is not restricted to the criminal courts.[46] Given the increase in the number of civil law suits filed with resulting overcrowded calendars, do we really want to encourage civil litigation over "innocuous results?"[47]

The "compensation for the otherwise uncompensated" argument must also fail. This argument refers to the idea that the law may not recognize certain interests as being compensable. To remedy this, punative damages are awarded instead. Actually, these are not "punitive damages" at all, but rather mislabeled compensatory damages. For example, in *Loeblich v. Garnier*[48] the jury had awarded a small amount of punitive damages for "mental anguish, humiliation, and embarrassment" which results from a trespass to land, notwithstanding the fact that at the time the case was argued, the applicable law was thought to limit recovery in that type of case to actual property loss resulting from the trespass.[49]

There does not appear to be any support among the commentators for this particular justification of punitive damage liability.[50] Obviously, if compensatory damages are inadequate, then our attention should be focused on a revision of the law of compensatory damages. Otherwise, we would face the anomaly of two plaintiffs with identical injuries only one of whom is fully compensated because of his "good" fortune that the defendant was drunk. The entire discussion here is premised on the idea that, to the extent that compensatory damages can do so, the plaintiff has been made whole. If additional payment is to be made it must necessarily have some legitimate function other than compensation to justify its existence.

The foregoing argument encompasses the "compensation for costs and at-

[45]*See,* Liodas v. Sahadi, 19 Cal.3d 278, 291, 562 P.2d 316, 323-24, 137 Cal. Rptr. 635, 642-43 (1977) rejecting even a "clear and convincing evidence" compromise between the "beyond a reasonable doubt" and "preponderance of the evidence" disparity. *But see,* Mince v. Butters, 200 Colo. 501, 504, 616 P.2d 127, 129 (1980) holding that under the applicable Colorado statute ". . . plaintiff must establish a claim for punitive damages beyond a reasonable doubt."

[46]*See generally* Ryan, Lipetz, Luskin and Neubauer, *Analyzing Court Delay — Reduction Programs: Why do some Succeed,* 65 JUDICATURE 58 (Aug. 1981).

[47]The matter is even worse than indicated. It must be noted that in all probability, because of the greater number of issues presented, it will take significantly longer to try the civil punitive damage case than the criminal drunk driving case arising out of the same fender bender.

[48]113 So.2d 95 (La. App. 1959).

[49]*Id.* at 102.

[50]*See, e.g.* DOBBS, *supra* note 35, at 205 (noting that this is not a punitive damage theory at all); MCCORMICK, *supra* note 35 at 276 (suggesting ". . . it is basically unsound to award this amount which the defendant is condemned to pay as punishment to the plaintiff who has already been made whole by the actual damages."); Ellis, *supra* note 14, at 10-11.

torney's fees" argument as well.[51] Costs and attorney's fees are recoverable where authorized by appropriate legislation. If they are to be recoverable, suitable legislation would be easy enough to draft. However, there is no logical reason why availability should be dependent upon the inebriation of the defendant.

B. *Retribution*

The retributive theory, in its purest form, has been stated as follows:

> It is an end-in-itself that the guilty should suffer pain . . . The primary justification of punishment is always to be found in the fact that an offense has been committed which deserves punishment, not in any future advantage to be gained by its infliction whether for society or for the offender as an individual.[52]

Inherent in such a formulation is the notion that it is morally appropriate that one who does wrong should receive punishment. Additionally, this punishment should be directly proportional to the offense itself.[53] While courts in punitive damage cases frequently speak in terms of "retribution," even a casual reading of the cases makes it clear that they are not truly speaking of retributive theory.[54] When mentioned at all, the retribution theory is discussed in terms of "deterrence."[55]

It is important to note that in actual practice the imposition of punitive damages does not fit into the retributive theory's formulation. That is to say, punitive damages do not satisfy the requirements of the definition of retribution. The most obvious failure in this regard is in the measurement of the damages themselves. As noted, the retribution theory requires that the amount of punishment be a function of the nature and degree of the culpability of the defendant's acts. In the case of punitive damages, although the quality of the act determines the applicability of the punishment, the amount is in practice a function of the defendant's wealth rather than a function of the degree of

[51] *See,* GHIARDI & KIRCHER, *supra* note 35, at § 2.12 ("If the present system of awarding costs to the successful party in civil litigation is to be faulted because the amount awarded is grossly inadequate, it would appear much more proper to attack the problem directly."); DOBBS, *supra* note 5, at 221 (noting that the "impetus for punitive damages would diminish were a new and effective scheme to be adopted for the financing of reasonable litigation.").

[52] A. EWING, THE MORALITY OF PUNISHMENT 13 (1929).

[53] *Id.* at 14-15.

[54] *See, however,* Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment* 56 S. CAL. L. REV. 133, 143-44 (1982), where the author concludes:

> The deterrence theory . . . badly fails the descriptive test: there is almost nothing in the common law of punitive damages that it clarifies, and there are central features in the law that it contradicts. I therefore propose that we be willing to take 'punitive' damages at face value — that is, as primarily designed to punish.

[55] *See, e.g.,* Gostkowski v. Roman Catholic Church of the Sacred Heart, 262 N.Y. 320, 324-25, 186 N.E. 798, 800 (1933) in which the court stated:

> Who so disturbs a dead body merely to suit his own convenience does so at his own risk. He may do a wrong for which he should be punished. He knows what he is doing. If he is wilful and malicious in his wrongdoing he should be punished to deter others from acting likewise.

culpability.[56]

Furthermore, even if we accept retribution as a desirable or at least permissible function of the legal system, the retribution rationale raises at least one major policy question and a host of related problems. The major policy question was alluded to in connection with the "private enforcement" argument. Should punishment for conduct which is in all jurisdictions a criminal offense be left to the criminal courts? Only a few courts have taken this view. In *Giddings v. Zellan*[57] the court applied the law of Maryland in reversing a judgment for the plaintiff. In so doing, it observed that the existing Maryland statute made it a criminal offense to drive while under the influence and concluded that the criminal law was a more appropriate sanction.[58]

The writers who have considered the question have generally done so on two bases. The first is whether the conduct which forms the justification for the punitive damage award is in fact routinely punished by the criminal justice system (as opposed to conduct which though technically a crime is rarely prosecuted).[59] The second involves an objection to the apparent existence of a double jeopardy problem. Thus, for example, one writer concluded

> Although it seems unjustifiable to permit punitive damages to supplement criminal punishment where the criminal law in fact operates to regulate the undesirable conduct, punitive damages seem to be a useful substitute for criminal law in areas where criminal punishment is inappropriate. In some cases the utility of punitive damages appears to require their imposition while the principles of double jeopardy appear to forbid their imposition. It is difficult to reconcile the demands of utility with the traditional guarantees of double jeopardy.[60]

The double jeopardy problem is one which has disturbed writers much more than it has disturbed the courts. Most courts that have considered the issue have disposed of the problem by finding that the word "jeopardy" applied only to cases that were purely criminal prosecutions.[61] Thus recovery of punitive damages is not precluded by the fact that the defendant has been or may be criminally punished for the same misconduct.[62]

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[56]*See infra* pp. 46-47 for a discussion of prejudicial effect of introducing evidence of wealth.

[57]160 F.2d 585 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 759 (1947).

[58]*See* Davis v. Gordon, 183 Md. 129, 133, 36 A.2d 699, 701 (1944). *See supra* note 23 and accompanying text.

[59]*See supra* note 42.

[60]Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1184 (1966).

[61]*See, e.g.* Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 813, 174 Cal.Rptr. 348, 383 (1981) stating, "The argument that [punitive damage liability] . . . violates the constitutional prohibition against double jeopardy is . . . fallacious. This prohibition is applicable only to criminal prosecutions."

[62]*See* Shelley v. Clark, 267 Ala. 621, 103 So.2d 743 (1958); Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948); Wilson v. Middleton, 2 Cal. 54 (1852); Courvoisier v. Raymond, 23 Colo. 113, 47 P. 284 (1896); Jefferson v. Adams, 4 Del. 321 (1845); King v. Nixon, 207 F.2d 41 (D.C. Cir. 1953); Smith v. Bagwell, 19 Fla. 117 (1882); Hauser v. Griffith, 102 Iowa 215, 71 N.W. 223 (1897); Wiley v. Man-A-to-wah, 6 Kan. 111

The minority view was expressed by the court in *Fay v. Parker*:[63]

> If exemplary, vindictive, or punitory damages are ever recoverable, we are clearly of the opinion that they cannot be recovered in an action for an injury which is also punishable by indictment, as libel and assault and battery. If they could, the defendant might be punished twice for the same act. (citations) . . . In very corrupt or flagitious wrongs, if a criminal prosecution lies for the public offense, I do not see much justification for what are called vindictive damages there, or smart money in a civil suit, as the criminal one covers them.[64]

Finally, a rather curious view seems to have prevailed in Indiana. Initially, the court adopted the view "that a provision of the statute allowing exemplary damages . . . violates a fundamental principle embodied in the Bill of Rights that no person shall be put in jeopardy twice for the same offense."[65] Thereafter, various exceptions were carved out of this rule. As things currently stand punitive damages are allowed in a civil action provided that the statute of limitations has run as to any criminal prosecution arising out of the same conduct.[66] Additionally, a corporation can be held for punitive damages since it cannot be criminally prosecuted for acts of its agents.[67] Finally, "conduct indicating a heedless disregard of the consequences will support an award of punitive damages."[68] It would thus appear that if the defendant intentionally runs someone down with his automobile and is criminally prosecuted, the victim cannot recover punitive damages. If, however, the injury is caused by conduct amounting to Indiana's variation of "extreme" conduct (which is short of intentional conduct), punitive damages are available.[69]

A closely related problem is whether the trier of fact in the civil case may consider the fact that the defendant had been previously criminally punished

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(1870); Doerhoefer v. Shewmaker, 123 Ky. 646, 97 S.W. 7 (1906); Johnson v. Smith, 64 Me. 553 (1875); Elliot v. Van Buren, 33 Mich. 49 (1875); Boetcher v. Staples, 27 Minn. 308, 7 N.W. 263 (1880); Wagner v. Gibbs, 80 Miss. 53, 31 So. 434 (1902); Corwin v. Walton, 18 Mo. 71 (1853); Blackmore v. Ellis, 70 N.J.L. 264, 57 A. 1047 (1904); Cook v. Ellis, 6 Hill (N.Y.) 466 (1844); Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911); Roberts v. Mason, 10 Ohio St. 277 (1859); Roshak v. Leathers, 277 Or. 207, 560 P.2d 275 (1977); Wirsing v. Smith, 222 Pa. 8, 70 A. 906 (1908); Rowe v. Moses, 43 S.C.L. 423 (1856); Flanagan v. Womack, 54 Tex. 45 (1880); Gray v. Janicki, 118 Vt. 49, 99 A.2d 707 (1953); Brown v. Swineford, 44 Wis. 282 (1878).

[63]53 N.H. 342 (1872).

[64]*Id.* at 372.

[65]Koerner v. Oberly, 56 Ind. 284 (1877).

[66]Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966); True Temper Corp. v. Moore, 157 Ind.App. 142, 299 N.E.2d 844 (1973).

[67]Indiana Bleaching Co. v. McMillan, 64 Ind.App. 268, 113 N.E. 1019 (1916); Baltimore & O.S.W.R. Co. v. Davis, 44 Ind.App. 375, 89 N.E. 403 (1909).

[68]Nicholson's Mobile Homes Sales Inc. v. Schramm, 164 Ind.App. 598, 606, 330 N.E.2d 785, 791. *See also* True Temper Corp. v. Moore, 157 Ind. App. 142, 299 N.E.2d 844 (1973), Capital Dodge Inc. v. Haley, 154 Ind.App. 1, 288 N.E.2d 766 (1972).

[69]*See* Thompson v. Pickle, 136 Ind.App. 139, 145, 191 N.E.2d 53, 56 (1963) holding that intoxication, excessive speed and erratic driving supported a finding of wanton misconduct. The court did not, however, consider a punitive damage issue.

as mitigation. Generally, the answer is that they cannot.[70] However, there is a contrary but minority view. Thus in *Browand v. Scott Lumber Co.*[71] the court stated:

> Since evidence of a defendant's wealth is admissible to enable the jury to determine what amount of punishment should be imposed . . . it would appear equally proper to consider, as obviously the jury here did, what other punishment the defendant McFairen had received for the same act and in the exercise of its discretion to conclude that his conviction and fine in the justice's court was sufficient punishment for him . . .[72]

One other factor which must be taken into consideration is the effect of double punishment on the efficient administration of the judicial system. Arguably, the availability of punitive damages for drunk driving may have certain undesirable effects on the goal of efficient administration of the criminal law by requiring more "driving while intoxicated" cases to be tried rather than be disposed of pleas. Assume that an individual is facing charges of driving while intoxicated as the result of an injury accident. Can his counsel advise him to enter a guilty plea? If the jurisdiction allows punitive damages the answer is probably no. The guilty plea would certainly be an admission which could be used in the subsequent civil proceeding.[73] If the driving under the influence offense is charged as a misdemeanor, many courts would hold a conviction not admissible in the subsequent civil matter.[74]

The obvious solution to this problem is to enter a plea of *nolo contendere* (assuming no good defense) which would not be an admission. In fact, this is the very reason for the existence of the *nolo* plea.[75] However, a no contest plea is not open to the accused in all jurisdictions.[76] Even in those jurisdictions

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[70]*See* Irby v. Wilde, 155 Ala. 388, 46 So. 454 (1908) (defendant not entitled to introduce criminal judgment of conviction in civil case as mitigation); Redden v. Gates, 52 Iowa 210, 2 N.W. 1079 (1879) (no error for refusing to instruct the jury that a fine could be considered in mitigation); Gray v. Janicki, 118 Vt. 49, 99 A.2d 709 (1953) (criminal fine immaterial on question of punitive damages).

[71]125 Cal.App. 2d 68, 269 P.2d 891 (1954).

[72]*Id.* at 74-75, 269 P.2d at 896. *Accord,* Sanders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911).

[73]*See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 265, 635-36 (2d ed. 1972). While it is true that the same argument applies to compensatory damages, in those jurisdictions where a public policy prohibits insuring against punitive damages the defendant's personal assets are exposed and therefore there would be less inclination to plead guilty.

[74]*See* Bolen v. Buyze, 16 Mich.App. 252, 167 N.W.2d 808 (1969) (conviction for reckless driving held inadmissible in civil personal injury action); Loughner v. Schmelzer, 421 Pa. 283, 218 A.2d 768 (1966) (conviction for failure to drive on right side of the road held inadmissible in civil personal injury action even though a felony conviction would be admissible). The MODEL CODE OF EVIDENCE Rule 521 provides for admissibility of any judgment finding a person guilty of a crime or misdemeanor.

[75]*See* United States v. Pannell, 178 F.2d 98, 100 (3rd Cir. 1949) explaining that the no contest plea was retained by the criminal procedure rules. FED. R. CRIM. P. 11.

[76]Holding a *nolo contendre* plea not available to accused see May v. Lingo, 277 Ala. 92, 167 So.2d 267 (1964); In Re Eaton, 14 Ill.2d 388, 152 N.E.2d 850 (1958); Mahoney v. State, 197 Ind. 335, 149 N.E. 444 (1925); Federal Deposit Ins. Corp. v. Cloonan, 165 Kan. 68, 193 P.2d 656 (1948); State v. Keiwel, 166 Minn.

which do recognize it, it is held not to be available to the accused in all criminal prosecutions. It is allowable only on leave and acceptance by the court, and the court has rather broad discretion in this regard.[77] It must also be noted that some courts will not accept a *nolo* plea in a mandatory imprisonment case[78] which is an increasingly more common punishment for driving while intoxicated.[79]

In any event, for purposes of the discussion here it is not really necessary to resolve the grand debate over the propriety of retribution as a function of the legal system. Assuming that retribution is an acceptable goal, it seems self evident that achievement of this goal should be left to the criminal law. To allow punitive damages for the purpose of revenge in the civil action as well as the criminal action is both conceptually redundant and practically inefficient.

C. *Deterrence*

What commonly comes under the general label "deterrence," is really two separate concepts.[80] The first concept involves preventing persons other than the tortfeasor from committing similar offenses by holding the punished defendant up to the general public as an example (general deterrence). The second involves the idea of preventing the particular tortfeasor from repeating his tortious conduct (special deterrence).

The deterrence rationale has an essentially utilitarian basis. The exponents of the utilitarian theory of punishment argue that punishment is evil in itself and therefore is justified only if it serves to prevent some greater evil. As a corollary to this argument is the idea that the proper amount of punishment is the minimal amount which will achieve the socially useful goal.[81]

Thus, for example, as previously noted, the amount of punitive damages which will be awarded in a particular case is generally directly proportional to the defendant's wealth. The minimal amount of punishment necessary to achieve the desired deterrence must necessarily be greater in the case of the

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302, 207 N.W. 646 (1926); State v. Norman, 380 S.W.2d 406 (Mo. 1964); People v. Daiboch, 265 N.Y. 125, 191 N.E. 859 (1934); Laughlin v. Lamar, 205 Okla 372, 237 P.2d 1015 (1951).

[77]Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal.App.2d 476, 139 P.2d 681 (1943); State v. Pometti, 12 N.J. 446, 97 A.2d 399 (1953); State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956); Commonwealth v. Shrope, 264 Pa. 246, 107 A. 729 (1919); United States v. Faucette, 223 F. Supp. 199 (S.D. N.Y. 1963); United States v. Jones, 119 F. Supp. 288 (S.D. Cal. 1954).

[78]*See, e.g.*, Williams v. State, 130 Miss. 827, 94 So. 882 (1922); Roach v. Commonwealth, 157 Va. 954, 162 S.E. So. (1932); *See generally* 21 AM. JUR. 2d *Criminal Law*, § 493 (1975).

[79]*See, e.g.*, CAL. VEH. CODE § 23160(a) (West Supp. 1984) (effective 1-1-82) (mandatory 96 hour imprisonment for first time offenders); OHIO REV. CODE ANN. § 4511.99(A) (3-16-83) (mandatory 72 hour imprisonment for first time offenders).

[80]Some writers also included the idea of preventing the victim or those acting on his behalf from seeking vengeance or committing other similar acts which constitute a breach of the peace under the general label of "deterrence." For example, see Ellis *supra*, note 14, at 8. *See supra* note 39 and accompanying text.

[81]J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1823).

rich defendant than in the case of the poor defendant.[82]

The notion that establishing a rule authorizing punitive damages in the drunk driving case will deter persons other than the defendant from drinking and driving is one of the most often repeated rationales and in some ways is one of the most disturbing. Frequent repetition of the idea has, in some quarters, raised it to the level of self evident truth, a position which one suspects it simply does not deserve. Before attempting to point out the major weakness in this rationale, it is instructive to examine a fairly typical example of the judicial opinion following the "self evident truth" mold.

Opinions frequently begin with a recitation of the grim statistics and, without explanation or apology, go on to conclude that punitive damages should be recoverable. For example, in *Taylor v. Superior Court,*[83] after noting that "traffic accidents are the greatest cause of violent death in the United States" and that "[o]ne third of the injuries and one half of the deaths are alcohol related,"[84] the court continued:

> [T]he fact of common knowledge that the drinking driver is the cause of so many of the more serious automobile accidents is strong evidence in itself to support the need for *all possible means of deterring* persons from driving automobiles after drinking, including the exposure to awards of punitive damages in the event of accidents.[85]

The weakness here is that the argument itself assumes that the availability of punitive damages is, in fact, a "means of deterring persons from driving after drinking . . ." without ever attempting to prove the proposition. Many of the writers who have taken the time to analyze the problem have concluded that the deterrent effect is either nonexistent[86] or unprovable.[87] The following is an example of the "unprovable" claim:

> 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 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

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[82] *See infra* pp. 46-47 for discussion of the prejudicial effect of offering evidence of the defendant's wealth.

[83] 24 Cal.3d 890, 598 P.2d 854, 157 Cal.Rptr. 693 (1979).

[84] *Id.* at 898, 598 P.2d at 858, 157 Cal. Rptr. at 698.

[85] *Id.* at 897. 598 P.2d at 857, 157 Cal. Rptr. at 697.

[86] *See,* Schwartz, *supra* note 54, at 133; *see also infra* note 89.

[87] Comment, *supra* note 14, at 117.

proof will fail.[88]

Note first that the foregoing assumes that there is, in fact, a "large . . . portion of the population" which is deterred. Such a claim has not been established. Furthermore, even if there is a potentially large group of persons who might react as suggested, it does not foreclose the issue.

Any discussion of whether a specific sanction will deter one from a course of conduct rests on the assumption that he who is to be deterred is aware of the existence of the sanction. In other words, if the risk of punitive damages is expected to dissuade the general public from drinking and driving then it is to be assumed that the general public knows what punitive damages are, and knows that such a penalty can be imposed on them should they drink and drive. While virtually everyone knows that driving under the influence is a criminal offense, it is unlikely that, outside the members of the bench and bar, many people know what punitive damages are, let alone whether they are available in a civil suit resulting from damage caused by the intoxicated driver.[89]

The public's lack of awareness of the nature or availability of punitive damages should not be confused with popular misconceptions regarding the consequences of drinking, driving and causing an accident. That is to say, the layman might well state that it is his belief that if he drinks and drives and causes an accident the injured party will "sue him for every penny he has." Loosely speaking, this may well be true if punitive damages are available. However, the existence of the belief does not depend on the underlying reality. Whatever deterrence there may be is a result of the mythology surrounding lawsuits and would not be affected by unpublicized judicial opinion on the subject.

While the foregoing is not, of course, a valid objection to the theoretical concept of punitive damages as a deterrent to the drinking driver, it would seem to dispose of any claim that punitive damages have the practical effect of reducing highway accidents and fatalities. That is, even if we assume *arguendo* that the sanction of punitive damages can serve as a general deterrent, it is not so serving at the present time.

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[88] *Id.* at 128-129 n. 66.

[89] *See also* REDDEN, *supra* note 35, at § 7.6(B), 628. The author concluded that the deterrence rationale:

> [I]s strictly a fiction. Few persons have any knowledge and understanding of what punitive damages are, yet they are quite aware of criminal sanctions against acts for which they could also be held liable in punitive damages. . . . The vague public policy of granting punitive damages because of a deterrent effect is not supported by any empirical facts."

This lack of awareness among the general public is the key factor which distinguishes the arguable deterrent effect of punitive damages in the drunk driving case from the potential deterrent effect in, for example, the products liability action. The class of persons whose conduct the law seeks to influence in the latter case is more likely to possess the legal awareness or sophistication to realize that a knowing distribution of a defective product may have enormous adverse economic consequences. Certainly, all major corporate manufacturers would have this awareness. In contrast, a few persons may realize that punitive damages are available in the drunk driving case, however, they would make up no more than a small fraction of the total class.

The claim that punitive damages are an appropriate device to deter the recidivist offender, however, bears close attention. While the general public is unaware of the availability of punitive damages, the recidivist has by his conduct already enmeshed himself in the criminal or civil justice system. Under such circumstances, it would not be difficult to advise him personally that he risks subjecting himself to potentially severe economic consequences should he drink and drive again.[90]

There is, however, the specter of the alcoholic haunting the proceedings. Would the compulsive drinker be deterred by the knowledge that punitive damages would be available in the future? Most authorities hold the opinion that he would not.

> Alcoholism has been recognized as a disease which does on many occasions, respond to knowledgeable treatment. It does not usually respond to heavy fines, limited suspension of the license, financial responsibility regulations, jail terms, or platitudinous statements that "if you drink, don't drive." We must develop mechanisms for identifying which drivers who are convicted of drunk driving, or are involved in an accident, are social drinkers who might respond to usual motivational techniques. And we must know which ones have serious problems with alcohol and need simultaneous referral to the driver licensing agency for an open-ended revocation pending improvement and to other agencies for medical and social therapy.[91]

However, for the non-compulsive drinker, the option may well be viable if not overwhelmed by conflicting considerations. That is, it would seem that many of the objections to the concept of a general deterrent value of punitive damages fail in this situation, at least if the defendant was advised at the time of the first conviction or adverse judgment that punitive damages would thereafter be available. Thus, imposition of punitive damages on this one relatively small group may constitute an effective measure.

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[90]At least one writer has taken the position that the criminal law is a more effective sanction in this situation also. *See*, Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1173-74 (1966). The author states:

> No matter how mild the criminal sanction, the possibility of confinement or the stigma of a criminal record are greater deterrents to wrongful conduct than the mere imposition of monetary sanctions. Criminal penalties should constitute a sufficient general deterrent for wrongful conduct; moreover, criminal law serves as a more effective special deterrent. The memory of the harsher penalty will be more vivid. The violator will also know that his criminal record will affect his sentence in future criminal actions.

However, one state legislature seems to have recognized that the recidivist may be an appropriate exception to a general rule against the imposition of punitive damages. In 1982, New Hampshire, one of the few states that had refused to recognize punitive damages under any circumstances, enacted N.H. REV. STAT. ANN. § 265:89-a (1982). This section provides in part as follows

> A defendant in a civil case arising from an accident which resulted in the defendant's conviction [of driving while intoxicated], where such conviction was the second or subsequent conviction for that offense in a 7 year period, shall be liable for double the amount of damages awarded.

Id.

[91]Waller, *Alcohol Ingestion, Alcoholism and Traffic Accidents, The Legal Issues in Alcoholism and Alcohol Usage*, B.U.L.-MED. INST. 79-80 (1965).

IV. OTHER OBJECTIONS

The imposition of punitive damages, however, creates certain problems even when their availability is limited to the case against the recidivist, non-alcoholic offender. These problems can loosely be classified as those which affect the arguable potential for effective deterrence and those which create practical difficulties in providing the defendant with a fair trial. If the potential for effective deterrence is lost, it is submitted that there is no justification whatsoever for punitive damage liability against the drinking driver. Specifically, if the defendant can insure against the liability, abolition of this form of liability is in order.

On the other hand, the existence of practical problems in ensuring a fair trial does not necessarily mandate the abolition of punitive damage liability. The nature and extent of these difficulties should, however, be weighed and balanced against the utility of civil punishment.

A. *Effect of Third Party Liability Insurance*

There is a clear and fundamental split in the various jurisdictions on the issue of whether a tortfeasor can insure against punitive damage liability.[92]

Preliminarily, it should be noted that insurers have two related but distinct obligations to the insured under the standard automobile liability policy. There is both a defense obligation and an indemnity obligation. Generally speaking, there is no question that the insurer will defend the civil drunk driving case, and therefore that portion of the issue will be omitted.[93]

[92]For decisions holding that one cannot insure against punitive damage liability see City Prod. Corp. v. Globe Indem., 88 Cal.App. 3d 31, 151 Cal.Rptr. 494 (1979); Brown v. Western Casualty & Sur. Co., 484 P.2d 1252 (Colo. Ct. App. 1971); Tedesco v. Maryland Casualty Co., 127 Conn. 533, 18 A.2d 357 (1941); Perez v. Otero, 415 So.2d 101 (Fla. Distr. Ct. App. 1982); Beaver v. Country Mut. Ins. Co., 95 Ill.App.3d 1122, 420 N.E.2d 1058 (1981); Guar. Abstract & Title Co. v. Interstate Fire & Casualty Co., 228 Kan. 532, 618 P.2d 1195 (1980); Caspersen v. Webber, 298 Minn. 93, 213 N.W.2d 327 (1973); Crull v. Gleb, 382 S.W.2d 17 (Mo. Ct. App. 1964); City of Newark v. Hartford Accident & Indem. Co., 134 N.J. Super. 537, 342 A.2d 513 (1975); Hartford Accident & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 422 N.Y.S.2d 47, 397 N.E.2d 737 (1979); Esmond v. Liscio, 209 Pa.Super. 200, 224 A.2d 793 (1966).

For decisions holding that one can insure against punitive damage liability see American Fidelity & Cas. Co. v. Werfel, 230 Ala. 552, 162 So. 103 (1935); Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 502 P.2d 522 (1972); Southern Farm Bureau Casualty Ins. Co. v. Daniel, 246 Ark. 849, 440 S.W.2d 582 (1969); Abbie Uriguen Olds. Buick Inc. v. U.S. Fire Ins. Co., 95 Idaho 501, 511 P.2d 783 (1973); Cedar Rapids v. Northwestern Nat. Ins. Co., 304 N.W.2d 228 (Iowa 1981); Continental Ins. Cos. v. Hancock, 507 S.W.2d 146 (Ky. 1974); Concord Gen. Mut. Ins. Co. v. Hills, 345 F. Supp. 1090 (D. Me. 1972); Harrell v. Travelers Indem. Co., 279 Ore. 199, 567 P.2d 1013 (1977); Morrell v. LaLonde, 45 R.I. 112, 120 A. 435 (1923); Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965); Lazenby v. Universal Underwriters Ins. Co., 241 Tenn. 639, 383 S.W.2d 1 (1964); Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341 (Tex. Civ. App. 1972); State v. Glens Falls Ins. Co., 137 Vt. 313, 404 A.2d 101 (1979); Hensley v. Erie Ins. Co., 283 S.E.2d 227 (W. Va. 1981).

For a general analysis of the issue of insurability for punitive damages see GHIARDI & KIRCHER, *Punitive Damages Law & Practice, supra* note 35 at § 2.03; Young, *Insurability of Punitive Damages,* 62 MARQ. L. REV. 1 (1978); Note, *Insurance for Punitive Damages: A Reevaluation,* 28 HASTINGS L.J. 431 (1976). *See also* Comment supra note 14, at 117.

[93]*See, e.g.* Aetna Casualty & Sur. Co. v. Certain Underwriters at Lloyds of London, England, 56 Cal. App. 3d 791, 129 Cal. Rptr. 47, 55 (1976) ("The duty to defend . . . may be broader than the duty to indemnify."); Gray v. Zurich Ins. Co., 65 Cal.2d 263, 54 Cal.Rptr. 104 (1966) (holding that the insurer was obligated to de-

Regarding the indemnity obligation, we shall assume that the insurer is required to indemnify the insured for liability for the portion of a judgment assessing compensatory damages, although there is some room for argument about this point. The problem would arise if the policy contained the rather typical provision excluding coverage for losses intended by the insured.[94] Depending on how a court characterized what we have been calling "extreme" conduct, it is conceivable that the conduct would be considered to rise to the level of "intentional" conduct thereby precluding coverage. The dissent in *Taylor v. Superior Court* was concerned with precisely this issue. It stated:

> Under the traditional view, an award of punitive damages nullifies all insurance coverage. An insurer is not liable for loss intentionally caused by the insured, and any contract providing for liability is void as being against public policy [citations omitted]. When an insured commits an intentional injury, he cannot require his insurer to indemnify him for either punitive or compensatory damages paid under a judgment. [citations omitted] Because punitive damage is recoverable only for malicious or other intentional injury [Civ. Code, Sec. 3294], a punitive award traditionally exonerated the insurance company from coverage.[95]

The dissent then concluded that permitting the imposition of punitive damages would cause "the undesirable result that liability insurers will now avoid all coverage in such cases. While a few victims injured by wealthy drunk drivers will receive both compensatory and punitive damages, the many unfortunately injured by drivers without assets will be unable to recover even compensatory damages from insurers."[96] Given the fact that protection of the injured victim is one of the legitimate, important functions of liability insurance, it is obvious that we do not want to countenance a practice that would have the result predicted above. Fortunately, those courts that have ruled on the issue have not felt compelled to reach that result.

Typical of the reasoning courts generally follow in such cases is the Fourth Circuit opinion in *Pennsylvania T. & F. Mutual Casualty Insurance Co. v. Thornton.*[97] In that case, the court stated:

> Negligent conduct may be so gross as to merit characterization as willful and wanton in the sense of the rule for punitive damages, yet fall far short of an assault and battery which would distinguish it from an accidental event and withdraw it from the coverage of the policy.[98]

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fend an assault action notwithstanding policy language excluding coverage for "bodily injury or property damages caused intentionally by or at the direction of the insured."); See also, Comment, *The Insurer's Duty to Defend Under a Liability Insurance Policy* 114 U. PA. L. REV. 734 (1966).

[94]For example, the standard form "Family Combination Automobile Policy" provided by the Insurance Information Institute provides for a liability exclusion for "bodily injury or property damage caused intentionally by or at the direction of the insured."

[95]24 Cal.3d at 904, 157 Cal.Rptr. at 702, 598 P.2d at 862.

[96]24 Cal.3d at 905, 157 Cal.Rptr. at 702, 598 P.2d at 862-63.

[97]244 F.2d 823 (4th Cir. 1957).

[98]*Id.* at 827.

Under the *Thornton* type rationale, there is then coverage for the compensatory portion of the judgment, but what of the punitive portion?

In *Northwestern National Casualty Company v. McNulty*[99] the court reasoned that to permit insurability would destroy the deterrent value of punitive damages. The court stated:

> If [the defendant] were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.[100]
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> * * *
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> 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 regulation 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. . . . The delinquent driver must not be allowed to receive a windfall at the expense of the purchasers of insurance, transferring his responsibility for punitive damages to the very people — the driving public — to whom he is a menace.[101]

The opposite position was taken by the court in *Lazenby v. Universal Underwriters Insurance Co.*[102] The *Lazenby* decision is as interesting for what was not said as for what was. The court permitted insurance for punitive damages on the theory that to prohibit insurability would not deter such drivers from the wrongful conduct in view of the fact that there are large numbers of criminal sanctions attached to such behavior already and such sanctions have little deterrent effect.[103] In other words, it does not matter whether one can insure against punitive damages because they do not serve

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[99]307 F.2d 432 (5th Cir. 1962).

[100]*Id.* at 440-41.

[101]*Id.* at 441-42.

[102]241 Tenn. 639, 383 S.W.2d 1 (1964).

[103]*Id.* at 642, 383 S.W.2d at 5. The court specifically noted that "[t]his State, in regard to the proper operation of motor vehicles, has a great many detailed criminal sanctions, which apparently have not deterred this slaughter on our highways and streets. Then to say the closing of the insurance market, in the payment of punitive damages, would act to deter guilty drivers would in our opinion contain some element of speculation." *Id.*

their intended deterrent function anyway. It would appear that the court is making an argument against the wisdom of imposing punitive damages in this type of case, rather than making a case for insurability.[104]

Finally, it is necessary to look at the so-called "rate deterrent" argument. Illustrative of this concept is *Price v. Hartford Accident and Indemnity Company*.[105] Briefly, the case arose as follows: Gary Gardner was injured as a result of a drag race between 17 year old Charles Price and another boy. Gardner sued Price and the other driver on an extreme misconduct theory. He also named Price's mother as a defendant on theories of negligent entrustment, agency, and family purpose. He sought compensatory and punitive damages. Mrs. Price was the named insured under a Hartford policy with a $1 million liability limit. Hartford agreed to defend, but advised Mrs. Price that there was no coverage for any punitive damages which might be assessed. The Prices then filed an action for declaratory judgment against Hartford. On motion for summary judgment, the trial court ruled that Hartford owed neither defense nor indemnity obligations to the Prices with regard to the punitive damage portion of the claim. The basis of the trial court's ruling was that "public policy of the state of Arizona precludes coverage for [punitive] damages. . . ."[106] The Arizona appellate court agreed that there was no indemnity obligation but found a defense obligation. The Arizona Supreme Court held that there was both a defense and indemnity obligation as to the punitive damage portion of the claim.

The court specifically rejected the *McNulty* rationale on the basis of a rate deterrent theory. The court stated: "even though a driver is insured for punitive damages he cannot engage in wanton conduct with impunity. . . . Drag racing would subject him to criminal penalties. His insurance rates would soar."[107]

This reasoning is interesting though not persuasive. The key to the court's decision appears to be a rather ambiguous statement that "Hartford has voluntarily covered its insured's liability for punitive damages, and since its premiums were based on its exposure, it may be presumed that holding it liable for what it promised to pay would not result in additional burdens on the driving public."[108]

Apparently, the court believed that Hartford had based its premium struc-

[104] *See also*, Ellis, *supra* note 14, at 75. Professor Ellis also observes that in the case of Hartford Accident & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 228, 397 N.E.2d 737, 744, 422 N.Y.S.2d 47, 54 (1979), the court stated that the *Lazenby* type of argument "essentially address[es] not whether there should be coverage but whether there should be punitive damages at all." *Id.* at 228, 397 N.E.2d at 744, 422 N.Y.S.2d at 54.

[105] 108 Ariz. 485, 502 P.2d 522 (1972).

[106] *Id.* at 486, 502 P.2d at 523.

[107] *Id.* at 487, 502 P.2d at 524.

[108] *Id.*

ture on the assumption that it would have to cover punitive damages, and now, was not going to permit a windfall in the form of reduced coverage. This would be fair enough if it were not for the fact that, at least in theory, everyone's premiums should be less if the coverage is restricted.

Furthermore, the court assumes that the young drag racer is going to maintain $1 million in liability insurance regardless of the higher premium and would thereby be punished.[109] Also, under Arizona's assigned risk procedure, Price could have obtained a $15,000/30,000 policy at a rate which may well not have been truly indicative of the risk which he represented.[110] Perhaps even more importantly, in those states where insurance is not mandatory, he would simply drive without insurance.

Thus, the rate deterrent argument only works if the tortfeasor is required to insure and if state regulation does not prevent premiums from rising proportionately to the risk presented by the individual insured. Under assigned risk plans or in states not having mandatory liability insurance, the practical result of a *Price* type decision would simply be that there would be many people unable to afford insurance who would be driving either uninsured or underinsured. This is certainly not a result which the court intended. Nor is it a result which the court should inadvertently permit.

In reading *Price,* one suspects that the real basis for the decision was that the court did not believe that punitive damages were a deterrent at all. The court stated, "there is no evidence that those states which deny coverage have accomplished any appreciable effect on the slaughter on their highways."[111] If, as one suspects, this is the true basis of the *Price* decision, it seems more honest to confront the problem directly.

The other issue that should be mentioned in connection with insurance is that the possibility of attaining punitive damages creates a potential conflict of interest for the insurance defense counsel.[112] This may adversely affect his trial strategy.

To illustrate the trial strategy problem, assume the case where defense counsel is confronted with defending a typical rear end collision case where the defendant had a number of drinks shortly prior to the accident. Discovery reveals that the plaintiff had come to a complete stop at a red traffic signal and had been stopped for ten or fifteen seconds when the collision occurred.

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[109]*See,* GHIARDI & KIRCHER, *supra* note 35, at § 2.03, noting that "[t]he premium increase, if it actually occurs, may never equal in total the amount of money which would have been paid in a lump sum if punitive damages were not allowed to be covered by insurance."

[110]*Id.* The author noted that "[t]hose who are insured through an assigned risk plan have never paid premiums at levels which are commensurate with those which would be justified by the claims frequency and severity of the group." *Id.*

[111]108 Ariz. at 487, 502 P.2d at 524.

[112]*See generally,* Morris, *Conflicts of Interest in Defending Under Liability Insurance Policies: A Proposed Solution,* 1981 UTAH L. REV. 457.

Assume further that the plaintiff's injury consisted of purely subjective non-specific low back pain and that plaintiff's medical records reveal a ten year history of similar complaints. If the jurisdiction does not permit punitive damages, defense counsel could and should admit liability and simply try the issue of damages. By so doing, he could prevent the jury from hearing the evidence that his client had been drinking since such evidence would be irrelevant to the issues tendered (i.e., the nature and extent of the plaintiff's damage, if any). If, however, the particular jurisdiction permits punitive damages, defense counsel has no incentive to admit liability and, in fact, would be forced to vigorously defend on the issue of intoxication.

The potential for defense counsel to be caught in a conflict of interest arises because, as previously noted, the insurer's defense obligation probably extends to the entire case even though the indemnity obligation extends only to the compensatory portion.[113] If the case is going to be settled, the insured may have to contribute. In structuring a settlement, defense counsel is caught between the insurer (who is paying his fees and probably giving him other business) and his primary client, the insured. Each, of course, wants the other to contribute the settlement funds.

B. *Fairness Objections*

Several other issues arise and cannot be ignored. We begin with the fundamental notion that the defendant is entitled to a fair trial regardless of what his conduct is alleged to have been. Can he receive a fair trial under the circumstances which we are discussing here? There are several factors in the civil drunk driving case which either independently or in combination may preclude or at least reduce the possibility of a fair trial.

First there is the practical problem that the issue of the nature of the defendant's conduct may become the focal point of the trial overshadowing the fact that plaintiff's injuries were, in our previous hypothetical, minor or nonexistent. As every trial lawyer knows, certain cases have a "punitive" aspect to them even if punitive damages are not allowable; i.e., the conduct of the defendant is such as to prejudice a jury against him with resultingly exaggerated verdicts. As previously noted, defense counsel might have been able to avoid such prejudice by admitting liability and just trying the damage issue. This option is not available, as a practical matter, if punitive damages are recoverable however. Thus, it may well be that the prejudice to the defendant has become unavoidable.

In addition to the highly prejudicial effect of revealing to the jury that a defendant had been drinking, there is at least one other aspect of the proof of

[113] *See supra* note 93 and accompanying text.

punitive damages which may be so highly prejudicial to the defendant as to virtually eliminate any possibility of a fair trial.

Generally speaking, the amount of punitive damages to be assessed are within the discretion of the jury. There is no formula or standard means of fixing an amount.[114] Virtually all courts however, permit the jury to consider the wealth of the defendant in assessing an appropriate amount of punitive damages.

The reason for permitting evidence of wealth has been stated to be "entirely consistent with the notion that punitive damages have a deterrent affect. Therefore, the greater the personal wealth of the defendant, the greater the fine necessary to serve as a deterrent."[115]

It is readily apparent that the prejudicial nature of such evidence may, in certain cases, be overwhelming.[116] One writer observed:

> [It] is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function.[117]

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[114]Frequently courts will state that there should be some corrolation between compensatory and punitive damages. *See,* Note, *Punitive Damage and the Reasonable Relation Rule: A Study in Frustration of Purpose* 9 PAC. L.J. 823 (1978); *see also* Morris, *Punitive Damages in Tort Cases,* 44 HARV. L. REV. 1173, 1180 (1931) ("[T]his test is probably more often a rationalization of results than a means of obtaining them. The proper ratio between actual damages is placed at a figure which supports the judge's view of the verdict . . ." *Id.*).

[115]*See* Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 424 (Iowa 1977) ("The rationale employed in these decisions is that the jury needs to know the extent of the defendant's holdings in order to know how large an award of damages is necessary to make him smart." *See also Note: Evidence — Punitive Damages — Evidence of Defendant's Financial Condition is Admissible to Determine the Amount of Punitive Damages to be Awarded Against the Defendant. Hall v. Mntgomery (Iowa 1977),* 27 DRAKE L. REV. 584, 586 n. 18 (1977-78) which includes a comprehensive list of the cases in which defendant's wealth was a factor in assessing the amount of punitive damages; 2nd Freezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases* 78 U. PA. L. REV. 805 (1930).

[116]*See, e.g.,* Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 822, 174 Cal.Rptr. 348, 389-90 (1981) (in which the jury had returned a verdict which included a punitive damage award of $125 million.) It is interesting to note the inconsistent treatment that evidence of the parties' wealth receives from the courts. For example, in *Seimon v. Southern Pacific Transp. Co.* 67 Cal.App.3d 600, 605-06, 136 Cal.Rptr. 787, 790 (1977) the court chastised plaintiff's counsel for stating to the jury that "I represent the little guy." The court stated:

> It seems clear to us that plaintiff's counsel was deliberately trying to convey an image of himself and his client as financial underdogs, as 'little guys,' in a court battle against the 'big guy' railroad corporation. This was clearly improper. Justice is to be accorded to rich and poor alike, and deliberate attempts by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is not relevant to the issues of the case.

Nevertheless, that very case involved a punitive damage issue and, presumably, the wealth of Southern Pacific Transportation Company was put before the jury. *Id.*

[117]Morris, *supra* note 114, at 1191. *See also,* ELLIS, *supra* note 14, at 77, noting that allowing the jury to consider the defendant's wealth causes "[r]edistributional tendencies [to be] reinforced, biases countenanced, and disproportional punishments encouraged."

The question of comparative fault is a further issue which needs to be addressed. To illustrate the problem, let us imagine a typical right angle intersection controlled in all directions by stop signs. The plaintiff, a teetotaler approaches the intersection at the posted speed limit of thirty-five miles per hour. Unfortunately, he is thinking of what he plans to do that evening, or the day at the office or something other than his driving and therefore fails to observe either the stop sign or the defendant who is approaching the intersection at the same speed. The defendant is also inattentive. However, he has also consumed enough alcohol to be legally intoxicated. The two vehicles collide in the center of the intersection and both plaintiff and defendant sustain identical damages.

Were it not for the fact the defendant had been drinking, it is clear that we would expect a 50-50 liability split and a particular result depending on whether the jurisdiction has adopted comparative negligence and, if so, what form.

But, if the court focuses on the fact of the defendant's drinking rather than on the totality of his behavior, the possibility of an anomalous result exists. First, if the defendant's behavior is considered grounds for punitive damages (i.e., is considered some form of "extreme" behavior) and is thus somehow more than negligent, is the plaintiff's negligence a defense?[118] Second, in a jurisdiction similar to California a plaintiff can recover punitive damages against the defendant even though, for all intents and purposes, their conduct contributed equally to the happening of the accident.

IV. CONCLUSION

Having thus noted some objections to and the shortcomings of the civil punishment system, let us return to the basic question involved. Is there any place for the imposition of punitive damages for the unintentional tort and, if so, under what circumstances and with which limitations, qualifications and exceptions should they be imposed. To answer those questions let us again examine the possibilities established earlier. Courts could and some do, focus primarily on the totality of the defendant's conduct to prove state of mind. In such a case, the issue of punitive damages could not be submitted to the jury until such time as the judge has made a preliminary determination that the

[118]Attempts to analyze degrees of misconduct in this context results in the same confusion of language which was noted earlier. *See, e.g.*, W. PROSSER, TORTS § 64, 436-37 (3d ed. 1964). Prosser states:

> The ordinary contributory negligence of the plaintiff is to be set over against the ordinary negligence of the defendant, to bar the action. But where the defendants' conduct is actually intended to inflict harm upon the plaintiff, there is a difference, not merely in degree but in the kind of fault; and the defense has never been extended to such intentional torts. Thus it is no defense to assault and battery. The same is true of that aggravated form of negligence, approaching intent, which has been characterized variously as 'wilful,' 'wanton,' or 'reckless,' as to which all courts have held that ordinary negligence of the plaintiff will not bar recovery. . . . Thus if the defendants' negligence is merely 'gross,' an extreme departure from ordinary standards but still without elements of 'willfulness' or 'wantonness,' it is generally held that if plaintiff's own conduct is 'wilful,' 'wanton,' or 'reckless,' it will be balanced against similar conduct on the part of the defendant and recognized as a bar to his action.

conduct of the defendant was so extreme so as to pose an extraordinarily high risk of harm to the foreseeable plaintiffs. Having made that determination, the intoxicant use by defendant would be one of the factors tending to prove the extreme state of mind, a finding of which being a prerequisite to the imposition of punitive damages.

The other possibility is to focus solely on the drinking conduct of the defendant. If this approach is adopted, the drinking itself becomes the conduct to be punished regardless of whether it can be demonstrated in a particular case to be a factor in defendant's negligent conduct. That is to say, the voluntary consumption of alcohol conclusively establishes the extreme state of mind necessary to impose punitive damages.

The weakness in the second approach is that it is overinclusive. It extends punitive damages to the case, which on its face, is nothing more than momentary inattention or distraction. In her concurring opinion in *Taylor v. Superior Court,* California Supreme Court Chief Justice Bird neatly defined the overinclusive nature of the majority position:

> The majority allow a complaint for punitive damages to be pursued on the mere allegation that an accident occurred and the driver had taken enough wine at dinner to be classified as legally under the influence of alcohol and knew that he would have to drive home. This behavior may be reckless but it is not malicious
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> Malice has been held to be present where a person acted with knowledge that harm to others was substantially certain or at least highly probable (citations). However, to take this idea and expand it to include a circumstance where injury to others is not certain is unwise. Persons who drive while under the influence often lack a conscious appreciation of the high risk of harm they may present to others. In contrast, in the products liability area, a person who widely markets a dangerous drug without the proper warnings is aware that injury will probably result from his acts or omissions (citations). The decision to drive after having taken a few drinks ordinarily does not rise to a comparable level of *conscious* indifference to the safety of others.[119]

However, even if we reject the California approach as being overinclusive, we are not required to adopt the alternative. The question of justification for punitive damages for drunk driving remains. When in Part III, we discussed rationales for punitive damages, the only justification which lacked the substantial weakness present in all other suggestions was that punitive damages might be useful in deterring noncompulsive recidivist behavior.

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[119]24 Cal.3d at 900-901, 598 P.2d at 859-60, 157 Cal.Rptr. at 699-700 (Bird, C.J., concurring and dissenting).

The rationale of using punitive damages to deter persons other than the defendant (i.e., general deterrence) cannot possibly work unless and until the existence of punitive damages in the drunk driving case becomes a matter of common knowledge. The retribution rationale also failed both under the classic theory and as being a questionable goal for any legal system. Furthermore, if we are to have retribution as a goal at all, it seems clear that it is a matter better left to the criminal courts. Special deterrence, i.e., deterrence of a particular individual from repeating undesirable conduct may however be justifiable. The "lack of public awareness" problem inherent in the general deterrence possibility can be eliminated provided that punitive damages are not available against a first offender. Under such circumstances, at the time of an initial drunk driving offense, the defendant would be advised that punitive damages would be available the second time around. Having thus been forewarned, he could hardly be heard to complain should he be foolish enough to again engage in such extreme conduct.

It probably goes without saying, however, that nothing is to be gained by applying this rationale to the person who is truly incapable of molding his conduct to social expectations. Therefore, it should be a defense to the punitive damage portion of the case that the defendant's conduct was a result of illness and therefore he did not exhibit the requisite state of mind.

In her concurring opinion in *Taylor v. Superior Court* California Chief Justice Bird indicated that on the facts of that particular case punitive damages might be justifiable on the basis indicated here. She stated:

> [I]n this particular case the defendant is charged with repeatedly driving while intoxicated after his own experience has made him completely aware of the possible consequences of his act. Therefore, in this particular case it may be possible for a jury to conclude "the second time was no accident."[120]

It is also interesting to note that what is being recommended here bears some striking similarities to Professor Hall's recommendation regarding intoxication as a defense in the criminal law.[121] Professor Hall argues for exculpating extremely intoxicated persons "unless at the time of sobriety and voluntary drinking they had such prior experience as to anticipate their intoxication and that they would become dangerous in that condition."[122] While the criminal law has not adopted Professor Hall's position, it seems entirely appropriate to adopt some variation of his proposed standard in determining the propriety of imposing the quasi criminal remedy.

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[120] *Id.* at 901, 598 P.2d at 860, 157 Cal.Rptr. at 700.

[121] J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 556 (2d ed. 1960).

[122] *Id.*