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John W. deGravelles

J. Neale deGravelles

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John W. deGravelles[*]

J. Neale deGravelles[**]

INTRODUCTION

Louisiana's treatment of punitive damages reflects the unique hybrid of civil and common law traditions that exists in Louisiana law. Unlike most pure common law jurisdictions, Louisiana—in keeping with civilian traditions—refuses to allow punitive damages except where authorized by statute. However, the analytical framework employed by Louisiana courts in interpreting exemplary awards that are allowed by statute closely follows the traditional common law approach. The bedrock of this framework is an extreme deference to the findings of the trier of fact both as to when such damages should be awarded and in deciding, "untethered to strict numerical multipliers,"[1] the amount of the award. This amalgamation of approaches is the offspring of Louisiana's mixed judicial system.

This paper briefly reviews the history and present status of punitive damages law in Louisiana with a focus on the surviving Civil Code articles that allow for punitive damages not tied to a statutory cap.[2] It will consider issues of application and interpretation of these statutes and how these have been affected by Louisiana's mixed civil and common law past.

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* John W. deGravelles is a partner in the firm of deGravelles, Palmintier, Holthaus & Frugé in Baton Rouge, Louisiana. He is a member of the adjunct faculty of the Louisiana State University Paul M. Hebert Law Center.

** J. Neale deGravelles is an associate in the firm of deGravelles, Palmintier, Holthaus & Frugé in Baton Rouge, Louisiana.

1. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2620 (2008).

2. While these damages have no statutory cap, there are constitutional and other restrictions, discussed *infra* Section II.A.6, placed on the amount of these "uncapped" punitive damages statutes.

I. HISTORY

A. Civil Law

Punitive or exemplary damages[3] have an exceedingly long pedigree in code-based law across cultures. Often cited antecedents of modern punitive damages law include the Code of Hammurabi (4000 years old), Hittite laws (1400 B.C.), the Hebrew Covenant of Mosaic law (1200 B.C.) and the Hindu Code of Mannu (200 B.C.).[4] The very foundation of ancient Roman civil law, the Twelve Tables of 450 B.C., included punitive provisions, some calling for up to quadruple damages.[5] More obscure codes of law also included articles allowing for exemplary damages. Under the Kanun (Code) of Leke Dukagjini, the written code of the honor culture of the mountains of northern Albania, an individual who entered the sacred space of another's home without leave to do so was obligated to pay a fine in addition to double the cost of any damage done or the value of any goods stolen in the home.[6]

In contrast to ancient laws, the prevailing and longstanding rule in modern civil law is that punitive damages violate the purpose behind the law of damages, which is to "repair the harm sustained by the victim of a wrong, and not to punish the wrongdoer."[7] With this philosophical underpinning, "the civil law world has so far been reluctant to open its doors to [punitive damage recovery], instead remaining faithful to the traditional principle" that damages should be compensatory in nature.[8]

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3. Most Louisiana statutes use the term "exemplary" rather than "punitive" damages. The two terms are used interchangeably in Louisiana jurisprudence although they have slightly different connotations. "Punitive" emphasizes the goal of punishment. "Exemplary" emphasizes the goal of making an example of the wrongdoer for purposes of education and deterrence. James E. Bolin, Jr., *Enter Exemplary Damages*, 32 LA. B.J. 216, 217 (1984).

4. David G. Owen, *Strong Medicine or Poison Pill?: A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 368 (1994).

5. *Id.*

6. SHTJEFËN GJEÇOV, THE CODE OF LEKË DUKAGJINI 60 (Leonard Fox trans., 1989).

7. SAUL LITVINOFF, OBLIGATIONS § 7.6, *in* 6 LOUISIANA CIVIL LAW TREATISE 205 (2d ed. 1999) (citing 7 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 184 (2d ed. 1954)). *See also* 2 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 22.2 (5th ed. 2005); John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 396–98 (2004).

8. LITVINOFF, *supra* note 7, at 198. *See also* Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741 (2008).

This suspicion of punitive damages remains largely in place in modern pure civil law jurisdictions.[9] However, there are exceptions. The codes of Brazil, Israel, Norway, the Philippines, and Poland allow recovery of punitive damages of some kind.[10] Serious consideration is being given to a punitive law provision in the French Civil Code. In September of 2005, a group of civil law scholars, headed by project leader Pierre Catala at Université Pantheon Assas Paris 2, submitted to the French Minister of Justice what has been described as "one of the most ambitious and comprehensive attempts to reform the French Civil Code in a field where it has not been significantly modified in two hundred years of existence"[11]—the law of obligations. Among the proposed changes is a provision allowing punitive damages against a person guilty of an intentional or deliberate fault with a view toward profit.[12]

B. Common Law

Punitive damages have been a fixture of the common law for over 200 years.[13] One of the earliest known punitive provisions in English law dates back to 1275 and stated that "[t]respassers against religious persons, shall yield double damages."[14] From 1275 to 1753, the British Parliament passed an additional sixty-four punitive articles calling for the availability of between one to four times compensatory damages.[15]

Judicial recognition in English courts of the doctrine of punitive damages came in 1763. In *Wilkes v. Wood*, an award "for more than the injury received" was granted against the English Secretary of State for an unlawful search of the plaintiff's papers.[16] In *Huckle v. Money*, the same judge upheld a jury's award of £300 despite the compensatory damages being valued at roughly £20, stating, "If the jury had been confined by their oath to consider the

9. Koziol, *supra* note 8, at 748.
10. Gotanda, *supra* note 7, at 397.
11. Olivier Moréteau, *France*, *in* EUROPEAN TORT LAW 2005, at 270–80 (H. Kozoil & Barbara Steininger eds., 2006).
12. *Id.* at 274. *See also* SCHLUETER & REDDEN, *supra* note 7, § 22.2(A). To date the proposal has not been codified.
13. Gotanda, *supra* note 7, at 397.
14. GOVERNMENT OF IRELAND, THE LAW REFORM COMM'N, CONSULTATION PAPER ON AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES 18, n.9 (1998).
15. Owen, *supra* note 4, at 368.
16. (1763) 98 Eng. Rep. 489, 498 (K.B.).

mere personal injury only, perhaps [£20] would have been thought sufficient."[17]

In due course, the common law punitive damages doctrine was carried over to the common law courts of the United States by 1784.[18] During the nineteenth century, punitive damages became a widely accepted concept in America.[19] A central feature of the common law of damages was the jury's "broad discretion to award damages as they saw fit."[20] Under the common law approach, "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it."[21]

This broad discretion included whether to award punitive damages and the amount of such award.[22] Under the American common law of torts (i.e., that developed through jurisprudence in American Courts), "no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount."[23] Early common law decisions made clear that a jury's award of punitive damages would not be disturbed absent a finding that the award was so "outrageous" that "all mankind at first blush must think so."[24] American common law followed suit.[25]

C. Louisiana Law

Louisiana's Civil Code of 1808 did not include articles that directly addressed or allowed punitive damages. Even some provisions in traditional French law that contained elements of exemplary damages (such as the *partie civille*, which allowed a

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17. (1763) 95 Eng. Rep. 768, 768–69 (K.B.). The language of the judge in the *Huckle* case underscores what, apparently, remains a point of confusion in English law: are such awards actually affirmatively punitive in nature or "merely a swollen or aggravated allowance of compensatory damages permitted in cases of outrageous behavior on the part of the defendant[?]" *See* LITVINOFF, *supra* note 7, at 200. *See also* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2620 (2008) (discussing the development of punitive damages in British common law).

18. Atl. Sounding Co. v. Townsend, 129 S. Ct. 2561, 2566 (2009) (citing Genay v. Norris, 1 S.C.L. (1 Bay) 6, 7 (1784)).

19. *See Baker*, 128 S. Ct. at 2609; *Townsend*, 129 S. Ct. at 2566.

20. *Townsend*, 129 S. Ct. at 2566.

21. *Id.* (quoting Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998)).

22. *Id.*

23. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 27 (1991) (Scalia, J., concurring).

24. Huckle v. Money, (1763) 95 Eng. Rep. 768, 769 (K.B.).

25. Honda Motor Co. v. Oberg, 512 U.S. 415, 422 (1994) (citing and quoting *Huckle*, 95 Eng. Rep. 768, with favor.)

criminal victim to bring a civil action simultaneously with, and in the same court as, the criminal action)[26] did not carry over into Louisiana's code.[27] Nonetheless, Louisiana courts soon began to award punitive damages. As early as 1836,[28] the Louisiana Supreme Court approved a jury's award of "smart money."[29] Despite the lack of a specific statutory basis for such an award, at least ten decisions rendered between 1836 and 1917 awarded or recognized the availability of punitive damages under Louisiana law.[30] However, some courts felt the need to demonstrate a statutory justification for the award and turned to Louisiana Civil Code article 1928 (now 2324.1), which states "in the assessment of damages in cases of offenses, quasi-offenses, and quasi-contracts, much discretion must be left to the judge or jury."[31]

In *Black v. Carrollton Railroad Co.*, Judge Ogden's concurring opinion claimed that Civil Code article 1928 provided "the sanction of express legislation" for exemplary damages "which [had] so long existed at common law."[32] He went on to quote common and early American maritime law cases in praise of punitive damages as a "true and salutary doctrine"[33] that issued "proper punishment which belongs to . . . lawless conduct."[34] The

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26. GEORGE W. STUMBERG, GUIDE TO THE LAW AND LITERATURE IN FRANCE 168, 186 (1931).

27. Donald C. Massey & Martin A. Stern, *Punitive Damages and the Louisiana Constitution: Don't Leave Home Without It*, 56 LA. L. REV. 743, 770 (1996).

28. An earlier case, *Keene v. Lizardi*, 8 La. 26 (La. 1835), acknowledged that juries sometimes award "smart money" although it refused to reverse the jury's failure to make such an award. It is unclear whether the decision was based upon Louisiana or maritime law.

29. Punitive or "vindictive" damages are sometimes referred to as "smart money." *See, e.g.*, Dirmeyer v. O'Hern, 3 So. 132 (La. 1887) (vacated on other grounds); Summers v. Baumgard, 9 La. 161, 162 (La. 1836).

30. Casper v. Prosdame, 14 So. 317 (La. 1894); McFee v. Vicksburg, Shreveport & Pac. R.R. Co., 7 So. 720, 722–23 (La. 1890); Rutherford v. Shreveport & Houston R.R. Co., 6 So. 644, 644 (La. 1889); *Dirmeyer*, 3 So. at 134; Hill v. New Orleans, Opelousas & Great W. R.R. Co., 11 La. Ann. 292, 294 (La. 1855); Varillat v. New Orleans & Carrollton R.R. Co., 10 La. Ann. 88 (La. 1855); Black v. Carrollton R.R. Co., 10 La. Ann. 33, 38 (La. 1855); Grant v. McDonogh, 7 La. Ann. 447, 448 (La. 1852); McGary v. City of Lafayette, 4 La. Ann. 440, 440 (La. 1849); *Summers*, 9 La. at 162. *See also* Adams v. J.E. Merit Constr., Inc., 712 So. 2d 88, 90–91 (La. 1998) (citing and discussing some of those cases).

31. LA. CIV. CODE art. 1928 (1825) (now LA. CIV. CODE art. 2324.1 (2009)), *See McGary*, 4 La. Ann. 440; *Grant*, 7 La. Ann. 447; *Black*, 10 La. Ann. 33.

32. *Black*, 10 La. Ann. at 39 (Ogden, J., concurring).

33. *Id.* at 39 (citing Tillotson v. Cheetham, 3 Johns. 56, 56 (N.Y. Sup. Ct. (1808)).

34. *Id.* at 39 (quoting The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818)).

opinion concluded that the doctrine was "too well-settled in practice and . . . too valuable a principle to be called in question."[35]

Justice Slidell issued a vigorous dissent. He disputed the idea that punitive damages had any support in the Louisiana Civil Code and specifically disagreed with the proposition that Civil Code article 1928 authorized such an award.[36] Turning to Civil Code article 2294 (now article 2315), he argued that this article allowed for reparation only, i.e., "a just and adequate compensation to the plaintiff for the injury received by him from the defendant. It suggests no idea of revenge or punishment."[37] He acknowledged other instances in which courts allowed punitive damages but termed these pronouncements "dicta" and "casual expressions."[38] Citing (en Français) French legal scholars Merlin, Toullier, Duranton, and Domat, he stated: "My conclusion is that there is nothing in the provisions of our Code or settled provisions of our law which sanctions what are called punitory, vindictive, or exemplary damages . . . ."[39]

The continued tension between Louisiana's civilian principles and its adopted common law rule is well illustrated by the 1887 case of *Dirmeyer v. O'Hern*. In *Dirmeyer*, a lessee sued his lessor for damages arising from the lessor's "rough and bulldozing" efforts to execute a writ of provisional seizure, including putting the lessee in fear of a physical attack with a bludgeon.[40] The jury awarded $500, a sum in excess of the compensatory damages.[41]

The Louisiana Supreme Court, while expressing reluctance to do so, nonetheless affirmed the punitive damages award. The court acknowledged that "[t]here has been great confusion of ideas . . . in our own Reports . . . respecting actual and exemplary or punitory damages"[42] and conceded that the principle of punitive damages was "borrowed from the common law, and, though tacitly and sometimes expressly recognized in our decisions, it is really an exotic in our system."[43] "[W]ere the question an open one," the

35. *Id.* at 39.
36. *Id.* at 45.
37. *Id.* at 44.
38. *Id.*
39. *Id.*
40. Dirmeyer v. O'Hern, 3 So. 132, 133 (La. 1887).
41. The decision does delineate that part of the $500 award is punitive, although the court states that "it cannot well be seen how they could have found for a less sum consistently with the facts stated." *Id.* at 133. The court makes clear that at least part of that award was a sum in addition to the compensatory damages "imposed to punish the wrong-doer and by such punishment set an example to deter others from the commission of a like offense." *Id.* at 134.
42. *Id.* at 134.
43. *Id.*

court stated, "we would hesitate before recognizing this element of exemplary punitory or vindictive damages, as existing in the civil law."[44] However, the court concluded that it was no longer an open question since "in repeated decisions, [the court] has recognized [exemplary damages] as actual damages . . . ."[45]

The tide turned in 1917 in the case of *Vincent v. Morgan's Louisiana*.[46] *Vincent* involved a suit by the parents of a minor child who was shot and killed by a railroad employee.[47] The Louisiana Supreme Court affirmed the trial court's award of compensatory damages and its rejection of the plaintiffs' claim for punitive damages, quoting with approval much of Justice Slidell's dissent in *Black*.[48] It concluded that a plaintiff's recovery was limited to nothing more "in the way of damages than adequate indemnity for the injury and loss inflicted upon him . . . in mind, body or estate . . . ."[49] The court specifically held that "pecuniary penalties imposed as exemplary, punitive, or vindictive damages" were not recoverable.[50]

Since then Louisiana's courts have consistently held that "there is no authority in the law of Louisiana for allowing punitive damages in any case, unless it be for some particular wrong for which a statute expressly authorizes the imposition of some such penalty."[51] This position represents the current state of Louisiana law.[52] Louisiana's rule purporting to require strict construction of punitive damage statutes further reflects the civil law uneasiness with this kind of award.[53]

II. LOUISIANA'S PUNITIVE DAMAGES ARTICLES

Even in the common law, which has long embraced punitive damages, such damages have been highly controversial. From early in this nation's legal history, views among scholars have

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44. *Id.*
45. *Id.*
46. 74 So. 541 (La. 1917).
47. *Id.* at 541–42.
48. *See id.* at 548.
49. *Id.* at 549.
50. *Id.*
51. McCoy v. Ark. Natural Gas Co., 143 So. 383, 385–86 (La. 1932), *cert. denied*, 287 U.S. 661 (1932). *See also, e.g.*, Int'l Harvester Credit Corp. v. Seale, 518 So. 2d 1039 (La. 1988).
52. *See, e.g.*, Killebrew v. Abbott Labs., 359 So. 2d 1275 (La. 1978). *See also* FRANK L. MARAIST & THOMAS GALLIGAN, JR., LOUISIANA TORT LAW § 7.01 (2d ed. 2009).
53. *See, e.g., Int'l Harvester Credit Corp.*, 518 So. 2d at 1041. This rule requiring strict construction is often ignored.

varied widely on the topic.[54] The United States Supreme Court recently noted that this controversy has continued into modern times, stating, "American punitive damages have been the target of audible criticism in recent decades, but the most recent studies tend to undercut much of it."[55] Louisiana's treatment of punitive damages has in many ways followed that of common law states both in terms of the political controversy and legal interpretation.

Louisiana has many statutes allowing civil penalties to be awarded in a wide variety of circumstances.[56] However, the Louisiana Legislature has passed only a handful of statutes allowing for purely discretionary exemplary damages awards. Two exemplary damages statutes were passed in the 1984 legislative session: one allowing punitive damages for the wanton and

54. Owen, *supra* note 4, at 370.

55. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2624 (2008) (citation omitted).

56. *See, e.g.*, LA. REV. STAT. ANN. § 22:1973 (2009) (allows a penalty in an amount not to exceed two times the damages sustained or $5,000, whichever is greater, for breach of the insurer's duty of good faith and fair dealing); LA. REV. STAT. ANN. § 22:1811 (2009) (allows for a penalty of eight percent interest on the amount due under an insurance policy for accidental death claims if the insurer does not pay the insured within sixty days of receipt of proof of death and has no just cause for delay); LA. REV. STAT. ANN. § 22:1821(A) (2009) (allows a penalty of double the amount of health and accident benefits due under an insurance policy plus attorneys' fees when the insurer does not pay within thirty days and has no valid reason for delay); LA. REV. STAT. ANN. § 22:1821(B) (2009) (allows a penalty of six percent interest on the amount due under a policy for accidental death when the insurer fails to pay with no just cause within sixty days of receipt of proof of death); LA. REV. STAT. ANN. § 51:1409 (2003 & Supp. 2009) (allows a penalty of three times the actual damage sustained plus attorneys' fees to be awarded to a person who suffers an ascertainable loss of money or movable property as a result of the use of an unfair or deceptive trade method, act, or practice, if the practice was knowingly used); LA. REV. STAT. ANN. § 9:3552 (2009) (allows an award of triple finance charges plus attorneys' fees to be awarded for bad faith violations of consumer credit transaction laws); LA. REV. STAT. ANN. § 51:137 (2003) (allows an award of triple finance charges plus attorneys' fees for violation of monopoly laws); LA. REV. STAT. ANN. § 22:1892(B)(1) (2009) (allows an award of the greater of $1,000 or fifty percent damages on the amount found to be due on insurance policies other than those for health and accident if failure is found to be arbitrary, capricious, or without probable cause); LA. REV. STAT. ANN. § 22:1892(B)(4) (2009) (allows a reasonable penalty not to exceed ten percent of reasonable expenses or $1,000, whichever is greater, to be granted to a third person as a result of failure of the insurance company to pay reasonable expenses incurred by the third person in connection with rental of a car due to damage to the third person's personal vehicle); LA. REV. STAT. ANN. § 22:1892(C)(3) (2009) (allows a penalty of $200 or fifteen percent of the face amount of a check, whichever is greater, if the insurer intentionally or unreasonably delays the processing of a check issued for the settlement of an insurance claim).

reckless handling of toxic and hazardous substances[57] and the other based on the wanton and reckless disregard for the rights and safety of others by an intoxicated driver.[58] In 1985, the legislature authorized punitive damages awards against one who intercepts, discloses, or uses wire or oral communications.[59] Then in 1993, the legislature created a fourth statutory avenue to punitive damages, when a defendant engages in criminal sexual conduct towards a victim seventeen years old or younger.[60] Finally, a bill authorizing punitive damages awards against one illegally selling, distributing, or marketing an illegal controlled substance was passed in 1997.[61]

Of these statutes, Civil Code article 2315.3, permitting punitive damages related to injuries arising from the defendant's wanton or reckless handling of hazardous substances, was repealed in 1996 amidst great controversy.[62] The remaining statutes will be analyzed separately with the greatest attention going to article 2315.4, the existing punitive damages statute that has generated the most litigation and appellate analysis and resolution.

A. Louisiana Civil Code Article 2315.4: Intoxicated Drivers

> Art. 2315.4. Additional damages; intoxicated defendant
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> In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries.[63]

1. The Purpose of Article 2315.4

Scholars have identified multiple functions served by punitive damages: education, retribution, deterrence, compensation, and law enforcement.[64] While punitive damages are usually thought of as

57. LA. CIV. CODE art. 2315.3, *repealed by* 1996 La. Acts. No. 2, § 1.
58. LA. CIV. CODE art. 2315.4 (2009).
59. LA. REV. STAT. ANN. § 15:1312 (2005 & Supp. 2009).
60. LA. CIV. CODE art. 2315.7 (2009).
61. LA. REV. STAT. ANN. § 9:2800.76 (2009).
62. One writer, examining in detail the Louisiana Legislature's repeal of Louisiana Civil Code article 2315.3, concluded that "the several rationales offered by the legislature were not well-served by the repeal and . . . the repeal was more in response to industry political power than to doctrinal concerns with punitive damages." STUMBERG, *supra* note 26, at 186.
63. LA. CIV. CODE art. 2315.4 (2009).
64. Owen, *supra* note 4, at 374–82.

distinctly non-compensatory, the argument has been made that "punitive damages do indeed serve a variety of important compensatory roles[,]" including making the plaintiff whole for items of damage not usually recoverable, such as attorneys' fees.[65] The United States Supreme Court has focused on deterrence and retribution.[66]

The use of the word "exemplary" in Louisiana's article 2315.4 suggests that education is the main goal of the article.[67] However, some Louisiana courts suggest that compensating the victims is also an appropriate goal of the statute. In *Lafauci v. Jenkins*, the Louisiana First Circuit Court of Appeal held article 2315.4 has an additional purpose, to "both penalize (and thus deter) drunk drivers, and to provide damages for the victims of such drivers."[68] Similarly, in *Sharp v. Daigre*, the first circuit found that compensating the victim was a goal of the statute, citing *Black's Law Dictionary,* which lists, among other purposes served by punitive damages, "to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong . . . ."[69]

Most modern Louisiana courts, however, have agreed that punishment and deterrence are the main goals of our punitive damages provisions. In *Mosing v. Domas*, the Louisiana Supreme Court articulated the purpose of punitive damages as embodied in article 2315.4 as follows:

> Such damages . . . are given to the plaintiff over and above full compensation for his or her injuries for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example. . . .[70]

As described by the court, exemplary damages serve a threefold purpose: punishment for the act itself, specific deterrence for the individual being punished to prevent his or her engaging in

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65. *Id.* at 378.

66. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 415–16 (2003); BMW of N. Am., Inc., v. Gore, 517 U.S. 559, 568 (1996).

67. Bolin, *supra* note 3, at 217.

68. 844 So. 2d 19, 25 (La. App. 1st Cir. 2003), *writ denied*, 842 So. 2d 403 (La. 2003). The Louisiana First Circuit Court of Appeal was paraphrasing *Brumfield v. Guilmino*, 633 So. 2d 903, 912 (La. App. 1st Cir. 1994), *writ denied*, 637 So. 2d 1056 (La. 1994). *See also* Aycock v. Jenkins Tile Co., 703 So. 2d 117 (La. App. 1st Cir. 1997), *writ denied*, 709 So. 2d 753 (La. 1998).

69. 545 So. 2d 1063 (La. App. 1st Cir. 1989) (quoting BLACK'S LAW DICTIONARY 352 (5th ed. 1979)), *writ granted*, 550 So. 2d 640 (La. 1989).

70. Mosing v. Domas, 830 So. 2d 967, 978 (La. 2002) (citation omitted).

the prohibited action in the future, and general deterrence from such action for the citizenry as a whole.

2. Burden of Proof

The language of Civil Code article 2315.4 sets out the elements of proof required in order to obtain a punitive damages award. As explained by the court in *Lafauci*, the plaintiff is required to prove three elements: 1) that the defendant was intoxicated or had consumed a sufficient quantity of intoxicants to make him lose normal control of his mental and physical faculties; 2) that the intoxication was a cause in fact of the resulting injuries; and 3) that the injuries were caused by the defendant's wanton and reckless disregard for the rights and safety of others.[71]

a. Intoxication

Article 2315.4 requires the plaintiff to show that "intoxication . . . was a cause in fact of the resulting injuries."[72] As interpreted, however, the plaintiff need not show that the defendant was legally intoxicated; it is sufficient to show that the defendant's mental or physical abilities have been impaired by the intoxicant. The plaintiff is not required to produce scientific blood alcohol analysis or other such hard evidence to prove that the defendant was intoxicated within the purview of the article.[73]

In *Drouant v. Jones*, the trial court found the defendant was intoxicated and that his conduct was willful and malicious.[74] The primary evidence on this issue came from an eyewitness who testified that she had observed the defendant swerve erratically and cross over into oncoming traffic several times before finally entering the oncoming lane and striking the plaintiff's vehicle.[75] The witness testified that she believed the defendant was intoxicated based on his behavior.[76]

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71. *Lafauci*, 844 So. 2d at 25 (paraphrasing Minvielle v. Lewis, 610 So. 2d 942, 946 (La. App. 1st Cir. 1992)). *See also, e.g.*, Lacoste v. Crochet, 751 So. 2d 998, 1003 (La. App. 4th Cir. 2000).

72. LA. CIV. CODE art. 2315.4 (2009).

73. *See, e.g.*, Drouant v. Jones, 834 So. 2d 518, 519 (La. App. 4th Cir. 2002), *writ denied*, 839 So. 2d 43 (La. 2003).

74. *Id.* The issues of intoxication and "willful and malicious" conduct were relevant to the defendant–driver's related bankruptcy proceedings. The issue of exemplary damages was not before the court. *Id.*

75. *Id.*

76. *Id.* at 519.

At the accident scene, the witness suggested that the police officer conduct a sobriety test, but the officer declined.[77] The police report contained no mention of alcohol, only that the defendant was combative.[78] The hospital that treated the defendant for injuries sustained in the collision (in the direct aftermath of the wreck) also did not perform blood work to test for alcohol, nor was intoxication mentioned in the defendant's hospital records.[79] A blood test conducted the day after the accident was negative.[80] The defendant denied drinking alcohol and attributed his behavior to a diabetic blackout, but there was no medical evidence presented as to whether he actually suffered from that condition.[81] The trial court found that "the evidence of [the defendant's] behavior [was] one of intoxication and nothing else."[82] In upholding the trial court's findings, the Louisiana Fourth Circuit Court of Appeal held that "even absent a positive alcohol test, a driver's intoxication can be proven by the circumstances."[83]

Similarly, in *Levet v. Calais & Sons, Inc.*, the Louisiana Fifth Circuit Court of Appeal upheld a jury award of exemplary damages against a defendant who had "inexplicably" run a stop sign and entered the oncoming lane of travel, thereby injuring the plaintiff.[84] The evidence presented at trial was that the defendant and two adult friends had shared some eight beers prior to the accident.[85] The court found that this evidence, combined with the defendant's actions, was sufficient to affirm the jury's finding that the defendant was intoxicated and that the resulting impairment had caused the accident.[86]

It is clear that the plaintiff need not prove *legal* intoxication in order to meet his burden. However, even when the plaintiff *can* establish legal intoxication, such a finding does not automatically satisfy the plaintiff's burden under Civil Code article 2315.4. Under Louisiana Revised Statutes Section 32:662, particular results of a chemical analysis of a criminal defendant's blood give

77. *Id.* The investigating officer was deceased at the time of trial.
78. *Id.* at 519–20.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 520 (citations omitted).
84. 514 So. 2d 153 (La. App. 5th Cir. 1987).
85. *Id.* at 159.
86. *Id. See also* Lacoste v. Crochet, 751 So. 2d 998, 1003 (La. App. 4th Cir. 2000); Owens v. Anderson, 631 So. 2d 1313, 1317–18 (La. App. 4th Cir. 1994) ("Blood alcohol level is not the only way in which intoxication can be established in a civil case. The triers of fact can look to the totality of the circumstances . . . ."), *writ denied*, 635 So. 2d 1135 (La. 1994).

rise to certain presumptions for purposes of the defendant's criminal trial.[87] For instance, "[i]f the person had a blood alcohol concentration at that time of 0.08 percent or more by weight, it shall be presumed that the person was under the influence of alcoholic beverages."[88] The plaintiff in a civil proceeding, though, "cannot avail himself of the statutory presumption of intoxication that is allowed in a criminal proceeding."[89]

b. Cause in Fact

In addition to proving intoxication, the plaintiff must also prove that the intoxication was a cause in fact of the resulting injuries in order to be awarded punitive damages. In *McDaniel v. DeJean*, the defendant had 0.11% percent blood alcohol content when tested after an accident and pled guilty to DWI charges arising out of the wreck.[90] Still, the Louisiana Third Circuit Court of Appeal held that this strong evidence, "standing alone," was insufficient to warrant an award of exemplary damages.[91] The plaintiff must also prove that the intoxication was a cause in fact of the accident in order to recover punitive damages.[92] In *Myres v. Nunsett*, the Louisiana Second Circuit Court of Appeal found that a number of states have adopted policies making the operation of a motor vehicle while intoxicated "in and of itself" sufficient to warrant an award of exemplary damages in a civil case.[93] The court emphasized, however, that article 2315.4 requires an additional showing that the intoxication is the cause in fact of the accident before exemplary damages may be awarded.[94] Although the defendant had plead guilty to DWI and his intoxication was established by other evidence, the court found that this played no role in the defendant's failure to observe and avoid colliding with the stopped vehicle in front of him.[95] The court stated that "no evidence was presented that indicates [the defendant's] drinking

87. LA. REV. STAT. ANN. § 32:662 (A)(1)(c) (2009).
88. *Id.* § 32:662.
89. McDaniel v. DeJean, 556 So. 2d 1336, 1339 (La. App. 3d Cir. 1990). *See also* Brumfield v. Guilmino, 633 So. 2d 903, 910 n.3 (La. App. 1st Cir. 1994).
90. *McDaniel*, 556 So. 2d at 1338.
91. *Id.* at 1339.
92. *Id.* The plaintiff met his burden and the exemplary award of the trial court was upheld.
93. 511 So. 2d 1287, 1289 (La. App. 2d Cir. 1987).
94. *Id.*
95. *Id.*

was a cause-in-fact of this accident" and thus denied exemplary damages.[96]

As is clear from the black letter of article 2315.4, a plaintiff need only show that the intoxication was *a* cause of the plaintiff's injuries and not necessarily the *only* cause. Louisiana courts have confirmed this standard. Even where intoxication is only one of several causes of an accident, the trier of fact may properly award exemplary damages.[97]

c. Wanton and Reckless Conduct

The final element of the plaintiff's burden of proof for exemplary damages under article 2315.4 is that the plaintiff must establish that his injuries were caused by the defendant's wanton and reckless disregard for the rights and safety of others. Courts have not provided a precise or uniform definition of the phrase "wanton and reckless," making the decision of a jury on this question highly subjective.

For example, the Louisiana Supreme Court in *Billiot v. B.P. Oil Co.* addressed the definition of "wanton and reckless" within the context of another exemplary damages statute, the now repealed article dealing with the reckless handling of hazardous substances.[98] The court held that:

> In order to obtain an award of exemplary or punitive damages, the plaintiff first must prove that the defendant's conduct was wanton or reckless. In practice, this standard obliges the plaintiff to prove at least that the defendant proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position. In other words, the "wanton" or "reckless" conduct that must be proved is highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.[99]

On the other hand, the third circuit has phrased "wanton and reckless" in this way:

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96. *Id. See also, e.g.*, Carey v. Thomas, 603 So. 2d 263 (La. App. 5th Cir. 1992); Clifton v. Collins, 563 So. 2d 408 (La. App. 1st Cir. 1990).

97. *See, e.g.*, Byous v. Ebanks, No. 2007-CA-1534, slip op. (La. App. 4th Cir. May 28, 2008), *writ denied*, 992 So. 2d 992 (La. 2008); Hanson v. Benelli, 719 So. 2d 627 (La. App. 4th Cir. 1998).

98. 645 So. 2d 604 (La. 1994), *overruled on other grounds by* Adams v. J.E. Merit Constr. Inc., 712 So. 2d 88 (La. 1998).

99. *Id.* at 613 (citation omitted).

> To be considered wanton and reckless, typically, the necessary level of conduct is somewhere between an intent to do wrong and mere negligence. Actions knowingly taken which would likely cause injury to another fall within this category. Although no specific conduct by an actor is necessary, a conscious indifference to consequences must be shown. If the actor knows or should know that his actions will cause harm and proceeds anyway, there is a conscious indifference to consequences so that there is a wanton or reckless disregard for the rights and safety of others.[100]

Because a plaintiff must first establish that the defendant caused injury or damage while operating a vehicle while impaired due to intoxication, the question arises as to whether this fact, without more, is sufficient to meet the wanton and reckless prong of the test. If so, this would effectively make the wanton and reckless element superfluous.

That question is explored and addressed in the fourth circuit's opinion in *Bourgeois v. State Farm.* The defendant in *Bourgeois* collided with two unoccupied vehicles, causing property damage but no physical injury.[101] After the collision, the defendant was arrested for DWI and pled guilty. Her blood alcohol level was measured at 0.227.[102]

The owners of the damaged cars sued her seeking compensatory and exemplary damages.[103] The trial court found that article 2315.4 was inapplicable to property damage and that there was insufficient evidence of wanton and reckless disregard for the safety of others so as to satisfy the statutory requirements.[104] The fourth circuit reversed both of the trial court's findings.[105] On the issue of "wanton and reckless" the court noted that "several courts have, in *dicta*, indicated that a presumption of recklessness can be made when the intoxication of the defendant is the cause-in-fact of the accident."[106] "[I]n most circuits," the court continued, "only two issues must be proven since the intoxication

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100. Leary v. State Farm, 978 So. 2d 1094, 1101 (La. App. 3d Cir. 2008), *writ denied*, 983 So. 2d 900 (La. 2008).

101. 562 So. 2d 1177 (La. App. 4th Cir. 1990), *writ denied*, 567 So. 2d 611 (La. 1990).

102. *Id.* at 1178.

103. *Id.*

104. *Id.* at 1179.

105. *Id.* at 1184.

106. *Id.* at 1182 (citing Creech v. Aetna Cas. & Sur. Co., 516 So. 2d 1168 (La. App. 2d Cir. 1987); Myres v. Nunsett, 511 So. 2d 1287, 1289 (La. App. 2d Cir. 1987); Demarest v. Progressive Am. Ins. Co., 552 So. 2d 1329 (La. App. 5th Cir. 1989)).

element and the 'wanton and reckless element' are proven by the same facts."[107]

The court went on to review jurisprudence within the fourth circuit that held evidence of a certain alcohol level was generally insufficient to prove even simple negligence, much less to satisfy the considerably higher burden required to show wanton and reckless conduct.[108] It concluded that, at least in the fourth circuit, intoxication and "wanton and reckless" remained distinct elements of the plaintiff's burden that had to be satisfied separately.[109]

Because the case had been "tried on briefs," there was no real description in the record of the details of the defendant's actions.[110] This was of no consequence, the court found, because article 2315.4 does not require proof of "wanton and reckless *conduct*," but, rather, it requires proof of "wanton and reckless *disregard for* the rights and safety of others."[111] A plaintiff is only required to prove a "general state of mind" and a "conscious indifference to consequences."[112]

Although the court reiterated the "well established" principle that the criminal presumption of intoxication tied to chemical test results does not apply in civil cases, the court found that in certain instances, if the level of intoxication was high enough, this fact alone would allow the plaintiff to establish the conscious indifference necessary to meet the plaintiff's burden.[113] Under the facts shown, the court had "no trouble" concluding that a blood alcohol level of 0.227 would put any driver into "the state of mind sufficient to constitute 'wanton and reckless disregard'" so as to satisfy the requirements of the statute.[114]

The court concluded:

> Under the circumstances of the instant case, the evidence used to prove "wanton and reckless disregard for the rights and safety of others" is essentially the same as that used to prove intoxication. Nevertheless, the two elements are distinctly different and should be treated as such; i.e., the plaintiff must be required to prove both elements in order to prove entitlement to exemplary damages under La. C.C. art. 2315.4. In some cases, different evidence will be necessary

107. *Bourgeois*, 562 So. 2d at 1182.
108. *Id.* at 1179–82.
109. *Id.* at 1182–83.
110. *Id.* at 1183.
111. *Id.* at 1183 (emphasis added).
112. *Id.*
113. *Id.* at 1183–84.
114. *Id.*

> to prove the two elements. Simple proof that a person was driving under the influence of alcohol and that he might have been impaired, by itself, will not always be sufficient to establish the "wanton and reckless" element. The facts and circumstances of each case—including, but not limited to, the defendant's blood alcohol level, evidence of the effect of the alcohol on the specific defendant, and the consequences of the alcohol consumption—must be considered in determining the necessary "wanton and reckless" element. However, in this case, we believe that the evidence that the defendant's blood alcohol level was .227 is sufficient to prove the plaintiff's case.[115]

Thus, there remains disagreement among the circuits on the issue of whether a plaintiff may prove wanton and reckless disregard merely by proving intoxication, and, where this is not allowed, what additional proof is required to establish this element.

d. While Operating a Motor Vehicle

Article 2315.4 requires that the intoxicated defendant must have caused the injuries while operating a motor vehicle. The plaintiff in *Elder v. Rowe* was a police officer who responded to a call involving a disabled vehicle.[116] When the officer arrived, the car was on fire and the defendant driver was unconscious due to extreme intoxication, rendering him unable to extricate himself from his own automobile.[117] The plaintiff was in the process of helping to pull the defendant out of the car when the car exploded and the plaintiff was struck with flying debris.[118] The fourth circuit denied the plaintiff's claim for exemplary damages because he did not prove his injuries were caused by the defendant's "operation" of the vehicle, i.e., a hazard created by the "unsafe movement or placement" of the defendant's vehicle.[119]

However, at least one court has ruled that the defendant need not be in the car for article 2315.4 to apply. In *Duplechain v. Old Hickory Casualty Insurance Co.*, the intoxicated defendant had parked his still-running car in the travel lane of a road and exited to argue with his wife while standing in the oncoming lane of travel.[120] The plaintiff was driving in that lane and came upon the

115. *Id.* at 1184 (emphasis added).
116. 653 So. 2d 718 (La. App. 4th Cir. 1995).
117. *Id.* at 720.
118. *Id.* at 719–20.
119. *Id.* at 722.
120. 594 So. 2d 995, 997 (La. App. 3d Cir. 1992).

scene too quickly to stop, causing him to hit the defendant and his vehicle.[121] The third circuit found that the defendant was "operating" the vehicle within the meaning of the statute, thus making punitive damages available.[122]

Elder and *Duplechain* demonstrate that even the "operation of a motor vehicle" element of article 2315.4 remains open to interpretation. How that element will be applied in different Louisiana circuit courts remains unclear.

3. Whether to Award Exemplary Damages

Article 2315.4 states that exemplary damages *may* be awarded if the required elements of proof are met.[123] Whether to award punitive damages is therefore left to the discretion of the trier of fact. Louisiana courts have held that even when a plaintiff has successfully proven all the elements entitling him to exemplary damages, and thereby met his burden of proof, a jury may nonetheless deny *any* award of exemplary damages.[124] The jury is allowed to consider a very wide array of factors in making this decision.

The Louisiana Supreme Court in *Mosing v. Domas* discussed factors that could be considered on this issue:

> The factors that may be considered in deciding whether to award punitive damages include: "[t]he amount necessary to deter the defendant and others like him from engaging in such conduct in the future, the wealth of the defendant, the severity of the harm with which the plaintiff was threatened, the compensatory damages awarded, the reprehensibility of the defendant's conduct, the amount of any other punitive damages awarded against the defendant or with which the defendant is threatened, and any criminal punishment the defendant has suffered or may suffer as a

121. *Id.*
122. *Id.* at 998.
123. LA. CIV. CODE art. 2315.4 (2009).
124. *See, e.g.*, Brossett v. Howard, 998 So. 2d 916 (La. App. 3d Cir. 2008), *writ denied*, 3 So. 3d 492 (La. 2009); Khaled v. Windham, 657 So. 2d 672, 677–81 (La. App. 1st Cir. 1995), *writ dismissed*, 661 So. 2d 1369 (La. 1995). *But see* Judge Plotkin's dissent in *Boulmay v. Dubois*, 593 So. 2d 769, 776 (La. App. 4th Cir. 1992) (Plotkin, J., dissenting), in which he argues that despite the use of the "verb 'may' in the statute, the jurisprudence on this issue, when given its most reasonable interpretation, mandates imposition of exemplary damages under the circumstances for obvious public policy reasons."

result of the same conduct as that upon which the plaintiff's tort suit is based."[125]

In *Brossett v. Howard*, the defendant, who was highly intoxicated, was driving home from her birthday party when she swerved into an oncoming lane of travel and struck an automobile.[126] The wreck left one of the occupants dead and the other severely injured. At trial, the jury awarded compensatory damages but declined to award punitive damages.[127]

The third circuit recognized that the plaintiffs had met their burden of proof so as to be eligible for exemplary damages, going so far as to comment that if the jury had awarded exemplary damages it would have confirmed such an award.[128] In upholding the jury's decision, the court reviewed the evidence that the jury could have taken into consideration in denying a punitive award, which included:

1) the defendant's testimony that she was remorseful;
2) the fact that she had admitted fault both in the civil and criminal proceedings against her;
3) her lack of prior negative driving and criminal history;
4) her clean driving and criminal records subsequent to the accident in question;
5) that she had complied with restitution payments and motivational speaking engagements ordered by the criminal court;
6) testimony that her criminal conviction had hurt her livelihood as a hospital employee because hospitals denied privileges to felons;
7) her failed attempts prior to the accident to get a designated driver for the evening;
8) her contention that once she recognized that she was drunk that night, that she stopped drinking alcohol and began drinking water; and

125. 830 So. 2d 967, 977–78 (La. 2002). In at least one case, the *plaintiff's conduct* was found to be a permissible factor in the trier of fact's decision on an exemplary award. In *Aycock v. Jenkins Tile Co.*, 703 So. 2d 117 (La. App. 1st Cir. 1997), the plaintiff was the brother of a drunk driver defendant and passenger in the defendant's car, who was injured in a crash caused by the defendant. The appellate court, in upholding the trier of fact's decision to deny an exemplary award, took note that the plaintiff had been drinking himself and knew that his brother had been drinking and, therefore, was not a "totally innocent victim." *Id.* at 124.

126. 998 So. 2d 916 (La. App. 3d Cir. 2008), *writ denied*, 3 So. 3d 492 (La. 2009).

127. *Id.* at 922–23.

128. *Id.* at 935.

9) that she had supposedly asked her fellow party guests to make sure that she got home safely afterwards.[129]

The court added that evidence from categories seven through nine "may have been considered by the jury as a self-awareness of her impaired condition and attempts, although unsuccessful, to do no harm."[130] Interestingly, however, the court pointed to no evidence about the defendant's actual conduct during, or immediately before, the accident in question in its analysis of those things the jury may have considered in reaching their decision not to award punitive damages.

4. Amount of the Award

The Louisiana Supreme Court in *Mosing* also discussed multiple factors to be used by the jury in deciding the amount of the award.[131] The court emphasized that this decision is a "fact-driven determination" and therefore in "the unique province of the jury or trier of fact."[132] Thus, a jury must:

> Consider not merely the act, but all of the circumstances surrounding it, including the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, whether the defendant behaved recklessly or maliciously, and even, in appropriate circumstances, the wealth of the defendant.[133]

The facts in *Mosing* provide a concrete example of evidence elicited at trial and the application of the factors listed in *Brossett*. In *Mosing*, the plaintiff's vehicle was violently struck by a drunk driver who, at the time of the collision, was fleeing from an earlier hit and run accident that he had caused.[134] When the plaintiff's wife arrived at the accident site, she reasonably believed her husband was dead or seriously injured.[135] The defendant had a long and flagrant history of drunken driving offenses.[136] Several previous incidents showed not only the defendant's recidivism but also his total lack of remorse.[137] For example, after hitting the car of a past victim, the

129. *Id.* at 935.
130. *Id.*
131. Mosing v. Dumas, 830 So. 2d 967, 974 (La. 2002).
132. *Id.* at 974 (citation omitted).
133. *Id.*
134. *Id.* at 970.
135. *Id.*
136. *Id.*
137. *Id.* at 982.

defendant stopped just long enough to allow the victim to get out of his automobile before the defendant quickly fled the scene, "smirking at [the victim] as he passed him."[138]

The court concluded that the defendant was "a shockingly unrepentant recidivist drunk driver who has on more than one occasion displayed a conscious disregard for human life and safety while behind the wheel. . . . His wanton and reckless behavior . . . could hardly have been more reprehensible."[139] While there was no evidence introduced on the issue of the defendant's economic situation, the court concluded "that lack of evidence does not necessarily render the amount of the exemplary damages [of $500,000] so speculative as to constitute an abuse of discretion where the fact finder has other evidence to consider, such as the nature of the tort."[140]

Mosing provides a roadmap through the appropriate analysis to be applied by the trier of fact in determining the amount of an exemplary damages award. The trier should certainly focus on the act itself in that determination. Additionally, however, it should also consider the circumstances surrounding the act, including whether the act was part of a broader pattern of similarly reprehensible conduct.

5. Appellate Review—State Standard

The Louisiana Supreme Court considered in *Mosing* whether an exemplary award of $500,000 was excessive, especially in light of the compensatory award totaling only $55,559, which included loss of consortium and property damage.[141] The court recognized that Louisiana's abuse of discretion standard of review was "similar to the one that has evolved under the common law" where "juries have possessed vast discretion to determine the amount of exemplary damages."[142] Indeed, the court noted that under this standard, "[j]udicial interference with such awards has been typically reserved for the 'glaring case . . . of outrageous damages,' one which 'all mankind at first blush' would find outrageous."[143]

On appeal, the defendant challenged the award as unconstitutionally excessive in light of the line of United States Supreme Court cases, including *BMW of North America, Inc. v.*

138. *Id.* at 980.
139. *Id.* at 981.
140. *Id.* at 979.
141. *Id.* at 971–72.
142. *Id.* at 972.
143. *Id.* (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 421–22 (1994)).

Gore, which imposed federal due process limitations on punitive damage awards.[144] In *BMW*, the Court promulgated three "guideposts" to be used to determine whether an exemplary award had "cross[ed] the constitutional line": "(1) the reprehensibility of the defendant's conduct; (2) the ratio between the exemplary damage award and the harm the defendant's conduct caused, or could have caused; and (3) the size of any civil or criminal penalties that could be imposed for comparable misconduct."[145]

The defendant in *Mosing* asked the Louisiana Supreme Court to conduct a de novo review of the award in accordance with *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[146] However, because the defendant had not made a federal due process challenge of the award in the trial court, the court found that it was not required to perform the de novo review but, rather, was "free to review state law and common law excessiveness claims under an abuse of discretion standard" as it had always done.[147]

Significantly, although the court found that other state courts had "embraced *Cooper*'s *de novo* standard of review and [applied] it to all claims of excessive exemplary damages," the *Mosing* court "decline[d] the invitation to extend *Cooper*'s *de novo* review beyond its federal constitutional bounds."[148] While the court acknowledged that a jury's determination of the proper amount of the exemplary damages award necessarily "involves a judgment or policy choice . . . , the degree of punishment to be inflicted is inextricably tied to the particular facts of each case, rendering the determination a mixed question of law and fact entitled to deference by the appellate court."[149] The court further explained that the following factors have traditionally been used by Louisiana appellate courts to determine the appropriateness of a punitive damages award: 1) the nature and extent of the harm to the plaintiff; 2) the wealth or financial situation of the defendant; 3) the character of the conduct involved; and 4) the extent to which such conduct offends a sense of justice and propriety.[150] With the exception of considering the wealth of the defendant, the court found that *BMW*'s three "guideposts" "mirror[ed]" Louisiana's

144. Interestingly, the defendant did not make a similar challenge on Louisiana constitutional grounds. This issue is explored in Massey & Stern, *supra* note 27.

145. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

146. 532 U.S. 424 (2001).

147. *Mosing*, 830 So. 2d at 973.

148. *Id.*

149. *Id.* at 974.

150. *Id.* at 977.

test, and so, while not bound to do so, it chose to utilize these guideposts in its own review.[151]

The actual wording of both the *BMW* and traditional Louisiana factors suggests that "the conduct" of the defendant as used in those tests clearly refers to the conduct of the defendant in connection with the incident giving rise to the suit. However, when applying the factors, the Louisiana Supreme Court, as well as the third circuit, places the heaviest emphasis on the defendant's *history* of similar conduct.[152] In that regard, the court found the defendant to have a "long history of alcohol related offenses involving driving that evince a substantial disregard for the health and safety of others."[153] The defendant's conduct had "resulted in serious physical, as opposed to purely economic, injury, and pose[d] a clear threat to society at large."[154] After a detailed review of his driving record, the court held that his specific conduct in the incident sued upon "could hardly have been more reprehensible."[155] As such, the jury's high award was justified in terms of the first factor.

The *Mosing* court took note that in the United States Supreme Court's analysis of the second *BMW* prong, the Court compared the punitive damages award against the compensatory damages award and was troubled by the 500 to 1 ratio.[156] However, the Supreme Court cautioned against drawing a "mathematical bright line."[157] Based on this, the *Mosing* court found that a case involving a low compensatory award may still warrant a high exemplary award if a particularly egregious act was involved.[158] The nine-to-one ratio between the exemplary and compensatory damages found in the *Mosing* award, stated the Louisiana Supreme Court, represented "no 'shocking disparity.'"[159]

In *Mosing*, the court recognized that the letter of the second *BMW* guidepost calls for a comparison of the amount of the exemplary damages award not against the compensatory damages award but, rather, against the "*harm* the defendant's conduct

151. *Id.* at 978.
152. In support, the court cites *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 579–80 (1996) (holding that a high probability of recidivism justifies a higher than normal exemplary damages award).
153. *Mosing*, 830 So. 2d at 973.
154. *Id.* at 979.
155. *Id.* at 981.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*

caused, or *could have caused*."[160] Thus, the court looked not only at the physical harm actually done to the plaintiff (relatively little) but also at the harm that *could* have resulted from the defendant's conduct. As to the latter, the court noted that while the plaintiff did not have a passenger in his car at the time of the accident, it was the passenger's side that took the brunt of the impact.[161] The lack of actually-realized damage did not "detract from the real and substantial danger [the defendant's] outrageous conduct" could have caused.[162]

Referring again to the defendant's past conduct and the apparent ineffectiveness of past criminal sanctions, the court found the $500,000 award was further "reasonably calculated to punish this defendant and deter such similar recidivist conduct in the future."[163] The award was not so disproportionate that it represented impermissible "passion and prejudice" on the jury's part.[164]

The *Mosing* court then compared the exemplary damages award to civil or criminal penalties that could have been imposed.[165] The defendant was facing third offense DWI charges, which carried a mandatory prison term of no less than one year and a fine of no more than $2,000.[166] While the fine was relatively low, the court determined that the substantial mandatory term of imprisonment was comparable in severity to a high exemplary award.[167]

There was a dearth of evidence as to the defendant driver's financial condition, and he chose not to appear at the trial.[168] The court nonetheless held that it is the *defendant's* burden to produce evidence of his financial condition if he wished this factor to be considered in the award of exemplary damages.[169] The court held that, in any event, the defendant's financial condition was only one factor, and there was ample evidence on the other factors to justify the award.[170]

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160. *Id.* at 973 (emphasis added).
161. *Id.* at 981.
162. *Id.*
163. *Id.* at 982.
164. *Id.*
165. *Id.* at 977–78.
166. *Id.*
167. *Id.*
168. *Id.* at n.11.
169. *Id.* at 979 (citing Woods-Drake v. Lundy, 667 F.2d 1198, 1203 n.9 (5th Cir. 1982)).
170. *Id.*

Based on all the foregoing and "with a view to the *great deference* to be accorded to the trier of fact," the *Mosing* court concluded that the $500,000 exemplary damages award was not an abuse of the jury's discretion.[171] *Mosing* introduced *BMW*'s three guideposts into Louisiana's analysis of the excessiveness vel non of a punitive damages award. Yet little of substance has changed. The court retained the inquiry as to the wealth of the defendant and, as noted by the court, the *BMW* guideposts "mirror" Louisiana's traditional test.[172]

In its opinion in *Mosing*, the Louisiana Supreme Court resisted the invitation to impose an arbitrary mathematical ratio tying punitive damages to the compensatory award. In applying Louisiana's exemplary damages statute, the court paid homage, in both word and deed, to the "vast discretion" given to juries in making exemplary damages awards under common law. A nine-to-one exemplary to compensatory ratio was not a "shocking disparity" and was upheld.[173] Although not expressly stated, the tenor of the court's language in *Mosing* certainly suggests that, under the right circumstances, higher exemplary to compensatory ratios would not run afoul of the court's excessiveness standards.[174] Practically, however, Louisiana courts seldom face exemplary awards that would test the issue. To the contrary, the punitive awards granted in Louisiana have tended to be similar *or lower* than the compensatory damages awards.[175] For instance, in *Lafauci*, the jury awarded roughly $48,000 in compensatory damages and $22,500 in punitive damages.[176] The first circuit described the award as "arguably *generous*" but upheld the award, in part, because the exemplary damages were "much less than the amount of compensatory damages awarded."[177]

The fourth circuit in *Dekeyser v. Automotive Casualty Insurance Co.* was asked to review an exemplary award of

171. *Id.* at 983.
172. *Id.* at 978.
173. *Id.* at 981–83.
174. Such an award could put exemplary damages into the double-digit disparity category that, under a de novo review for possible violation of federal due process, would probably be deemed excessive. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (discussed *infra*).
175. This is consistent with the national experience where "by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1." Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2624 (2008).
176. Lafauci v. Jenkins, 844 So. 2d 19, 23 (La. App. 1st Cir. 2003).
177. *Id.* at 26 (emphasis added).

$850,000 when the jury had made a $500,000 compensatory award.[178] The jury's findings were upheld.

In *Byous v. Ebanks*, the fourth circuit considered an exemplary award of $225,000 against a compensatory award of $450,000.[179] Finding it unreasonable—relying heavily on the added financial inquiry factor—the court lowered the punitive award to $50,000.[180] In contrast, a compensatory award of $1,625,181.90 and a punitive award of $1,750,000.00 (roughly one-to-one) was granted by the jury in *Leary* (discussed *supra*) and held not to be an abuse of discretion.[181]

6. Appellate Review—Federal Due Process

How the Louisiana Supreme Court will ultimately handle a due process challenge to an award rendered under article 2315.4 will necessarily depend on how it applies cases such as *BMW*,[182] *Cooper*,[183] *State Farm Mutual Automobile Insurance Co. v. Campbell* (*State Farm*),[184] and *Philip Morris USA v. Williams*.[185] In *State Farm*, the United States Supreme Court found a ratio of 145 to 1 (exemplary to compensatory) constitutionally excessive and added that although it was reluctant to assign that mathematical bright line, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process."[186] Although an exemplary award may surpass

178. 706 So. 2d 676 (La. App. 4th Cir. 1998), *abrogated by* Champagne v. Ward, 893 So. 2d 773 (La. App. 1st Cir. 2001).

179. Byous v. Ebanks, No. 2007-CA-1534, slip op. (La. App. 4th Cir. May 28, 2008).

180. *Id.* at 26. Despite there apparently being no federal due process challenge at the trial court level, and admittedly reviewing the case under an abuse of discretion standard, the fourth circuit's analysis is heavily reliant on federal jurisprudence such as *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

181. Leary v. State Farm, 978 So. 2d 1094, 1096–97 (La. App. 3d Cir. 2008), *writ denied*, 983 So. 2d 900 (La. 2008).

182. 517 U.S. 559 (1996).

183. 532 U.S. 424 (2001).

184. 538 U.S. 408 (2003).

185. 549 U.S. 346 (2007).

186. *State Farm*, 538 U.S. at 410. In *Exxon Shipping Co. v. Baker*, the Supreme Court created a maritime rule of punitive damages for marine pollution, setting a one-to-one punitive to compensatory damages cap when the conduct of the defendant was reckless but not malicious, was not driven by the profit motive, and when the compensatory damages award was large. It remains to be seen whether the same cap will be imposed when the circumstances are different. 128 S. Ct. 2605 (2008). In *Atlantic Sounding Co. v. Townsend*, the Supreme Court held that punitive damages are available to a seaman whose

that ratio and remain within the confines of due process, such an award would probably be based on a particularly egregious act and a small amount of economic damages. The Court added that:

> The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.[187]

In *Phillip Morris USA*,[188] the Supreme Court found that it was a violation of the Due Process Clause of the Fourteenth Amendment to punish a defendant for harms to non-parties.[189] Thus, in deciding whether to make a punitive damages award, the jury is precluded from considering the defendant's harm to non-parties. However, in deciding the amount of the award, the jury is allowed to consider the defendant's harm to others. As explained by Frank Maraist and Thomas Galligan, "How a jury or court can meaningfully draw such fine lines is not apparent."[190]

By way of guidance to Louisiana trial courts, Maraist and Galligan have written that, in order to avoid constitutional challenges, those courts "should adequately and clearly instruct juries as to the purposes and polices underlying punitive damages and the factors that they may consider in deciding whether to award punitive damages . . . ."[191] Further, in light of the *Phillip Morris USA* decision, "Louisiana courts should make sure that the jury is instructed that it may not punish the defendant for harm to non-parties."[192]

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employer has willfully withheld maintenance and cure. 129 S. Ct. 2561, 2575 (2009). The Court's pretermitted consideration of whether such damages should be subject to a cap. *Id.* at 2574 n.11.

187. *State Farm*, 538 U.S. at 425.

188. The case has "ping ponged" between the United States Supreme Court and the Oregon Supreme Court on a variety of issues. The most recent ruling of the Oregon Supreme Court found that its decision to uphold the original award was supported by a state law rule that could not be reviewed by the United States Supreme Court. After initially granting writs to review the decision again, the United States Supreme Court has now dismissed the writ as "improvidently granted." *See* 129 S. Ct. 1436 (2009).

189. *Williams*, 549 U.S. at 353–55.

190. MARAIST & GALLIGAN, *supra* note 52, § 7.03[2], at 7–34.

191. *Id.* at 7–35.

192. *Id.*

One Louisiana court has had an opportunity to grapple with these issues, although not in the application of article 2315.4. *Grefer v. Alpha Technical* involved a $1 billion jury award made under Louisiana's article 2315.3 (repealed), that allowed for punitive damages resulting from reckless handling of hazardous substances.[193] In *Grefer*, the plaintiffs sued Exxon Mobil Corporation (Exxon), Intracoastal Tubular Services, Inc. (ITCO), and others for damages related to the radioactive contamination of thirty-three acres of land belonging to the Greffers.[194] The land had been leased to ITCO for cleaning, testing, and other handling of oil field pipe that was used by Exxon and others.[195] After a five-week trial, the jury found for the plaintiffs and awarded $56,145,000 in compensatory damages and $1 billion in exemplary damages.[196] It allocated eighty-five percent of the fault to Exxon, five percent to ITCO, and ten percent to two absent defendants.[197]

On appeal, the fourth circuit reduced the punitive damages award to $112,290,000, an amount twice the amount of the compensatory damages award.[198] The Louisiana Supreme Court denied writs.[199] The United States Supreme Court granted certiorari, vacated the fourth circuit's decision, and remanded the case for further consideration in light of the intervening case of *Philip Morris USA*.[200]

On remand, the fourth circuit rejected Exxon's contention that the United States Supreme Court's order mandated a new trial, noting that Louisiana courts are constitutionally permitted to review both fact and law.[201] It reviewed its prior decision and concluded that its initial holding was proper and that "Exxon [was] afforded all of the constitutional protections available under the Due Process Clause of the U. S. Constitution."[202]

The court meticulously reviewed the instructions given to the jury and noted that "for all intents and purposes, the trial court's instructions tracked almost verbatim Exxon's proposed instructions."[203] It concluded that the instructions properly

193. 965 So. 2d 511 (La. App. 4th Cir. 2007), *writ denied*, 967 So. 2d 523 (La. 2007), *cert. denied*, 128 S. Ct. 2054 (2008).
194. *Id.* at 514.
195. *Id.*
196. *Id.*
197. *Id.*
198. Grefer v. Alpha Technical, 901 So. 2d 1117, 1152 (La. App. 4th Cir. 2005), *writ denied*, 925 So. 2d 1248 (La. 2006).
199. Grefer v. Alpha Technical, 925 So. 2d 1248 (La. 2006).
200. Exxon Mobil Corp. v. Grefer, 549 U.S. 1249 (2007).
201. LA. CONST. art. V, § 10(B); *Grefer*, 925 So. 2d at 526.
202. *Id.* at 518.
203. *Id.*

distinguished between the evidence of Exxon's reckless conduct toward non-parties and evidence of Exxon's reckless conduct toward the parties.

The court recited its earlier conclusion that Exxon's conduct "did involve an element of deceit"[204] and "satisfied the wanton and reckless requirement, i.e., it was reprehensible."[205] The earlier decision to significantly reduce the amount of the award was reviewed and affirmed. The *Grefer* court described the move as a "drastic . . . reduction based on the *State Farm* multiplier and the compensatory award"[206]

7. Vicarious Liability

The question of whether an employer of an intoxicated driver may be assessed with exemplary damages under article 2315.4 is not a settled one in Louisiana, and in this regard Louisiana law is consistent with the conflict on this subject nationwide.[207]

At least one circuit has found that an employer can be assessed with an exemplary damages award for the conduct of his intoxicated employee who is in the course and scope of his employment. In *Curtis v. Rome*, the fourth circuit reviewed a summary judgment that precluded a claim for punitive damages against an employer of an intoxicated tortfeasor because article 2315.4 "clearly intended that the driver and only the driver be found liable for exemplary damages."[208]

The court initially noted that there was "no case directly on point addressing this issue."[209] Relying on Civil Code articles 13 and 2320, the court concluded that "those who are legally responsible for the intoxicated driver may be assessed with punitive damages under [article 2315.4]."[210] Subsequently, in *Lacoste v. Crochet*, the fourth circuit confirmed its holding in *Curtis*.[211]

The first circuit, however, has suggested in dicta that it would reach a different result. The specific issue before the first circuit in *Darby v. Sentry Insurance Automobile Mutual Co.* was evidentiary

204. *Id.* at 522.
205. *Id.* at 525.
206. *Id.* at 526.
207. MARAIST & GALLIGAN, *supra* note 52, § 7.03[1]; Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2614–16 (2008).
208. 735 So. 2d 822, 824 (La. App. 4th Cir. 1999), *writ denied*, 748 So. 2d 441 (La. 1999).
209. *Id.* at 825.
210. *Id.*
211. 751 So. 2d 998, 1003 (La. App. 4th Cir. 2000).

in nature, but the broader issue considered was whether one solidary obligor could be assessed punitive damages for the actions of his co-solidary obligor.[212] The first circuit refused such an assessment. In a footnote, the *Darby* court mentioned that the trial court had cited *Curtis* and *Lacoste* favorably and seemingly as controlling precedent on the issue of exemplary awards against the employers of intoxicated drivers.[213] In something of a rebuke, the first circuit stated flatly: "[H]owever, as this [c]ourt is not bound by the decision of our colleagues on this issue and such a conclusion may be contrary to the principle of strict construction of punitive statutes, we leave that analysis for another day."[214]

8. Insurance Coverage

The question of when and to what extent typical automobile liability and uninsured motorist policies may provide coverage for exemplary damages is well-settled. Louisiana courts have held that finding that insurance covers awards of punitive damages does not violate public policy or the philosophical underpinnings of article 2315.4 when the *language* of the policy would otherwise provide coverage.[215]

Such coverage does not violate public policy because whereas exemplary damages are awarded in situations involving wanton negligence, the conduct covered is negligence nonetheless.[216] Further:

> [P]ermitting coverage does not automatically shift the burden of payment. The insurance company can charge the insured a premium for coverage of exemplary damages. To the extent that such damages exceed the policy limits, there is no shift in the payment of damages. Although the purpose of punitive damages is to punish and deter, the injured party receives the benefit of such payment and from the plaintiff's

212. 960 So. 2d 226 (La. App. 1st Cir. 2007), *writ denied*, 953 So. 2d 59 (La. 2007).

213. *Id.* at n.1.

214. *Id.* at 230 n.1.

215. Sharp v. Daigre, 555 So. 2d 1361 (La. 1990); Falgout v. Wilson, 531 So. 2d 492 (La. App. 1st Cir. 1988), *writ denied*, 532 So. 2d 154 (La. 1988); Louviere v. Byers, 526 So. 2d 1253 (La. App. 3d Cir. 1988), *writ denied*, 528 So. 2d 153 (La. 1988); Beard v. Allstate Ins. Co., 534 So. 2d 52 (La. App. 3d Cir. 1988); Creech v. Aetna Cas. & Sur. Co., 516 So. 2d 1168, 1173 (La. App. 2d Cir. 1987).

216. *See, e.g.*, *Louviere*, 526 So. 2d at 1253.

> standpoint, punitive damages are additional compensation for the egregious conduct inflicted upon him.[217]

Other courts have found different paths to the same conclusion. For instance, the fifth circuit in *Gonzalez v. Casadaban* found it important that the legislature included no language whatsoever in article 2315.4 to suggest that automotive insurance coverage should not apply despite the fact that the lawmakers would have been aware that drivers were required to have insurance, and those policies generally provided coverage "against claims of any character" except for intentional acts.[218] The court found that another reason such insurance did not violate public policy—and should therefore apply if the language of the policy was broad enough to include such coverage—was that "an insurance company which accepts a premium for covering all liability for damages should honor its obligation."[219]

Louisiana courts have also concluded that it does not violate the statutory purpose of article 2315.4 (i.e., to deter and punish) for an insurance company, whose policy would otherwise cover such damages, to be held responsible for the payment of an exemplary award.[220] The typical argument presented by insurers on this issue was that if insurance companies were actually paying punitive damages awards, the tortfeasor would not be deterred from, nor punished for, his reckless actions. The courts' response has been that the tortfeasor himself can, and ultimately will, bear the burden of the punishment because his insurer has the right to proceed against him in a subrogation action to collect any amount paid out by it on his behalf.[221] Such an action would not be without teeth because an award of exemplary damages is non-dischargeable in bankruptcy.[222]

Despite the foregoing, Louisiana courts have repeatedly held that, although it does not violate public policy or the statute's

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217. *Id.* at 1257 (quoting *Creech*, 516 So. 2d at 1173). This justification is based, in part, on the theory regarding the purposes of punitive damages still cited by courts as outlined above (*see, e.g.*, Lafauci v. Jenkins, 844 So. 2d 19 (La. App. 1st Cir. 2003)), in which some compensatory function remains an aspect of the purpose. This theory is out of step with the most recent proclamations of the Louisiana Supreme Court, e.g., *Mosing v. Dumas*, 830 So. 2d 967 (La. 2002), the United State Supreme Court, e.g., *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), and scholarship, e.g., BLACK'S LAW DICTIONARY 448 (9th ed. 2009).

218. 556 So. 2d 1291, 1292 (La. App. 5th Cir. 1990).

219. *Id.* at 1292.

220. *See, e.g.*, Bauer v. White, 532 So. 2d 506, 508–09 (La. App. 1st Cir. 1988).

221. *See, e.g.*, *Creech*, 516 So. 2d at 1173.

222. 11 U.S.C. § 523 (2006).

purpose for insurance policies to cover exemplary damages, it is permissible for an insurer to exclude such coverage from its policies.[223] Additionally, if, under the language of its policy, the insurer must provide coverage for exemplary damages, its exposure is limited to the policy limits.[224]

Whereas the intoxicated driver–defendant, and possibly his insurer or insurers, may be taxed with exemplary damages, those removed from the incident or injuries giving rise to the cause of action are not subject to the assessment. The Louisiana Supreme Court in *Berg v. Zummo*, in keeping with Louisiana's dram shop liability position generally, found that the legislature, in passing article 2315.4, had not intended to punish those that had provided alcohol to the driver (e.g., the tavern owner).[225]

B. Louisiana Civil Code Article 2315.7: Criminal Sexual Activity

Article 2315.7. Liability for damages caused by criminal sexual activity occurring during childhood:

> In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through criminal sexual activity which occurred when the victim was seventeen years old or younger, regardless of whether the defendant was prosecuted for his or her acts. The provisions of this Article shall be applicable only to the perpetrator of the criminal sexual activity.[226]

On its face, the article requires that the following elements be satisfied by the plaintiff for a favorable verdict: 1) an act of *criminal* sexual activity (whether or not the perpetrator was actually prosecuted); 2) directed toward a victim seventeen years old or younger; and 3) shows wanton and reckless disregard for the rights and safety of the victim.

Since its adoption in 1993, mention of the article in Louisiana jurisprudence is almost entirely limited to its use as an example of the limited circumstances under which a plaintiff may be awarded punitive damages under Louisiana law. Only two appellate cases

223. *See, e.g.*, Eaglin v. Champion Ins. Co., 558 So. 2d 284, 288 (La. App. 3d Cir. 1990).

224. *See, e.g.*, Pietsch v. Farmer, 957 So. 2d 315, 318 (La. App. 2d Cir. 2007), *writ denied*, 964 So. 2d 338 (La. 2007).

225. 786 So. 2d 708 (La. 2001).

226. LA. CIV. CODE art. 2315.7 (2009).

have actually dealt with the application of the article: *S.K. v. Catholic Diocese of Baton Rouge*[227] and *Capdeboscqu v. Francis*.[228]

In *Capdebosqu*, the plaintiffs, two women who were minors at the time of the alleged offense, sued the producers of a "Girls Gone Wild" video after the producers took footage of the women "flashing" a camera and then subsequently used the footage in one of their videos.[229] At issue was plaintiffs' attempt to amend their complaint to include, among other claims, an article 2315.7 claim for punitive damages.[230] The court denied plaintiffs' motion on the grounds that the proposed amendment did not sufficiently allege the elements required for criminal sexual activity; thus, the claim was bound to fail.[231]

S.K. involved a series of incidents in which one special education student had inappropriate sexual contact with another student during class.[232] The parents of the affected child brought suit against the Catholic Diocese of Baton Rouge, which ran the special education program.[233] Among other items of damage, the plaintiffs requested punitive damages under article 2315.7.[234] In denying the plaintiffs' claims, the court indicated that, although the defendant had been negligent in its supervision of the children, the conduct of the employees fell "significantly short of what is normally described as wanton or reckless."[235] Interestingly, the court failed to mention that, under the requirements of the statute, the Diocese could not have been assessed with exemplary damages because it was not the *perpetrator* of the criminal sexual activity. Unlike article 2315.4, the perpetrator of the act, and only the perpetrator of the act, is liable for exemplary damages under article 2315.7.[236] Theories of vicarious liability and possible insurance coverage are undone by the clear language of the article itself.

Another feature of article 2315.7 that stands out in contrast to 2315.4 is that, in addition to proving wanton and reckless conduct, the plaintiff must prove conduct that is criminal in nature. Under article 2315.4, the plaintiff need not show *criminal* intoxication, but only that the amount of intoxicants consumed was enough to

227. No. 2007 CA 0742, slip op. (La. App. 1st Cir. Dec. 21, 2007).
228. No. 03-0556, 2003 U.S. Dist. LEXIS 8989 (E.D. La. May 27, 2003).
229. *Id.* at *3.
230. *Id.*
231. *Id.*
232. *S.K.*, slip op. at 1.
233. *Id.* at 4.
234. *Id.* at 17.
235. *Id.* at 24.
236. LA. CIV. CODE art. 2315.7 (2009).

materially alter the defendant's judgment.[237] Under the plain language of article 2315.7, however, wanton and reckless *criminal* conduct is required in order to obtain judgment, even if no formal prosecution has taken or will take place.

C. Louisiana Revised Statutes Section 15:1312: Interception, Disclosure, or Use of Wire or Oral Communication

Louisiana Revised Statutes section 15:1312 was passed in 1985 as a part of the Louisiana Electronic Surveillance Act. Section 15:1303 makes it "unlawful" to "willfully" intercept or use any electronic, mechanical, or other device to intercept any oral communication under certain circumstances.[238] The violation of this provision subjects the violator to a fine and/or imprisonment.[239]

Louisiana Revised Statutes section 15:1312 states:

> A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and be entitled to recover from any such person:
> (1) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation or one thousand dollars, whichever is greater.
> (2) A reasonable attorney's fee and other litigation costs reasonably incurred.
> (3) Punitive damages.
> B. A good-faith reliance on a court order shall constitute a complete defense to any civil or criminal action brought under this Chapter.

Relatively little use has been made of this statute for the purpose of pursuing a punitive damages award, and to date no awards of punitive damages have been made pursuant to it.

D. Louisiana Revised Statute Section 9:2800.76: Sale, Distribution, or Marketing of Illegal Controlled Substance

The Louisiana Drug Dealer Liability Act was passed in 1997 "to provide a civil remedy for damages to persons in a community

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237. *See supra* Section II.A.2.a and accompanying discussion.
238. LA. REV. STAT. ANN. § 15:303(A)(1) (2005 & Supp. 2010).
239. *Id.* § 15:303(B).

injured by an individual's use of illegal controlled substances."[240] Under this statute, certain plaintiffs may bring a civil action for compensatory as well as exemplary damages against persons who have distributed, or possessed with the intent to distribute, illegal controlled substances.[241] The action is available to several classes of plaintiffs, including family members of a drug user, an individual who is exposed to an illegal controlled substance in utero, an employer of a user, a medical facility or other entity that spends money on behalf of an individual user, and any person "injured as a result of the willful, reckless, or negligent actions of an individual user."[242] All plaintiffs except drug users may recover economic damages, general damages, reasonable attorneys' fees, litigation costs, and exemplary damages.[243]

In order for a drug user to bring the action, a plaintiff must disclose to narcotics enforcement authorities, not less than six months before filing the action, all the information the plaintiff has regarding his sources of illegal controlled substances.[244] Furthermore, the plaintiff cannot have used illegal controlled substances within thirty days prior to filing the action, nor can he use such substances during the pendency of the action.[245]

Section 9:2800.76 deals specifically with exemplary damages:

> In addition to general and special damages that may be awarded under this Chapter, exemplary damages may be awarded upon proof that the sale or distribution of any illegal controlled substance or participation in the marketing of an illegal controlled substance was in wanton or reckless disregard for the rights, health, and safety of others.[246]

There have been no reported cases utilizing this cause of action.

CONCLUSION

Despite the lack of any punitive damages provisions in Louisiana's Civil Code of 1808, Louisiana courts routinely applied the common law doctrine of punitive damages for over eighty years. As they did so, however, the tension between applying this common law doctrine in the face of Louisiana's civil law roots was expressed in a variety of ways. One decision admitted to a

240. *Id.* § 9:2800.61(B) (2009).
241. *Id.* § 9:2800.63, .64, .76.
242. *Id.* § 9:2800.63(A).
243. *Id.* § 9:2800.63(D).
244. *Id.* § 9.2800.64(A)(1).
245. *Id.* § 9:2800.64(A).
246. *Id.* § 9:2800.76.

"confusion of ideas" on the subject.[247] Several courts attempted to rely on statutes to support their approval of punitive damages (specifically what is now article 2324.1), a misplaced reliance since the statute made no mention of punitive damages. This tension was also expressed in strong dissenting opinions.

Following the 1917 case of *Vincent v. Morgan's Louisiana*,[248] Louisiana emphatically returned to the modern civil law view that damages are meant to make reparation and to compensate the victim and not to punish or make an example of the wrongdoer. Thus, Louisiana law now permits exemplary damages only when specifically authorized by statute.

Louisiana's experience with common law punitive damages has not been forgotten, however. It has clearly played a role in the interpretation and application of Louisiana's punitive damages provisions, especially Civil Code article 2315.4. Lip service is given to strict construction of these punitive damages statues, a concept that arose from civilian uneasiness with exemplary damages. In reality, however, statutes have not been strictly construed. For instance, in the application of article 2315.4, key terms such as "intoxication" and "wanton or reckless" have been given broad, not narrow, readings.

Consistent with the common law approach, juries are given "vast discretion" in considering a wide array of variables outside the listed statutory factors in deciding whether punitive damages should be awarded. Even when the plaintiff has met all the statutory requirements for recovery of punitive damages, juries have been allowed to consider these extra-statutory factors in denying an award.

The same wide discretion is given to the trier of fact in determining the amount of the punitive damages award. The standard used by appellate courts in reviewing the jury's decision mirrors that of traditional common law courts, and great deference is given to the jury's decision.

In recent years, there have been dramatic developments in the law of punitive damages on a federal constitutional level. Louisiana seems prepared to resist changes to its own punitive damages rules. Louisiana's law of punitive damages continues to reflect both its civil and common law traditions.

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247. Dirmeyer v. O'Hern, 3 So. 132, 134 (La. 1887).
248. 74 So. 541 (La. 1917).