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ADAMS V. MURAKAMI—NEW JUDICIALLY MADE RULES AFFECTING PUNITIVE DAMAGES IN CALIFORNIA

I. INTRODUCTION

Awards of punitive damages, damages beyond those required to fully compensate a party for his or her injuries, have long been a part of the common and statutory law in England and the United States.¹ Recently, punitive damages have come under increasing scrutiny both in the political arena² and in the courts³ of the United States.

Punitive damages were originally conceived as a public way to punish a defendant's improper behavior. By making an example of the defendant, the defendant and others would thereby be deterred from committing future malicious, oppressive or fraudulent conduct of a similar nature.⁴ Critics of the punitive damage system have commented that, in the past, punitive damages were requested only in cases in which the defendant had a "quasi-criminal intent to harm the plaintiff."⁵ Now, critics contend, "plaintiffs in civil lawsuits routinely ask juries to award

1. See *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1041-42 (1991); *id.* at 1047 (Scalia, J., concurring); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274-75 & n.20 (1989). See also David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262-63 & 1263 nn.18-19 (1976), for a discussion of English statutory provisions and case law relating to punitive damages.

2. *E.g.*, PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 5-6, 22-23 (1991) [hereinafter CIVIL JUSTICE REFORM]. This report was completed under the supervision of the Vice President in order to attempt to remedy the abuse and overuse of the legal system which "impose tremendous costs upon American society. Each year the United States spends an estimated \$300 billion as an indirect cost of the civil justice system." *Id.* at Memorandum for the President. This report is not, however, universally accepted as accurate. One critic accuses the report of "exaggerat[ing] the extent and cost of litigation for consumers and manufacturers alike. [The report] gives phony credibility to unscientific cost estimates . . . manufactured by business groups and their supporters." Kenneth Jost, *Tampering with Evidence*, A.B.A. J., Apr. 1992, at 44, 45.

3. See, *e.g.*, *Haslip*, 111 S. Ct. 1032 (examining punitive damages under Fourteenth Amendment); *Browning-Ferris*, 492 U.S. 257 (examining punitive damages under Eighth Amendment); *Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991) (requiring plaintiff to present evidence of defendant's financial condition and examining constitutional sufficiency of punitive damage system in California).

4. *Adams*, 54 Cal. 3d at 110, 813 P.2d at 1350, 284 Cal. Rptr. at 320. See also CAL. CIV. CODE § 3294(a) (West Supp. 1992), which provides that when a defendant is "guilty of oppression, fraud, or malice," a plaintiff "may recover damages for the sake of example and by way of punishing the defendant."

5. CIVIL JUSTICE REFORM, *supra* note 2, at 5.

. . . punitive damages."⁶ With juries more willing to award them, punitive damages have become more of a lottery for the plaintiff than a way to deter future wrongdoing by punishing the defendant.⁷

Some have argued, and some serious consideration has been given to the supposition, that the common-law method of awarding punitive damages may be unconstitutional under the Eighth Amendment⁸ or the Fourteenth Amendment.⁹ Although "all nine participating Members of the Court [have] noted concern"¹⁰ about the constitutionality of punitive damages, the United States Supreme Court has nonetheless refused to hold the common-law method of assessing punitive damages "per se unconstitutional" under the Due Process Clause.¹¹ This holding is consistent with the holding of virtually every federal or state court that has considered the question.¹²

In an effort to spare defendants from what some believe to be excessive punitive damages, some courts have resorted to fashioning rules designed to limit punitive damages.¹³ In such an effort, the California Supreme Court, in *Adams v. Murakami*,¹⁴ ruled that when a plaintiff asks for an award of punitive damages, evidence of the defendant's financial condition must be introduced at trial and is a prerequisite to receiving that award.¹⁵

This Note reviews the history of punitive damages, including their development in California. It then critically analyzes the California Supreme Court's reasoning in *Adams*. This Note concludes that the court incorrectly interpreted relevant California statutes and prior precedent, unnecessarily discussed constitutional considerations irrelevant to the case at hand, and, by compelling pretrial discovery of the defendant's financial condition, created a rule that potentially burdens both plaintiffs and defendants. Finally, this Note examines the effects of the decision on California law and proposes means to otherwise limit onerous punitive damage awards and to prevent the adverse effects this case may have.

6. *Id.*

7. *Id.* at 5-6.

8. *E.g.*, *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

9. *E.g.*, *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991).

10. *Id.* at 1038.

11. *Id.* at 1043.

12. *Id.*

13. *See, e.g.*, *Adams v. Murakami*, 54 Cal. 3d 105, 131, 813 P.2d 1348, 1365, 284 Cal. Rptr. 318, 335 (1991) (Mosk, J., dissenting).

14. 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

15. *Id.* at 109, 813 P.2d at 1349, 284 Cal. Rptr. at 319.

II. BACKGROUND

A. History of Punitive Damages

Punitive damages, in the form of multiple damages,¹⁶ have been allowed since the origin of law.¹⁷ Professor Owen notes that “[m]ultiple damages were provided for in Babylonian law nearly 4000 years ago in the Code of Hammurabi, the earliest known legal code.”¹⁸ Multiple damages were also awarded in the Hittite Laws of 1400 B.C.,¹⁹ “in the Hebrew Covenant Code of Mosaic law of about 1200 B.C.,”²⁰ and in the Hindu Code of Manu of about 200 B.C.,²¹ which “provided for multiple damages in at least one case.”²² Early Roman Civil Law was punitive in nature, and in several cases called for “double, treble, and quadruple damages.”²³

Provisions for multiple damages in English statutory law first appeared in 1275, when awards of double damages were permitted from trespassers against religious persons.²⁴ Punitive damages “first received explicit recognition by the English common law”²⁵ in *Huckle v. Money*,²⁶ decided in 1763.²⁷ “The doctrine was rapidly transported to America and by the middle of the nineteenth century had gained substantial acceptance in this country.”²⁸ Since its inception in the United States, the doctrine of punitive damages has been, and continues to be, criticized but nonetheless has become deeply rooted in both federal and state common law.²⁹

16. “Since multiple damages are awarded to a plaintiff in an amount equal to a legislatively prescribed multiple of his actual damages, they are plainly a form of punitive damages.” Owen, *supra* note 1, at 1262 n.17.

17. *Id.* at 1262 & n.17.

18. *Id.* at 1262 n.17.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Statute of Westminster I, 3 Edw. 1, ch. 1 (1275) (Eng.), reprinted in 1 STATUTES AT LARGE 40, 41 (Owen Ruffhead ed., 1763); see Owen, *supra* note 1, at 1262, 1263 n.18 (discussing punitive damages under English statutory law).

25. Owen, *supra* note 1, at 1262-63.

26. 95 Eng. Rep. 768, 769 (K.B. 1763).

27. Owen, *supra* note 1, at 1263 n.19.

28. *Id.* at 1263 (footnotes omitted).

29. *Id.* at 1263-64, 1267. See also *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1041 (1991), where Justice Blackmun, writing for the Court, observed that “[p]unitive damages have long been a part of traditional state tort law.” *Id.* (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)).

B. *Constitutionality of Punitive Damage Awards*

The United States Supreme Court has reviewed the constitutionality of punitive damages on several occasions.³⁰ Recently, the Supreme Court has effectively avoided reaching the issue of constitutionality in punitive damages cases by deciding cases on other grounds³¹ or by declaring the record not sufficiently developed for constitutional adjudication.³² Perhaps realizing that it would soon have to decide the constitutionality of punitive damage awards under the Excessive Fines Clause³³ or the Due Process Clause,³⁴ the Supreme Court in *Bankers Life & Casualty Co. v. Crenshaw*³⁵ suggested some less intrusive alternatives that would be preferable to the high Court ruling on the constitutionality of punitive damages:

[T]he . . . State Legislature might choose to enact legislation addressing punitive damages awards . . . ; failing that, the . . . state courts may choose to resolve the issue by relying on the State Constitution or on some other . . . non-federal ground; and failing that, the [state] Supreme Court will have its opportunity to decide the question of federal law in the first instance³⁶

1. Examining punitive damages under the Excessive Fines Clause: the *Browning-Ferris* decision

Finally, in 1989, the United States Supreme Court, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,³⁷ decided a punitive damages case

30. See, e.g., *Smith v. Wade*, 461 U.S. 30, 34-38 (1983) (upholding punitive damages awarded pursuant to common-law rule when action brought under civil rights statute, 42 U.S.C. § 1983 (1988)); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 285 (1912) (upholding punitive damages absent hearing or rule for measuring punitive damages); *Minneapolis & St. L. Ry. v. Beckwith*, 129 U.S. 26, 36 (1889) (holding that punitive damages cannot "be justly assailed as infringing upon the Fourteenth Amendment"); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (upholding punitive damages awarded by jury unless verdict outrageous); *Missouri Pac. Ry. v. Hume*, 115 U.S. 512, 521 (1885) (relying on traditional legal practices to uphold jury discretion in awarding punitive damages); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) (holding, before passage of Fourteenth Amendment, that punitive damages were "a well-established principle of the common law" and that amount of award is traditionally "left to the discretion of the jury . . . [depending] on the peculiar circumstances of each case").

31. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986) (not reaching Eighth and Fourteenth Amendment questions since decision possible on other grounds).

32. See, e.g., *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988) ("[W]e believe that the more prudent course in this case is to decline to review appellant's [Eighth and Fourteenth Amendment] claims" because record is not fully developed).

33. U.S. CONST. amend. VIII, § 1.

34. *Id.* amend. XIV, § 1.

35. 486 U.S. 71 (1988).

36. *Id.* at 80.

37. 492 U.S. 257 (1989).

under the Excessive Fines Clause³⁸ of the Eighth Amendment.³⁹ The Court extensively explored the history of the Eighth Amendment and the framers' intent.⁴⁰ The Court concluded that the Excessive Fines Clause could apply only in cases where the government is seeking monetary retribution.⁴¹ Although the Court did not decide whether the Eighth Amendment applied only to criminal cases, the Court declared that the Eighth Amendment did "not constrain an award of money damages in a civil suit when the government neither ha[d] prosecuted the action nor ha[d] any right to receive a share of the damages awarded."⁴²

2. Examining punitive damages under the Due Process Clause: the *Haslip* decision

Justice Brennan's concurrence in *Browning-Ferris* expressed hope that in the future the Court would consider the possible constraint the Due Process Clause imposed on punitive damage awards.⁴³ In *Pacific Mutual Life Insurance Co. v. Haslip*⁴⁴ the Court addressed its "concern about punitive damages that 'run wild,'"⁴⁵ by initially investigating the common-law history of punitive damages⁴⁶ and then by formulating procedural parameters sufficient to satisfy the mandates of the Due Process Clause when awarding punitive damages.⁴⁷

Examining the long common-law history of punitive damages,⁴⁸ the Court stated: "So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process."⁴⁹ Common-law punitive damages assessment predated the

38. "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII, § 1 (emphasis added).

39. *Browning-Ferris*, 492 U.S. at 259. Although the Court ruled on the constitutionality of punitive damages under the Eighth Amendment, U.S. CONST. amend. VIII, § 1, it refused to consider the issue under the Due Process Clause of the Fourteenth Amendment, *id.* amend. XIV, § 1. The question was not raised in the district court or the court of appeals, nor was it raised in the petition for certiorari. *Browning-Ferris*, 492 U.S. at 276-77.

40. *Browning-Ferris*, 492 U.S. at 262-78.

41. *Id.* at 263-64 & 264 n.4.

42. *Id.* at 264.

43. *Id.* at 280 (Brennan, J., concurring).

44. 111 S. Ct. 1032 (1991).

45. *Id.* at 1043.

46. *Id.* at 1041-43.

47. *Id.* at 1044-46.

48. *Id.* at 1041-43. See *supra* notes 25-29 and accompanying text for a discussion of punitive damages under the common law.

49. *Haslip*, 111 S. Ct. at 1043.

Fourteenth Amendment,⁵⁰ and “[n]othing in that Amendment’s text or history indicates an intention on the part of its drafters to overturn the prevailing method.”⁵¹ Given this tradition, only an extraordinary case could invoke due process protection.⁵² In fact, in his concurrence Justice Scalia indicated that common-law tradition alone provided due process: “[I]f the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process”⁵³

The majority, however, believed it “inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional.”⁵⁴ Instead, the Court looked at Alabama’s system for awarding and reviewing punitive damages and concluded that the punitive damages award was constitutionally acceptable under the Due Process Clause.⁵⁵

The Court expressed concern that “unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.”⁵⁶ However, upon examination the Court found that although the jury instructions in this case gave the jury substantial discretion in awarding punitive damages, the discretion was not unlimited.⁵⁷ In fact, the Court approved of the trial court’s jury instructions because they specifically explained the purpose of punitive damages and limited the jury’s discretion in awarding punitive damages to purposes of deterrence, punishment and example.⁵⁸

50. *Id.*; see *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) (holding that punitive damages were “well-established principle of the common law,” with amount of award traditionally “left to the discretion of the jury [depending] on the peculiar circumstances of each case”).

51. *Haslip*, 111 S. Ct. at 1043.

52. *Id.*

53. *Id.* at 1050 (Scalia, J., concurring).

54. *Id.* at 1043.

55. *Id.* at 1044.

56. *Id.* at 1043.

57. *Id.* at 1044.

58. *Id.* The instruction given to the jury was, in pertinent part:

“[I]f you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, . . . you don’t have to even find fraud, . . . but you may, the law says you may award an amount of money known as punitive damages.

“This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. . . . [I]t is also called exemplary damages, which means to make an example. . . . [I]f you are reasonably satisfied from the evidence that the plaintiff [is the victim of a fraud] and as a direct result [suffered injury,] in addition to compensatory damages you may in your discretion award punitive damages.

“[T]he purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, . . . by way of punishment to the defendant and for the added purpose of protecting the public by deterring [*sic*] the defendant and others

In addition to approving the jury instructions given in Alabama's punitive damages cases, the United States Supreme Court approved of the Alabama Supreme Court's procedures for post-verdict review of punitive damage awards both at trial and on appeal.⁵⁹ Before the *Haslip* trial began, the Alabama Supreme Court, in *Hammond v. City of Gadsden*,⁶⁰ recognized that a jury award "may be flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive."⁶¹ To assist in ascertaining a reasonable figure for punitive damages awards and to make appellate review of the awards easier, the Alabama court found that the trial court should take into consideration, among other things, "[t]he culpability of the defendant's conduct, . . . the desirability of discouraging others from similar conduct . . . and the impact upon the parties [and] innocent third parties."⁶²

The United States Supreme Court found that Alabama's method for appellate review of punitive damage awards guarantees that such awards are "reasonable in their amount and rational in light of their purpose to punish [and] deter."⁶³ In addition, the Court stated, "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."⁶⁴ Thus, because the *Haslip* jury was instructed adequately, because the trial court's post-verdict hearing conformed to the factors set forth in *Hammond*, and because the Alabama Supreme Court appropriately reviewed the punitive damage award on appeal, the award did not violate the Due Process Clause.⁶⁵

from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong."

Id. at 1037 n.1 (alteration in original). See *infra* note 70 for the California jury instruction involving punitive damages.

59. *Haslip*, 111 S. Ct. at 1044-45.

60. 493 So. 2d 1374 (Ala. 1986).

61. *Id.* at 1378.

62. *Id.* at 1379 (citations omitted). See *infra* notes 339-41 and accompanying text for other criteria considered when reviewing punitive damage awards in Alabama.

63. *Haslip*, 111 S. Ct. at 1045.

64. *Id.* Interestingly, by this statement, the United States Supreme Court seemed to indicate that the financial condition of a defendant should not be considered by a jury and should, if at all possible, be avoided.

65. *Id.* at 1046. The Supreme Court found that the amount of punitive damages, even though more than four times the amount of compensatory damages, was nonetheless based on objective criteria and did not "cross the line into the area of constitutional impropriety." *Id.*

C. Overview of California Statutes Relevant to Punitive Damages

California statutorily authorized punitive damage awards when the California Legislature enacted section 3294 of the California Civil Code in 1872.⁶⁶ Today three statutes are central to proving a punitive damage award in California: sections 3294⁶⁷ and 3295⁶⁸ of the California Civil Code and section 500 of the California Evidence Code.⁶⁹ In addition, the jury instruction given in punitive damages cases, from the California Book of Approved Jury Instructions (BAJI) No. 14.71,⁷⁰ has direct rele-

66. California established its Civil Code in 1872, and § 3294 was included. CAL. CIV. CODE § 3294 (West 1970 & Supp. 1992); see *Adams v. Murakami*, 54 Cal. 3d 105, 125, 813 P.2d 1348, 1361, 284 Cal. Rptr. 318, 331 (1991) (Mosk, J., dissenting) (explaining origins of statutorily authorized punitive damages in California); *infra* notes 72-75 and accompanying text (discussing CAL. CIV. CODE § 3294).

67. CAL. CIV. CODE § 3294 (West 1970 & Supp. 1992); see *Adams*, 54 Cal. 3d at 122-23, 813 P.2d at 1359-60, 284 Cal. Rptr. at 329-30 (discussing relevant sections of civil code); *infra* notes 72-75 and accompanying text (discussing CAL. CIV. CODE § 3294).

68. CAL. CIV. CODE § 3295 (West Supp. 1992); see *Adams*, 54 Cal. 3d at 121-23, 813 P.2d at 1358-60, 284 Cal. Rptr. at 328-30 (discussing application of relevant California Civil Code sections); *infra* notes 76-80 and accompanying text (discussing CAL. CIV. CODE § 3295).

69. CAL. EVID. CODE § 500 (West 1966); see *Adams*, 54 Cal. 3d at 119-23, 813 P.2d at 1357-60, 284 Cal. Rptr. at 327-30; *infra* notes 81-83 (discussing CAL. EVID. CODE § 500).

70. The 1989 revision of the jury instruction, which is essentially identical to the 1986 instruction existing at the time of the *Adams* trial, provides:

If you find that plaintiff suffered actual injury, harm, or damage as a [proximate] [legal] result of [the cause of action], you may then consider whether you should award punitive damages against defendant . . . for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evidence that said defendant was guilty of [oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

. . . .
The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

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

If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict.

2 CALIFORNIA JURY INSTRUCTIONS: CIVIL (BAJI) No. 14.71 (7th ed. 1986 & Supp. 1992) [hereinafter BAJI] (brackets in Paragraph (3) in original). Paragraph (3) (in brackets) must be given to the jury if requested by the defendant. 2 *id.*

In addition, California law now allows for a bifurcated trial where punitive damages are requested. See *infra* notes 76-80 and accompanying text for a discussion of CAL. CIV. CODE § 3295 (West Supp. 1992). In bifurcated proceedings, a separate jury instruction is given at the portion of the trial where punitive damages are to be awarded (after it is found that the defendant is liable for compensatory and punitive damages):

You must now determine whether you should award punitive damages against defendant . . . for the sake of example and by way of punishment. Whether punitive

vance to the California Supreme Court's decision in *Adams v. Murakami*.⁷¹

At the time of the *Adams* trial, section 3294(a) of the California Civil Code provided that a plaintiff could be awarded punitive damages, in a non-contract civil action, "where the defendant has been guilty of oppression, fraud or malice," in order to punish the defendant.⁷² In addition, subsection (c) of section 3294 defines the terms malice,⁷³ oppression⁷⁴ and fraud.⁷⁵

At the time of the trial, section 3295(a) of the California Civil Code provided that, in a punitive damages case, before the plaintiff could introduce evidence of the defendant's financial condition⁷⁶ or profits gained by the defendant's wrongful act,⁷⁷ "[t]he court [could], for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for [punitive] damages."⁷⁸ After the prima facie case was established, subsection (c) provided that the court could enter an order permitting pretrial discovery by the plaintiff to establish the defendant's financial condition.⁷⁹ It allowed the plaintiff to subpoena relevant documents or witnesses "for the purpose of establishing the [defendant's] profits or financial condition."⁸⁰

damages should be imposed, and if so, the amount thereof, is left to your sound discretion, exercised without passion or prejudice.

If you determine that punitive damages should be assessed against a defendant, in arriving at the amount of such an award, you must consider:

[The three factors in the non-bifurcated trial instruction are then mentioned here.]

2 BAJI, *supra*, No. 14.72.2.

71. 54 Cal. 3d 105, 114, 813 P.2d 1348, 1353, 284 Cal. Rptr. 318, 323 (1991) (discussing importance of jury instruction).

72. CAL. CIV. CODE § 3294(a) (West 1970 & Supp. 1986). Subsection (a) was subsequently amended in 1987 and now provides: "[W]here it is proven by *clear and convincing* evidence that the defendant has been guilty of oppression, fraud, or malice." *Id.* (emphasis added).

73. Malice is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." *Id.* § 3294(c)(1) (West 1970 & Supp. 1992).

74. Oppression is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." *Id.* § 3294(c)(2) (West 1970 & Supp. 1992).

75. Fraud is defined as "intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." *Id.* § 3294(c)(3) (West 1970 & Supp. 1992).

76. *Id.* § 3295(a)(2) (West Supp. 1992).

77. *Id.* § 3295(a)(1) (West Supp. 1992).

78. *Id.* § 3295(a) (West Supp. 1992).

79. *Id.* § 3295(c) (West Supp. 1992).

80. *Id.* In 1987, subsequent to the *Adams* trial, the California Legislature enacted subsec-

Section 500 of the California Evidence Code assigns an obligation to "a party to produce a particular state of conviction in the mind of the trier of fact as to the existence or nonexistence of a fact."⁸¹ It provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."⁸² As the Law Revision Commission noted in its comment, section 500 of the Evidence Code "has been criticized as establishing a meaningless standard" because deciding who has the burden of proof as to a particular fact is not clearly settled.⁸³

D. Prior California Appellate Decisions Regarding Punitive Damages

The traditional function of California appellate courts in reviewing an award of punitive damages was set forth in *Neal v. Farmers Insurance Exchange*.⁸⁴ Relying on its decision in *Bertero v. National General Corp.*,⁸⁵ the court in *Neal* held that appellate "review of punitive damage awards rendered at the trial level is guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice.'"⁸⁶ The central question then is how to determine which decisions were "rendered as the result of passion and prejudice."⁸⁷

A brief summary of California punitive damages law may be helpful. Although there is authority to the contrary,⁸⁸ in California "punitive damages . . . are allowed only in addition to recovered actual damages."⁸⁹ This "is based on the principle that [the] defendant must have

tions (d) and (e) to Civil Code § 3295. Subsection (d) provides for the bifurcation of a punitive damages trial, precluding a plaintiff from introducing evidence of defendant's profits or financial condition until after "the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is" liable for punitive damages. *Id.* § 3295(d) (West Supp. 1992). Subsection (e) provides that "[n]o claim for [punitive] damages shall state an amount or amounts." *Id.* § 3295(e) (West Supp. 1992).

81. CAL. EVID. CODE § 500 law revision commission comment (West 1966).

82. *Id.* § 500 (West 1966).

83. *Id.* § 500 law revision commission comment (West 1966).

84. 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978).

85. 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974).

86. *Neal*, 21 Cal. 3d at 927, 582 P.2d at 990, 148 Cal. Rptr. at 399 (quoting *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 65, 529 P.2d 608, 624, 118 Cal. Rptr. 184, 200 (1974)).

87. *Bertero*, 13 Cal. 3d at 65, 529 P.2d at 624, 118 Cal. Rptr. at 200.

88. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1977).

89. *See, e.g.*, *Mother Cobb's Chicken Turnovers, Inc. v. Fox*, 10 Cal. 2d 203, 206, 73 P.2d 1185, 1186 (1937) (disallowing punitive damages award in unfair competition case where no actual damages were shown).

committed a tortious act before [punitive] damages can be assessed.”⁹⁰ In addition, there is no fixed standard for measuring punitive damage awards; after consideration of all the circumstances, the decision of whether to award damages and in what amount is left to the sole discretion of the jury.⁹¹ Of course, upon review all awards are subject to rejection or reduction if not supported by the evidence.⁹² In any case, jury discretion aside, there is a general rule that the punitive damage award must have some “reasonable relationship” to the compensatory damage award.⁹³

The court in *Neal* found three factors “all of which [were] grounded in the purpose and function of punitive damages”⁹⁴ which courts should take into consideration when reviewing an award of punitive damages.⁹⁵ First, “the particular nature of the defendant’s acts in light of the whole record”⁹⁶ should be considered, and “the more reprehensible the act, the greater the appropriate punishment.”⁹⁷ Second, the amount of the compensatory damages in relationship to the punitive damage award should be taken into account.⁹⁸ Third, the financial condition of the particular defendant should be weighed against the amount of punitive damages.⁹⁹ In this way, the purpose of punitive damages was served: the greater the

90. *Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 802, 197 P.2d 713, 720 (1948).

91. *E.g., id.* at 801, 197 P.2d at 720 (granting or withholding punitive damage award within control of jury; trial judge must let jury make decision for itself); *Wetherbee v. United Ins. Co. of Am.*, 18 Cal. App. 3d 266, 271-72, 95 Cal. Rptr. 678, 681-82 (1971) (holding that properly instructed jury has reasonable discretion to determine whether to award punitive damages and their amount).

92. *See, e.g., Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (1980) (holding punitive damages of \$10 million excessive in light of defendant’s conduct and in comparison to \$158,000 compensatory damage award); *cf. Vossler v. Richards Mfg. Co.*, 143 Cal. App. 3d 952, 966, 192 Cal. Rptr. 219, 227 (1983) (viewing evidence in light most favorable to judgment supports amount of punitive damages), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

93. *See, e.g., Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 496, 136 Cal. Rptr. 132, 142 (1976) (finding \$175,000 punitive damage award excessive in light of \$4000 compensatory damage award). But see *Finney v. Lockhart*, 35 Cal. 2d 161, 164, 217 P.2d 19, 21-22 (1950) (approving punitive damage to compensatory damage award ratio of 2000 to 1) and *Wetherbee*, 18 Cal. App. 3d at 271, 95 Cal. Rptr. at 681 (affirming punitive damages of \$200,000 with only \$1050 in compensatory damages), which prove “there is no fixed ratio by which to determine the proper proportion between the two classes of damages.” *Finney*, 35 Cal. 2d at 164, 217 P.2d at 21-22.

94. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* See *supra* notes 92-93 and accompanying text for a discussion of the relationship between the amount of compensatory damages and punitive damages.

99. *Neal*, 21 Cal. 3d at 928, 582 P.2d at 990, 148 Cal. Rptr. at 399.

defendant's wealth, the greater the amount of punitive damages required to effectively punish and deter;¹⁰⁰ conversely, the lesser the defendant's wealth, the lesser the amount of punitive damages required to effectively punish and deter future similar behavior.¹⁰¹

Prior to 1989,¹⁰² California was in accord with "the vast majority of [its] sister jurisdictions"¹⁰³ and, like most modern decisions, held that a plaintiff need not introduce evidence of a defendant's financial condition as a prerequisite to an award of punitive damages.¹⁰⁴ In these prior California cases, either the plaintiff or the defendant could have introduced evidence of the defendant's financial condition if the evidence helped his or her case, but neither was required to introduce the evidence.¹⁰⁵ However, the court of appeal decisions of *Dumas v. Stocker*¹⁰⁶ and *Storage Services v. Oosterbaan*¹⁰⁷ held that to enable appellate courts to meaningfully review an award of punitive damages, the record *must* contain information of the defendant's financial condition.¹⁰⁸ The California Supreme Court granted review in *Adams v. Murakami*¹⁰⁹ to resolve the authoritative split in the appellate courts.¹¹⁰

III. ADAMS V. MURAKAMI: STATEMENT OF THE CASE

A. Facts

Appellant and defendant Clifford Murakami was the attending physician of respondent and plaintiff Lonnetta Ree Adams, a female resident of View Heights Convalescent Hospital.¹¹¹ Adams was a "shy, reserved,

100. *Id.*

101. *Id.*

102. In 1989 the Fourth District Court of Appeal held that evidence of a defendant's financial condition is necessary for an award of punitive damages. *Dumas v. Stocker*, 213 Cal. App. 3d 1262, 1269, 262 Cal. Rptr. 311, 316 (1989).

103. *Adams v. Murakami*, 54 Cal. 3d 105, 128, 813 P.2d 1348, 1363, 284 Cal. Rptr. 318, 333 (1991) (Mosk, J., dissenting).

104. For examples of California decisions, see *infra* note 252. For examples of decisions in other jurisdictions, see *infra* note 236.

105. *Vossler v. Richards Mfg. Co.*, 143 Cal. App. 3d 952, 963-64, 192 Cal. Rptr. 219, 225-26 (1983), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

106. 213 Cal. App. 3d 1262, 262 Cal. Rptr. 311 (1989).

107. 214 Cal. App. 3d 498, 262 Cal. Rptr. 689 (1989).

108. *Id.* at 516, 262 Cal. Rptr. at 700-01; *Dumas*, 213 Cal. App. 3d at 1267, 262 Cal. Rptr. at 314.

109. 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

110. *Id.* at 115, 813 P.2d at 1354, 284 Cal. Rptr. at 324.

111. *Id.* at 109, 813 P.2d at 1349, 284 Cal. Rptr. at 319.

[and] cooperative"¹¹² patient diagnosed as a chronic schizophrenic of low intelligence.¹¹³ When Adams voluntarily entered View Heights, she was placed on four potent psychotropic drugs.¹¹⁴ She was examined by Murakami, at which time Murakami learned that Adams had recently had an abortion.¹¹⁵

View Heights treated both male and female patients, and the hospital's policy allowed the patients free access to one another and "consensual sexual relations between the patients."¹¹⁶ Adams's "medical chart indicated she was seen in bed with men."¹¹⁷ Adams asked Murakami for birth control, and some of the nurses asked Murakami to prescribe birth control for Adams.¹¹⁸ Yet Murakami did not, even though he had prescribed it for other patients in the hospital.¹¹⁹

From October through December of 1980, Adams showed numerous symptoms of pregnancy,¹²⁰ however Murakami did not conduct an examination of the patient until three months later when a nurse informed Murakami that she believed that Adams was pregnant, in what was Adams's seventeenth week of pregnancy.¹²¹ Without counselling Adams, Murakami ordered an abortion to be performed,¹²² but it was not done because Adams's brother-in-law, one of the seven men with whom Adams had sexual relations,¹²³ threatened the hospital.¹²⁴ After this, Murakami did not inform Adams that the medication she was taking could be harmful to a baby, that childbirth could exacerbate Adams's own mental illness, or that the child could genetically inherit Adams's mental illness.¹²⁵

Adams's son was born severely retarded and autistic, and it was highly probable that he inherited his problems from one or both of his parents.¹²⁶ Subsequent to her son's birth, Adams "experienced two acute psychotic breaks . . . totally lost touch with reality, . . . and had

112. Adams v. Murakami, 268 Cal. Rptr. 467, 468 (Ct. App. 1990) (deleted opinion), *rev'd*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

113. *Id.*

114. *Id.*

115. *Id.* at 468-69.

116. *Id.* at 469.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 469-70.

delusions."¹²⁷

B. Case History

Adams brought suit against the hospital and Murakami for medical malpractice, battery and intentional infliction of emotional distress.¹²⁸ Adams settled with the hospital, but the case against Murakami proceeded to a jury trial.¹²⁹ Judgment was entered in the total sum of \$1,024,266, of which \$750,000 were punitive damages.¹³⁰ Murakami appealed from the judgment claiming, in part, that the punitive damages award was improper because Adams had shown no evidence of Murakami's financial status, even though Murakami made no attempt to show his own financial condition.¹³¹

The court of appeal rejected Murakami's argument, finding: Calculating the amount of punitive damages is a fluid process. The reprehensibility of the defendant's conduct, the defendant's wealth and the actual damages [citing *Neal v. Farmers Insurance Exchange*¹³²] are all considered in light of the objective of punitive damages, i.e., to punish the offender and to deter future similar acts. Each of these factors takes on different significance, depending on the underlying circumstances. Thus, if the defendant's actions are sufficiently reprehensible, the relationship between actual damages and punitive damages is less important.¹³³

The court further held that the defendant's financial condition was not a requirement for an award of punitive damages.¹³⁴

IV. THE CALIFORNIA SUPREME COURT'S RULING

After losing in the court of appeal, Murakami appealed to the California Supreme Court, which held that an award of punitive damages required the plaintiff to show evidence of the defendant's financial condition.¹³⁵ Further, the burden of proving the defendant's financial condi-

127. *Id.* at 470.

128. *Adams v. Murakami*, 54 Cal. 3d 105, 109, 813 P.2d 1348, 1349-50, 284 Cal. Rptr. 318, 319-20 (1991).

129. *Id.*, 813 P.2d at 1350, 284 Cal. Rptr. at 320.

130. *Id.*

131. *Id.*

132. 21 Cal. 3d 910, 928, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978).

133. *Adams v. Murakami*, 268 Cal. Rptr. 467, 473 (Ct. App. 1990) (deleted opinion), *rev'd*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

134. *Id.*

135. *Adams*, 54 Cal. 3d at 115-16, 813 P.2d at 1354-55, 284 Cal. Rptr. at 324-25.

tion at trial was placed on the plaintiff.¹³⁶

A. Evidence of Defendant's Finances

The California Supreme Court reversed the court of appeal decision¹³⁷ because, at trial, the jury was not shown evidence of the defendant's financial condition prior to assessing punitive damages.¹³⁸ The court found that two factors compelled introduction of a defendant's financial condition. First, the court maintained that prior California decisions, the instructions given to trial juries, and effective appellate review required that the financial condition of the defendant be revealed.¹³⁹ Second, because of federal constitutional considerations, such as due process concerns, the court favored the introduction of evidence of the defendant's financial condition.¹⁴⁰

1. Prior California decisions, jury instructions and effective appellate review of punitive damages

a. the majority

The California Supreme Court found that the three criteria set forth in *Neal v. Farmers Insurance Exchange*¹⁴¹ established a three-part test by which punitive damages must be measured.¹⁴² By applying this test, the court found that it could fulfill its traditional function in assessing punitive damages and "determine whether the award [was] excessive as a matter of law or raise[d] a presumption that it [was] the product of passion or prejudice."¹⁴³ The court in *Neal* was guided by "certain established principles, all of which [were] grounded in the purpose and function of punitive damages,"¹⁴⁴ which "punish[ed] wrongdoers and thereby deter[red] the commission of wrongful acts."¹⁴⁵ The three factors set forth in *Neal*, relied on by the court in *Adams*, were (1) to examine the "particular nature of the defendant's acts in light of the whole record,"¹⁴⁶ (2) to scrutinize the amount of punitive damages awarded in

136. *Id.* at 123, 813 P.2d at 1360, 284 Cal. Rptr. at 330.

137. *Id.*

138. *Id.* at 115-16, 813 P.2d at 1354-55, 284 Cal. Rptr. at 324-25.

139. *Id.* at 109-16, 813 P.2d at 1350-55, 284 Cal. Rptr. at 320-25.

140. *Id.* at 116-18, 813 P.2d at 1355-57, 284 Cal. Rptr. at 325-27.

141. 21 Cal. 3d 910, 928, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978).

142. *Adams*, 54 Cal. 3d at 110, 813 P.2d at 1350, 284 Cal. Rptr. at 320.

143. *Id.* at 109-10, 813 P.2d at 1350, 284 Cal. Rptr. at 320.

144. *Neal*, 21 Cal. 3d at 928, 582 P.2d at 990-91, 148 Cal. Rptr. at 399-400.

145. *Id.* at 928 n.13, 582 P.2d at 990 n.13, 148 Cal. Rptr. at 399 n.13.

146. *Id.* at 928, 582 P.2d at 990, 148 Cal. Rptr. at 399.

relation to the compensatory damages awarded,¹⁴⁷ and (3) to consider the wealth of the defendant.¹⁴⁸

The court in *Adams* found that all three factors espoused in *Neal* were necessary for a "reviewing court to make an informed determination of whether an award is excessive."¹⁴⁹ The court explained that "[e]ven if an award [were] entirely reasonable in light of the other two factors in *Neal*, [nature of the misconduct and amount of compensatory damages], the award [could] be so disproportionate to the defendant's ability to pay that the award [would be] excessive for that reason alone."¹⁵⁰ The court explained its concern that without evidence of a defendant's financial condition, an appellate court may be precluded from "deciding whether an award might, for example, bankrupt the defendant."¹⁵¹ The court, therefore, agreed with appellate court decisions following *Dumas v. Stocker*,¹⁵² which required evidence of a defendant's financial condition before awarding punitive damages, rather than those following *Vossler v. Richards Manufacturing Co.*,¹⁵³ which allowed consideration but did not require evidence of the defendant's financial condition.¹⁵⁴

The court determined that for a jury to make informed decisions about the amount of punitive damages to award, it must have knowledge of the defendant's financial condition.¹⁵⁵ The court observed that "absent financial evidence, a jury [would] be encouraged (indeed, required) to speculate as to a defendant's net worth in seeking to return a verdict that [would] appropriately punish the defendant."¹⁵⁶ Another reason juries would be encouraged to speculate¹⁵⁷ was because, when awarding punitive damages in California, they were routinely asked to consider "[t]he amount of punitive damages which [would] have a deterrent effect on the defendant in the light of [the] defendant's financial condition."¹⁵⁸

147. *Id.*

148. *Id.* See *supra* notes 84-86, 94-101 and accompanying text for a discussion of the *Neal* holding.

149. *Adams*, 54 Cal. 3d at 114, 813 P.2d at 1353, 284 Cal. Rptr. at 323.

150. *Id.* at 111, 813 P.2d at 1351, 284 Cal. Rptr. at 321.

151. *Id.* at 114, 813 P.2d at 1353, 284 Cal. Rptr. at 323 (quoting *Dumas v. Stocker*, 213 Cal. App. 3d 1262, 1269, 262 Cal. Rptr. 311, 316 (1989)).

152. 213 Cal. App. 3d 1262, 262 Cal. Rptr. 311 (1989).

153. 143 Cal. App. 3d 952, 192 Cal. Rptr. 219 (1983), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

154. See *supra* notes 105-10 and accompanying text for a discussion of the *Dumas* and *Vossler* decisions.

155. *Adams*, 54 Cal. 3d at 114, 813 P.2d at 1353, 284 Cal. Rptr. at 323.

156. *Id.*

157. *Id.*

158. 2 CALIFORNIA JURY INSTRUCTIONS: CIVIL (BAJI) No. 14.71 (7th ed. 1986). The

The court expressed its concern that a jury would be asked to base a decision on "a factor as to which there was no evidence [and found that s]ound public policy should preclude awards based on mere speculation."¹⁵⁹

b. the dissent

Justice Mosk, in his dissent, objected to the majority's characterization of the decision in *Neal* as a hard and fast three-pronged analysis.¹⁶⁰ Justice Mosk asserted that the *Neal* court "did not set forth 'criteria' that must be examined to determine whether punitive damages should be awarded; instead, [the court] simply recognized factors to guide an appellate's [sic] court['s] determination of whether the jury's award was a result of passion and prejudice."¹⁶¹ Justice Mosk contended that *Neal* simply helped trial and appellate courts determine whether first, the jury was justified in awarding punitive damages by examining the evidence to ascertain if it supported a finding of malice, oppression or fraud¹⁶² and second, whether the jury's result was motivated by passion or prejudice.¹⁶³ The dissent conceded that "evidence of the defendant's financial condition may be relevant to the [second] determination,"¹⁶⁴ but contended that neither *Neal* nor any other California Supreme Court case suggested "that evidence of the defendant's financial condition *must* be introduced to sustain an award of punitive damages."¹⁶⁵ Furthermore, the dissent found that the jury instruction given in punitive damages cases was intended to give guidance to the jury.¹⁶⁶ Likewise, the *Neal* holding established principles which would guide a reviewing court in determining whether punitive damages awarded were excessive.¹⁶⁷ According to the dissent, neither the jury instruction nor the *Neal* decision required information of the defendant's finances.¹⁶⁸

current jury instruction, although revised in 1989, provides essentially the same instruction regarding defendant's financial condition. 2 BAJI, *supra* note 70, No. 14.71.

159. *Adams*, 54 Cal. 3d at 114, 813 P.2d at 1353, 284 Cal. Rptr. at 323.

160. *Id.* at 127, 813 P.2d at 1362, 284 Cal. Rptr. at 332 (Mosk, J., dissenting).

161. *Id.* (Mosk, J., dissenting).

162. *Id.* (Mosk, J., dissenting).

163. *Id.* (Mosk, J., dissenting).

164. *Id.* (Mosk, J., dissenting).

165. *Id.* at 127, 813 P.2d at 1362-63, 284 Cal. Rptr. at 332-33 (Mosk, J., dissenting) (emphasis added).

166. *See id.* at 126, 813 P.2d at 1361-62, 284 Cal. Rptr. at 331-32 (Mosk, J., dissenting) (explaining process by which jury awards punitive damages). *See supra* note 70 for the text of the jury instructions in punitive damages cases.

167. *See Adams*, 54 Cal. 3d at 126, 813 P.2d at 1362, 284 Cal. Rptr. at 332 (Mosk, J., dissenting).

168. *See id.* at 126-27, 813 P.2d at 1362, 284 Cal. Rptr. at 332 (Mosk, J., dissenting).

The dissent argued that sections 3294¹⁶⁹ and 3295¹⁷⁰ of the California Civil Code supported the conclusion that punitive damage awards did not require a showing of a defendant's financial condition.¹⁷¹ Justice Mosk observed that at the time section 3295 was added, the application of section 3294 was "governed by case law providing, 'the plaintiff has the burden of proof, that proof is by a preponderance of the evidence, and *permits* the consideration of various factors in determining the amount of the award.'"¹⁷² The Legislature, then, intended that the plaintiff be "*permitted*, but not compelled, to introduce evidence of the defendant's profits and financial condition."¹⁷³ According to Justice Mosk, "whether punitive damages should be awarded and the amount of such an award are issues left to the jury's discretion."¹⁷⁴ The plaintiff must only introduce evidence proving punitive damages are warranted and may introduce "evidence bearing on the amount of the award," but need not do so.¹⁷⁵

2. Constitutional considerations which require evidence of the defendant's financial condition

a. *the majority*

As discussed above, the United States Supreme Court, in a few recent cases, has examined the constitutionality of punitive damages under the Eighth and Fourteenth Amendments of the United States Constitution.¹⁷⁶ Although the California Supreme Court did not explicitly decide *Adams* on constitutional grounds,¹⁷⁷ Justice Baxter's majority opinion

169. CAL. CIV. CODE § 3294 (West 1970 & Supp. 1992). See *supra* notes 72-75 and accompanying text for a discussion of CAL. CIV. CODE § 3294.

170. CAL. CIV. CODE § 3295 (West Supp. 1992). See *supra* notes 76-80 and accompanying text for a discussion of CAL. CIV. CODE § 3295.

171. *Adams*, 54 Cal. 3d at 125, 813 P.2d at 1361, 284 Cal. Rptr. at 331 (Mosk, J., dissenting).

172. *Id.* (Mosk, J., dissenting) (quoting LEGISLATIVE COUNSEL'S DIGEST S. 227 (1979-80 Reg. Sess.) (emphasis added)).

173. *Id.* (Mosk, J., dissenting).

174. *Id.* at 126, 813 P.2d at 1361, 284 Cal. Rptr. at 331 (Mosk, J., dissenting).

175. *Id.* (Mosk, J., dissenting).

176. *E.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (examining constitutionality of punitive damages under Fourteenth Amendment); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (examining constitutionality of punitive damages under Eighth Amendment); see also *supra* notes 30-65 and accompanying text (examining constitutional analysis of punitive damage awards).

177. "We need not decide, and do not decide, whether evidence of a defendant's financial condition is a *constitutional* prerequisite . . ." *Adams*, 54 Cal. 3d at 118, 813 P.2d at 1356, 284 Cal. Rptr. at 326.

did consider the question in depth.¹⁷⁸ The court observed that, although the question in *Adams* was primarily one of state law, "it ha[d] recently acquired a federal constitutional dimension, which . . . weigh[ed] strongly in favor of requiring evidence of a defendant's financial condition."¹⁷⁹ After noting the United States Supreme Court's concern in *Pacific Mutual Life Insurance Co. v. Haslip*,¹⁸⁰ about punitive damages that "run wild" and potentially violate the Due Process Clause,¹⁸¹ the California Supreme Court applied due process analysis to the California system for awarding punitive damages.¹⁸²

The court emphasized that Alabama's system for assessing punitive damages was found constitutional in *Haslip* because of the "detailed substantive standards" employed by the Alabama courts when reviewing punitive damage awards on appeal.¹⁸³ The Alabama Supreme Court stated that a "defendant's financial condition is 'a consideration *essential* to a post-judgment critique of a punitive damages award.'"¹⁸⁴ The California Supreme Court interpreted this to mean that consideration of defendant's wealth was an important step in satisfying the due process requirements of the Fourteenth Amendment.¹⁸⁵ The court concluded that *Haslip* "made clear a constitutional mandate for meaningful judicial scrutiny of punitive damages awards. This requirement weigh[ed] heavily in favor of [requiring] evidence of a defendant's financial condition" ¹⁸⁶ The constitutionality of a punitive damages award cannot be assured absent such evidence.¹⁸⁷

b. the concurrence and the dissent

Both the concurring opinion of Justice Kennard¹⁸⁸ and the dissent of Justice Mosk¹⁸⁹ found the discussion of the constitutional sufficiency of the California punitive damage review procedures irrelevant to decid-

178. *Id.* at 116-18, 813 P.2d at 1355-56, 284 Cal. Rptr. at 325-26.

179. *Id.* at 116, 813 P.2d at 1355, 284 Cal. Rptr. at 325.

180. 111 S. Ct. 1032 (1991).

181. *Haslip*, 111 S. Ct. at 1043. See *supra* notes 43-65 and accompanying text examining the constitutionality of punitive damages awards under the Due Process Clause.

182. *Adams*, 54 Cal. 3d at 116-18, 813 P.2d at 1355-56, 284 Cal. Rptr. at 325-26.

183. *Id.* at 117, 813 P.2d at 1355, 284 Cal. Rptr. at 325 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991)).

184. *Id.* (quoting *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989) (emphasis added)).

185. See *id.* at 118, 813 P.2d at 1356, 284 Cal. Rptr. at 326 (discussing constitutional requirements for meaningful appellate review of punitive damage awards).

186. *Id.*

187. *Id.*

188. *Id.* at 124, 813 P.2d at 1360-61, 284 Cal. Rptr. at 330-31 (Kennard, J., concurring).

189. *Id.* at 128-29, 813 P.2d at 1363-64, 284 Cal. Rptr. at 333-34 (Mosk, J., dissenting).

ing the case. In her concurrence, Justice Kennard stated: "California courts have long adhered to the policy that constitutional questions ordinarily should be reached only if the matter at hand cannot otherwise reasonably be resolved."¹⁹⁰ Moreover, in dissent, Justice Mosk accused the majority of "engag[ing] in creative lawyering when they attempt[ed] to employ"¹⁹¹ the opinion in *Haslip*, noting the significant differences between the punitive damages schemes of California and Alabama.¹⁹²

Justice Mosk asserted that the California and Alabama systems differed in two significant ways. First, in Alabama "the jury [was] not allowed to consider the defendant's financial condition; rather, the information [was] introduced at a post-judgment 'critique' of the award."¹⁹³ Alabama's system recognized that jury knowledge of the defendant's financial condition was not necessary in assigning a constitutionally proper award of punitive damages.¹⁹⁴ Second, the dissent noted that "the defendant in *Haslip* argued that its financial condition should not be considered even on postjudgment review."¹⁹⁵ Because of the significant differences between the California and Alabama systems, the dissent contended that the United States Supreme Court's decision in *Haslip* did not support the position that introduction of the defendant's wealth was necessary to satisfy the Due Process Clause.¹⁹⁶

B. Burden of Proof

1. The majority

Having established that evidence of a defendant's wealth at trial was necessary for an award of punitive damages, the California Supreme Court had to decide who was to bear the burden of proving the defendant's wealth. The court decided that the burden should be placed on the plaintiff because section 500 of the California Evidence Code¹⁹⁷ and fundamental fairness compelled it,¹⁹⁸ because the plaintiff faced no risk in

190. *Id.* at 124, 813 P.2d at 1360, 284 Cal. Rptr. at 330 (Kennard, J., concurring).

191. *Id.* at 128, 813 P.2d at 1363, 284 Cal. Rptr. at 333 (Mosk, J., dissenting).

192. *Id.* at 128-29, 813 P.2d at 1363-64, 284 Cal. Rptr. at 333-34 (Mosk, J., dissenting).

193. *Id.* (Mosk, J., dissenting) (quoting *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989)).

194. *Id.* at 129, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting).

195. *Id.* (Mosk, J., dissenting); see also *Arguments Before the Court*, 59 U.S.L.W. 3315, 3316 (U.S. Oct. 30, 1990).

196. *Adams*, 54 Cal. 3d at 129, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting).

197. Evidence Code § 500 states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." CAL. EVID. CODE § 500 (West 1966).

198. *Adams*, 54 Cal. 3d at 119-22, 813 P.2d at 1357-59, 284 Cal. Rptr. at 327-29.

introducing this evidence¹⁹⁹ and because the legislature assumed, when enacting section 3295 of the California Civil Code,²⁰⁰ that the burden of proof would be placed on the plaintiff.²⁰¹

Because section 500 of the California Evidence Code requires that "a party has the burden of proof as to each fact . . . essential to the claim for relief,"²⁰² the majority asserted that the plaintiff should bear the burden of showing the defendant's wealth at trial.²⁰³ Furthermore, the court stated "[f]undamental fairness must be the lodestar for [its] analysis."²⁰⁴ Placing the burden on the plaintiff was the just result, recognizing that the plaintiff received the benefit of punitive damages, even after fully recompensed with an award of compensatory damages.²⁰⁵ Additionally, trial practice reality made this the *only* fair result²⁰⁶—a plaintiff had nothing to lose in introducing this evidence, but compelling a defendant to do so introduced inherent prejudice²⁰⁷ and placed the defendant in a "damned if you do, damned if you don't" position.²⁰⁸ The jury could regard a defendant's introduction of financial evidence as an admission that some amount of punitive damages was an appropriate remedy, thus causing the jury to ignore the merits of the case.²⁰⁹ The court found that a plaintiff desiring not to introduce a defendant's financial information could only be motivated by a defendant's meager financial resources.²¹⁰ In this case, "the plaintiff would be deliberately seeking an award disproportionate . . . to the defendant's ability to pay,"²¹¹ which is contrary to the purpose of punitive damages.²¹²

Lastly, the court found that the wording of section 3295 of the Cali-

199. *Id.* at 122, 813 P.2d at 1359, 284 Cal. Rptr. at 329.

200. See *supra* notes 79-80 and accompanying text for the relevant portion of § 3295.

201. *Adams*, 54 Cal. 3d at 122-23, 813 P.2d at 1359-60, 284 Cal. Rptr. at 329-30.

202. CAL. EVID. CODE § 500 (West 1966).

203. *Adams*, 54 Cal. 3d at 119, 813 P.2d at 1357, 284 Cal. Rptr. at 327.

204. *Id.*

205. *Id.* at 120, 813 P.2d at 1357-58, 284 Cal. Rptr. at 327-28.

206. *Id.* at 120, 813 P.2d at 1358, 284 Cal. Rptr. at 328.

207. *Id.*

208. *Id.* at 121, 813 P.2d at 1358, 284 Cal. Rptr. at 328.

209. *Id.*; see GUY O. KORNBLUM ET AL., CALIFORNIA PRACTICE GUIDE: BAD FAITH § 11:236 (1990). The court also noted that because this case was tried before bifurcated punitive damages proceedings could be compelled upon application of the defendant, the potential prejudice in this case was particularly more likely. See CAL. CIV. CODE § 3295(d) (West Supp. 1992). Dr. Murakami would be forced to reveal his own financial status even before the jury made an award of compensatory damages. *Adams*, 54 Cal. 3d at 121, 813 P.2d at 1358-59, 284 Cal. Rptr. at 328-29.

210. *Adams*, 54 Cal. 3d at 122, 813 P.2d at 1359, 284 Cal. Rptr. at 329.

211. *Id.*

212. *Id.*

ifornia Civil Code²¹³ and the legislative history showed that the California Legislature intended to compel the plaintiff to produce the defendant's financial information at trial.²¹⁴ The plaintiff's power under section 3295, to subpoena documents and witnesses to establish the defendant's financial condition,²¹⁵ showed legislative intent, the majority reasoned, to place the burden of proof on the plaintiff.²¹⁶ In addition, the 1988 amendments to section 3295, subsequent to the *Adams* trial, allowing for bifurcation of punitive damages proceedings upon motion of the defendant,²¹⁷ reinforced legislative awareness that the plaintiff rather than the defendant would seek to introduce the defendant's financial information.²¹⁸ "If *defendants* had that burden, the provisions regulating *plaintiffs'* introduction of the evidence would be meaningless. We do not presume that the Legislature engages in idle acts."²¹⁹

2. The dissent

The dissent believed that placing the burden of proof on either the plaintiff or the defendant should not be necessary because evidence of the defendant's finances should not be necessary.²²⁰ It did, however, criticize the majority's reasoning which led to the conclusion that the burden of proof was properly placed on the plaintiff.²²¹

First, Justice Mosk felt that the burden of proof discussed in section 500 of the Evidence Code²²² was only relevant to the elements of the plaintiff's cause of action.²²³ In other words, the plaintiff only had to prove "that the defendant acted with oppression, fraud, or malice" to support an award of punitive damages.²²⁴

Second, the dissent accused the majority of being disingenuous when

213. See *supra* notes 76-80 and accompanying text for a discussion of § 3295.

214. *Adams*, 54 Cal. 3d at 122-23, 813 P.2d at 1359-60, 284 Cal. Rptr. at 329-30.

215. CAL. CIV. CODE § 3295(c) (West Supp. 1992).

216. *Adams*, 54 Cal. 3d at 122, 813 P.2d at 1359, 284 Cal. Rptr. at 329.

217. CAL. CIV. CODE § 3295(d) (West Supp. 1992). See *infra* note 267 for the text of § 3295(d).

218. *Adams*, 54 Cal. 3d at 123, 813 P.2d at 1360, 284 Cal. Rptr. at 330.

219. *Id.*

220. *Id.* at 129, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting).

221. See *id.* at 129-30, 813 P.2d at 1364-65, 284 Cal. Rptr. at 334-35 (Mosk, J., dissenting).

222. CAL. EVID. CODE § 500 (West 1966).

223. See *Adams*, 54 Cal. 3d at 129-30, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting) (arguing that burden of proof only applies to plaintiff's substantive cause of action); see also CAL. CIV. CODE § 3294 (West 1970 & Supp. 1992) (allowing punitive damages for defendant's oppression, fraud or malice).

224. *Adams*, 54 Cal. 3d at 129, 813 P.2d at 1364, 284 Cal. Rptr. at 334; see CAL. CIV. CODE § 3294 (West 1970 & Supp. 1992) (defining elements to be proven in punitive damages cases).

it construed the wording of the statute and the legislative history as supporting the conclusion that the burden of proof was properly placed on the plaintiff.²²⁵ The dissent contended that section 3295(a) of the Civil Code, instead of reflecting an intent to force the burden of proof upon the plaintiff, reflected a legislative concern that a defendant should be protected from a plaintiff's pretrial discovery abuse.²²⁶ Additionally, similar to section 500 of the Evidence Code, the portion of section 3294 of the Civil Code which stated that "the burden of proof" was on the plaintiff²²⁷ simply referred to the plaintiff's burden of proving that the defendant was guilty of oppression, fraud or malice, rather than the burden of proving the defendant's financial condition.²²⁸

Finally, Justice Mosk took aim at the argument that it was "fundamentally fair" to compel the plaintiff to introduce evidence of the defendant's financial condition.²²⁹ Justice Mosk assumed that, since the majority used a defense-oriented practice guide,²³⁰ the majority was more concerned about fundamental fairness to defendants than plaintiffs. Justice Mosk noted, however, that this requirement actually was unfair to both the defendant and the plaintiff.²³¹ The dissent asked, was it "fundamentally fair not merely to permit, but actually to *compel*, the plaintiff to probe into and to expose to the world the finances of the defendant?"²³² The dissent reasoned that this new requirement would "result in increased pretrial discovery of the defendant's finances, with all its attendant burdens on the defendant."²³³

V. ANALYSIS

The California Supreme Court decision in *Adams v. Murakami*²³⁴

225. *Adams*, 54 Cal. 3d at 129, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting).

226. *Id.* at 129-30, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting). See generally 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW: TORTS § 1376(2) (9th ed. 1988) (explaining pretrial discovery abuse by plaintiffs before § 3295 enacted).

227. CAL. CIV. CODE § 3294(a) (West 1970 & Supp. 1992).

228. *Adams*, 54 Cal. 3d at 130, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting).

229. *Id.* (Mosk, J., dissenting).

230. *Id.* (Mosk, J., dissenting); see KORNBLUM et al., *supra* note 209, § 1:1 ("[M]ost of this Practice Guide is devoted to . . . cases against insurers, and defenses thereto.").

231. *Adams*, 54 Cal. 3d at 130-31, 813 P.2d at 1364-65, 284 Cal. Rptr. at 334-35 (Mosk, J., dissenting).

232. *Id.* at 130, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting).

233. *Id.* at 130, 813 P.2d at 1365, 284 Cal. Rptr. at 335 (Mosk, J., dissenting) (citations omitted).

234. 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

was probably an attempt to limit punitive damage awards.²³⁵ Nevertheless, the court's reasoning was flawed, and the decision was ill-advised for a number of reasons: (1) the court misinterpreted previous California decisions and California statutes in reaching its decision;²³⁶ (2) the court misplaced the burden of proof on the plaintiff because it misinterpreted the intent of the legislature when applying relevant statutes; and (3) the court attempted to support its decision by relying on the United States Supreme Court's interpretation of the Due Process Clause, when in fact these cases were totally irrelevant to the case at hand and were unnecessarily considered.

A. The Adams Court Misinterpreted Prior California Case Law and California Statutes

The California Supreme Court mainly relied on the reasoning in *Neal v. Farmers Insurance Exchange*²³⁷ to establish that proof of a defendant's wealth is necessary when awarding punitive damages.²³⁸ The court in *Neal* was "afforded guidance by certain established principles"²³⁹ when reviewing punitive damage awards.²⁴⁰ These included the nature of the defendant's acts, the amount of compensatory damages awarded in comparison with the amount of punitive damages awarded, and the wealth of the defendant.²⁴¹ Yet, nowhere in the *Neal* decision

235. See *id.* at 124-25, 813 P.2d at 1361, 284 Cal. Rptr. at 331 (Mosk, J., dissenting) ("No doubt there are those whose high hopes of ridding the world of what they apparently perceive to be a social menace were dashed when the Supreme Court recently upheld the constitutionality of punitive damages . . ."); see also Victoria Slind-Flor, *Court Takes Hit at Punitives; May Presage More Action*, NAT'L L.J., Sept. 2, 1991, at 3 (explaining that most lawyers agree *Adams* decision portends greater future restrictions on punitive damages); Lisa Stansky, *Court Swipes at Punitive Damages*, RECORDER, Aug. 16, 1991, at 1 ("[T]he decision may mark the start of a new trend" to limit jury discretion in awarding punitive damages).

236. In addition, the California Supreme Court ignored the rule in the majority of other jurisdictions. See, e.g., *Littlefield v. McGuffey*, No. 90-3799, 1992 WL 10449, at *12 (7th Cir. Jan. 27, 1992) (expressly rejecting rule in *Dumas v. Stocker*, 213 Cal. App. 3d 1262, 262 Cal. Rptr. 311 (1989)); *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 373 (2d Cir. 1988); *Tolliver v. Amici*, 800 F.2d 149, 151 (7th Cir. 1986); *Tri-Tron Int'l v. Velto*, 525 F.2d 432, 438 (9th Cir. 1975); *Rinaldi v. Aaron*, 314 So. 2d 762, 765 (Fla. 1975); *Poeta v. Sheridan Point Shopping Plaza Partnership*, 552 N.E.2d 1248, 1251 (Ill. App. Ct. 1990); *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 223 n.102 (Mo. Ct. App. 1988), *cert. denied*, 493 U.S. 817 (1989); *Anderson v. Latham Trucking Co.*, 728 S.W.2d 752, 754 (Tenn. 1987); *Fahrenberg v. Tengel*, 291 N.W.2d 516, 527 (Wis. 1980). Justice Mosk contended "[t]here is no persuasive reason for California to depart from this impressive company." *Adams*, 54 Cal. 3d at 128, 813 P.2d at 1363, 284 Cal. Rptr. at 333 (Mosk, J., dissenting).

237. 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr 389 (1978).

238. See *Adams*, 54 Cal. 3d at 109-16, 813 P.2d at 1350-55, 284 Cal. Rptr. at 320-25.

239. *Neal*, 21 Cal. 3d at 928, 582 P.2d at 990, 148 Cal. Rptr. at 399.

240. *Id.*

241. *Id.*

was it held that evidence of a defendant's financial resources was a prerequisite to an award of punitive damages.

Instead, the court in *Neal* held that the wealth of the particular defendant was to be *considered* when determining if the punitive damages award was excessive.²⁴² As Justice Mosk pointed out in his dissent, in *Neal* the court "did not set forth 'criteria' that *must* be examined"; instead it simply recognized factors that help in determining whether the award "was a result of passion and prejudice."²⁴³ The Fifth District Court of Appeal wrote in *Vossler v. Richards Manufacturing Co.*:²⁴⁴ "*Neal* holds only that in determining whether a punitive damages award was excessive as a matter of law, the court should consider the wealth of the defendant. *Neal* did not hold that a punitive damages claim would fall if [the] plaintiff did not introduce evidence of [the] defendant's wealth."²⁴⁵

In fact, in a *Neal* footnote that explained the purpose of punitive damages,²⁴⁶ the court cited *Fletcher v. Western National Life Insurance Co.*,²⁴⁷ which held that although the defendant's financial condition is relevant in assessing an award of punitive damages it is not a requirement.²⁴⁸ *Neal*, although relying on *Fletcher* a number of times, did not take issue with the part of the *Fletcher* holding that *Adams* later criticized.²⁴⁹ If the court in *Neal* had intended the defendant's financial information be shown, it seems reasonable that the court would have pointed out the inconsistent holding in *Fletcher*.

242. *Id.*

243. *Adams*, 54 Cal. 3d at 127, 813 P.2d at 1362, 284 Cal. Rptr. at 332 (Mosk, J., dissenting) (emphasis added); see *Vossler v. Richards Mfg. Co.*, 143 Cal. App. 3d 952, 961, 192 Cal. Rptr. 219, 224 (1983), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991) (introducing defendant's wealth not required under *Neal*); see also *Fenlon v. Brock*, 216 Cal. App. 3d 1174, 1179-80, 265 Cal. Rptr. 324, 327 (1989) (finding no basis to overturn punitive damages when evidence of defendant's net worth not on record), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

244. 143 Cal. App. 3d 952, 192 Cal. Rptr. 219 (1983), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

245. *Id.* at 961, 192 Cal. Rptr. at 224.

246. The footnote stated: "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." *Neal*, 21 Cal. 3d at 928 n.13, 582 P.2d at 990 n.13, 148 Cal. Rptr. at 399 n.13 (citing *Evans v. Gibson*, 220 Cal. 476, 31 P.2d 389 (1934); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991)).

247. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

248. *Id.* at 404, 89 Cal. Rptr. at 96.

249. See *Neal*, 21 Cal. 3d at 925, 928 & n.13, 582 P.2d at 988, 990 & n.13, 148 Cal. Rptr. at 397, 399 & n.13 (apparently agreeing with *Fletcher* in not requiring evidence of defendant's wealth).

The court in *Adams*, by relying on a Fourth District Court of Appeal case, *Dumas v. Stocker*,²⁵⁰ which stated that evidence of the defendant's wealth is necessary to sustain a punitive damages award,²⁵¹ deviated from the rule in the vast majority of California decisions²⁵² and from the rule in most other jurisdictions.²⁵³ Before the *Dumas* decision, the California rule, which followed the modern trend, was "[e]vidence of wealth, though discoverable and admissible . . . , is not essential to an award. . . . The plaintiff *may* offer such evidence, but need not; if the defendant wishes to establish inability to pay a large penalty, he may meet his burden by introducing such evidence."²⁵⁴

Sound policy reasons exist for not compelling the plaintiff to introduce evidence of a defendant's wealth in trials asking for punitive damages.²⁵⁵ First, if the defendant feels that such evidence would help in reducing the amount of punitive damages, the defendant always has the choice of introducing the evidence. This would enable the defendant to preserve the claim on appeal that an award of punitive damages is excessive in light of the defendant's net worth.²⁵⁶ Furthermore, the defendant has the best access to his or her own financial information and the ability

250. 213 Cal. App. 3d 1262, 262 Cal. Rptr. 311 (1989); see *Adams*, 54 Cal. 3d at 114, 813 P.2d at 1354, 284 Cal. Rptr. at 324 ("*Dumas* states the correct rule."). See also *supra* notes 106-08, 152 and accompanying text for a discussion of *Dumas*.

251. *Dumas*, 213 Cal. App. 3d at 1269, 262 Cal. Rptr. at 316.

252. See, e.g., *Fenlon v. Brock*, 216 Cal. App. 3d 1174, 1179-80, 265 Cal. Rptr. 324, 327 (1989), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991); *Vossler v. Richards Mfg. Co.*, 143 Cal. App. 3d 952, 961, 192 Cal. Rptr. 219, 224 (1983), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991); *Nelson v. Gaunt*, 125 Cal. App. 3d 623, 643, 178 Cal. Rptr. 167, 178 (1981), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991); *Zimmer v. Dykstra*, 39 Cal. App. 3d 422, 438, 114 Cal. Rptr. 380, 391 (1974), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 404, 89 Cal. Rptr. 78, 96 (1970), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991); *Hanley v. Lund*, 218 Cal. App. 2d 633, 645-46, 32 Cal. Rptr. 733, 740 (1963), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

253. See *supra* note 236 for examples of decisions in other jurisdictions. See also *Adams v. Murakami*, 54 Cal. 3d 105, 128, 813 P.2d 1348, 1363, 284 Cal. Rptr. 318, 333 (1991) (Mosk, J., dissenting) (explaining traditional California rule in accord with modern decisions); 6 WITKIN, *supra* note 226, § 1377 (same).

254. 6 WITKIN, *supra* note 226, § 1377 (citations omitted); see *Vossler*, 143 Cal. App. 3d at 963-64, 192 Cal. Rptr. at 225-26.

255. See generally *Fenlon*, 216 Cal. App. 3d at 1182-83, 265 Cal. Rptr. at 328-29 (suggesting policy reasons for not compelling plaintiff to introduce defendant's financial information); *Vossler*, 143 Cal. App. 3d at 964-65, 192 Cal. Rptr. at 226 (same).

256. *Fenlon*, 216 Cal. App. 3d at 1182, 265 Cal. Rptr. at 328 (1989); *Vossler*, 143 Cal. App. 3d at 964, 192 Cal. Rptr. at 226; see also *Adams*, 54 Cal. 3d at 127, 813 P.2d at 1363, 284 Cal. Rptr. at 333 (Mosk, J., dissenting) (advocating position taken in *Fenlon*).

to provide more accurate data.²⁵⁷ In general, it is contrary to the principles of an adversarial legal system to force a litigant to preserve a record that could help his or her opponent on appeal.²⁵⁸

Second, although a plaintiff will often find it advantageous to introduce evidence of the defendant's net worth, requiring a plaintiff to do so is unfair both to plaintiffs and defendants because of the unnecessary time required in discovery.²⁵⁹ This is especially true when one of the litigants lacks the resources to engage in extensive discovery. Furthermore, "[a] wealthy defendant . . . will ordinarily be delighted to have [the] plaintiff omit proof of its net worth and permit the jury to determine the amount without information on the subject."²⁶⁰ The defendant would still retain the option of having the punitive damages award reviewed as excessive in comparison to the compensatory damages award and by examination of the defendant's conduct in the particular case.²⁶¹

The *Adams* decision cites a practice guide for attorneys that says when the verdict is high, "[p]laintiff's counsel has everything to gain and nothing to lose by . . . introduction of the defendant's wealth."²⁶² However, this statement was taken out of context. The section referred to in the practice guide concerned corporations with millions of dollars in assets.²⁶³ In a subsequent section, the practice guide advises: "The defendant's counsel should give serious consideration to offering evidence of the defendant's lack of financial wealth in the appropriate case."²⁶⁴ If the defendant is a modest wage earner, the defendant will probably want to

257. *Fenlon*, 216 Cal. App. 3d at 1182, 265 Cal. Rptr. at 328 (1989); *Vossler*, 143 Cal. App. 3d at 963-64, 192 Cal. Rptr. at 226; see also *Adams*, 54 Cal. 3d at 127, 813 P.2d at 1363, 284 Cal. Rptr. at 333 (Mosk, J., dissenting) (advocating position taken in *Fenlon*).

258. See *Fenlon*, 216 Cal. App. 3d at 1182, 265 Cal. Rptr. at 328 (finding it untenable that plaintiff should have to preserve defendant's record for appeal); see also *Adams*, 54 Cal. 3d at 127, 813 P.2d at 1363, 284 Cal. Rptr. at 333 (Mosk, J., dissenting) ("[T]o require the plaintiff to introduce evidence of the defendant's financial condition to preserve meaningful appellate review for the defendant is unprecedented . . ."); *Vossler*, 143 Cal. App. 3d at 963-64, 192 Cal. Rptr. at 226 (finding motivation for defendant to introduce financial evidence when plaintiff chooses not to do so).

259. *Fenlon*, 216 Cal. App. 3d at 1182, 265 Cal. Rptr. at 328.

260. *Id.*

261. *Id.*, 265 Cal. Rptr. at 329. The defendant's conduct and the amount of compensatory damages awarded are two of the "established principles" from *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978).

262. TOM RILEY, PROVING PUNITIVE DAMAGES § 9.15 (1981).

263. *Id.* This section of the practice guide mainly discusses two cases, *Bankers Life & Cas. Co. v. Kirtley*, 307 F.2d 418 (8th Cir. 1962), and *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970). *Bankers Life and Casualty* is one of the largest insurance companies in the United States, and *Western National Life Insurance* probably had "millions of dollars in assets." RILEY, *supra* note 262, § 9.15.

264. RILEY, *supra* note 262, § 15.4(8).

offer his or her financial condition to the jury.²⁶⁵ However, if the defendant is a "relatively well-off individual or business firm, the defendant's counsel may not offer the evidence [of financial status] and chances are the plaintiff will do so."²⁶⁶ It is fairly obvious that evidence of a defendant's financial condition would be at times advantageous to the plaintiff and at times advantageous to the defendant; the decision of when or if to introduce such evidence should be left to the individual parties.

Third, as the law in California stands today, if the defendant requests it, his or her financial condition is not to be revealed to the jury until after the jury decides that the defendant's acts allow for an award of punitive damages.²⁶⁷ The court's contention in *Adams* that "[i]t is inherently prejudicial to require a defendant to introduce evidence of personal finances" because it implies that punitive damages are justified,²⁶⁸ is difficult to understand; the jury will have already found that the defendant is liable for punitive damages. The language of section 3295(d) of the California Civil Code "preclude[s] the admission of the defendant's profits or financial condition until *after* the trier of fact" finds a defendant is liable for punitive damages.²⁶⁹

A better argument than that employed in the *Adams* case is found in a California court of appeal decision:

A defendant of modest means will, under current law, not hesitate in the punitive damages phase of the trial to present his financial situation He knows punitive damages will be

265. *Id.*

266. *Id.*

267. CAL. CIV. CODE § 3295(d) (West Supp. 1992) (allowing bifurcation of punitive damages trials). The full section reads:

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

Id.

268. *Adams*, 54 Cal. 3d at 120, 813 P.2d at 1358, 284 Cal. Rptr. at 328. The court argued: [R]equir[ing] a defendant to introduce evidence of personal finances . . . places a defendant in the position of bidding against himself. A defendant in that position is forced to tell the jury in effect that: "My conduct doesn't warrant punitive damages. But, by the way, if you disagree, please be gentle, I'm worth only the following amount." . . . [T]he jury is led to think, "This person must know he deserves a beating or else he would not be pleading poverty."

Id. at 120-21, 813 P.2d at 1358, 284 Cal. Rptr. at 328.

269. CAL. CIV. CODE § 3295(d) (West Supp. 1992) (emphasis added). See *supra* note 267 for the text of § 3295(d).

awarded and has an incentive to minimize the amount. He is not in the position of appearing to concede that his conduct merits punitive damages since that issue is now determined, at his option, in the first phase of a bifurcated trial before his net worth is considered by the jury.²⁷⁰

A party to the particular litigation, whether plaintiff or defendant, should be assumed to know whether introduction of the defendant's wealth would help or hinder his or her case; each individual litigant should be given the option but should not be compelled to introduce this information.²⁷¹

The California Legislature, in the 1989-90 session, considered a bill to compel the plaintiff to introduce evidence of a defendant's wealth to the jury before awarding punitive damages, precisely as the California Supreme Court required in the *Adams* case.²⁷² On December 20, 1988, Senator Lockyer introduced legislation which would have "require[d] the trier of fact to consider the net worth of the defendant or defendants when assessing an award for [punitive] damages"²⁷³ by amending section 3294 of the Civil Code.²⁷⁴ The bill was amended a number of times²⁷⁵ until all that remained in the final version, amended on September 1, 1989, was a definition of "despicable conduct."²⁷⁶ The portion requiring introduction of a defendant's financial condition never made it to a vote of the full house in either the Senate or the Assembly.²⁷⁷ This lends support to Justice Mosk's contention, in dissent, that "to spare defendant in this case a punitive damages award that was deemed appropriate by a trial jury, a trial judge and a Court of Appeal, this court now indulges in

270. *Fenlon v. Brock*, 216 Cal. App. 3d 1174, 1183, 265 Cal. Rptr. 324, 329 (1989), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

271. *See id.* (arguing that litigants should be allowed to choose whether to introduce defendant's financial information); *Adams*, 54 Cal. 3d at 131, 813 P.2d at 1365, 284 Cal. Rptr. at 335 (Mosk, J., dissenting) ("[T]his court gives a defendant no choice in the matter: the plaintiff is required to make the defendant's wealth a major issue . . .").

272. *See* S. 106, Cal. 1989-90 Reg. Sess.

273. *Id.* legislative counsel's digest.

274. *See supra* notes 72-75 and accompanying text for a discussion of § 3294.

275. 1 SENATE FINAL HISTORY 95 (Cal. 1989-90 Reg. Sess.). In fact, the April 18, 1989, amendment of the bill even had a provision that a punitive damage award "in excess of 10% of a defendant's net worth is deemed to be excessive as a matter of law." S. 106, Cal. 1989-90 Reg. Sess. (as amended Apr. 18, 1989).

276. S. 106, Cal. 1989-90 Reg. Sess. (as amended Sept. 1, 1989). The May 4, 1989 and September 1, 1989 versions of the bill, which defined the term "despicable conduct" passed in the Senate and the Assembly, respectively. However, the wording in the bills was slightly different, and the bill died in the inactive file on November 30, 1990, at the end of the regular session. 1 SENATE FINAL HISTORY, *supra* note 275, at 95.

277. *See* 1 SENATE FINAL HISTORY, *supra* note 275, at 95.

judicial legislating that will inevitably inure to the detriment of countless future defendants.”²⁷⁸

By compelling that a defendant’s financial condition be revealed to the trier of fact, the court in *Adams* misinterpreted relevant state case law and ignored the vast majority of California cases and cases in other jurisdictions that have held to the contrary.²⁷⁹ While at least temporarily sparing one defendant from a punitive damage award found appropriate in the courts below, *Adams* may have harmed future defendants, especially those who for reasons of wealth, trial strategy or concerns about discovery, wish to withhold financial information.²⁸⁰

B. The Court Misinterpreted California Statutes in Allocating the Burden of Proof

By relying on various sections of the California Civil and Evidence Codes and declaring “[f]undamental fairness [as] the lodestar for [its] analysis,”²⁸¹ the court in *Adams* gave the plaintiff responsibility for introducing a defendant’s financial condition.²⁸² The court supported its position by examining section 500 of the Evidence Code,²⁸³ which requires a party asserting a claim to prove each essential fact necessary to the claim.²⁸⁴ Since a defendant’s wealth was now required in evidence before punitive damages could be awarded, the court reasoned that this evidence was “‘essential to the claim for relief’” as mandated by section 500 of the Evidence Code.²⁸⁵

The real question, however, is whether the defendant’s wealth can honestly be considered an integral part of the plaintiff’s claim for relief when the plaintiff asks for punitive damages. A plaintiff asks for punitive damages under section 3294 of the California Civil Code,²⁸⁶ which states that for a plaintiff to be entitled to an award of punitive damages, the

278. *Adams v. Murakami*, 54 Cal. 3d 105, 131, 813 P.2d 1348, 1365, 284 Cal. Rptr. 318, 335 (1991) (Mosk, J., dissenting) (emphasis added).

279. See *supra* notes 236, 252 for a listing of these cases.

280. See *Fenlon v. Brock*, 216 Cal. App. 3d 1174, 1182-83, 265 Cal. Rptr. 324, 328-29 (1989) (explaining policy reasons for not compelling evidence of defendant’s financial condition), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

281. *Adams*, 54 Cal. 3d at 119, 813 P.2d at 1357, 284 Cal. Rptr. at 327.

282. *Id.* at 119-23, 813 P.2d at 1357-60, 284 Cal. Rptr. at 327-30.

283. “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” CAL. EVID. CODE § 500 (West 1966).

284. *Id.*

285. *Adams*, 54 Cal. 3d at 119, 813 P.2d at 1357, 284 Cal. Rptr. at 327 (quoting CAL. EVID. CODE § 500 (West 1966)).

286. See *supra* notes 72-75 and accompanying text for a discussion of § 3294.

plaintiff must prove by clear and convincing evidence that the defendant is guilty of fraud, oppression or malice.²⁸⁷ Proving one of these elements, then, is what section 3294 of the Civil Code requires of the plaintiff because these are the elements of the plaintiff's own *cause of action*, as mandated by the California Legislature.²⁸⁸

The court in *Adams* thought it would be unfair and inherently prejudicial for a defendant to introduce evidence of its own financial information.²⁸⁹ The *Adams* majority did not, however, consider an argument made by the Fifth District Court of Appeal in *Vossler v. Richards Manufacturing Co.*²⁹⁰ In *Vossler* the court drew an analogy, noting that in personal injury cases where liability is disputed, defendants regularly introduce evidence attempting to show that a plaintiff's injuries were not as severe as claimed.²⁹¹ "Defendants have developed techniques which permit them to introduce mitigating evidence without diminishing the force of their contest as to liability."²⁹² A defendant introducing evidence of his or her own financial information, then, does not tacitly admit liability for punitive damages, but instead this evidence could be handled in the same way as mitigating evidence in a personal injury case.²⁹³ Considering this argument, the court in *Adams* could have allowed the defendant the opportunity to present the jury with information of wealth, setting a bench mark that could help the jury reasonably limit its punitive damages award but would not *compel* the plaintiff to introduce such information.²⁹⁴

In placing the burden of proof on the plaintiff (and, in many cases, in requiring defendant's financial condition at all), the court overlooked a number of practical considerations potentially making the whole litigation process more expensive and inconvenient for all involved.²⁹⁵ The

287. CAL. CIV. CODE § 3294(a) (West 1970 & Supp. 1992).

288. *See id.* (requiring proof by clear and convincing evidence of one of these elements); *Adams*, 54 Cal. 3d at 129, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting) ("The governing statutes and case law make clear that a plaintiff has the burden of proof only on the elements of his own cause of action . . .").

289. *Adams*, 54 Cal. 3d at 120, 813 P.2d at 1358, 284 Cal. Rptr. at 328.

290. 143 Cal. App. 3d 952, 192 Cal. Rptr. 219 (1983), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

291. *Id.* at 965, 192 Cal. Rptr. at 226.

292. *Id.*

293. The *Vossler* case was decided before the California Civil Code was amended to allow for bifurcation of punitive damage awards proceedings. *See* CAL. CIV. CODE § 3295(d) (West Supp. 1992).

294. *See Vossler*, 153 Cal. App. 3d at 964-65, 192 Cal. Rptr. at 226 (explaining how defendant's financial information could be seen as mitigating evidence).

295. *Fenlon v. Brock*, 216 Cal. App. 3d 1174, 1182, 265 Cal. Rptr. 324, 328-29 (1989), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

court overlooked the fact that the defendant has the best access to information concerning his or her own financial condition.²⁹⁶ If the plaintiff disagreed with the financial information presented by the defendant, the plaintiff would still have access to the traditional options predating the *Adams* decision.²⁹⁷ The plaintiff could engage in pretrial discovery and introduce his or her own evidence or could bring out inconsistencies through cross-examination.²⁹⁸ If the plaintiff agrees with the defendant's evidence of wealth or if the defendant would not have introduced the evidence anyway, a great deal of time would be saved and an enormous inconvenience to both parties would be avoided.²⁹⁹

The *Adams* decision requires a plaintiff to engage in pretrial discovery of a defendant's finances, burdening both the plaintiff and the defendant.³⁰⁰ The President's Council on Competitiveness found that "[p]retrial discovery is frequently the source of needless delay and expense."³⁰¹ Given this observation, it is difficult to understand why the court now compels the plaintiff to "probe into and to expose to the world the finances of the defendant"³⁰² in an unnecessarily time-consuming procedure in which, in many cases, neither the plaintiff nor the defendant wishes to engage.³⁰³ Justice Mosk called this a fundamentally unfair "compulsory invasion of privacy."³⁰⁴

California law traditionally protects the privacy of its citizens and their records containing personal information, including financial infor-

296. *Id.*

297. *See id.*

298. *See id.*

299. *See id.* ("Requiring plaintiff to prove defendant's net worth is also unfair to a wealthy defendant and, under current law, potentially unnecessarily time-consuming as well as unfair to all defendants.").

300. Justice Mosk noted that it is one thing "merely to permit" the plaintiff to engage in pretrial discovery "but actually to *compel*" the plaintiff to engage in this behavior could hardly be called fundamentally fair. *Adams v. Murakami*, 54 Cal. 3d 105, 130, 813 P.2d 1348, 1364, 284 Cal. Rptr. 318, 334 (1991).

301. CIVIL JUSTICE REFORM, *supra* note 2, at 7. Undoubtedly pretrial discovery in the United States is expensive. The Council recommended a number of reforms to the discovery process. The most severe and ostensibly the most controversial was that, beyond an initial "free" round of discovery, the requesting party would *have to pay* any costs incurred in subsequent discovery. *Id.* (emphasis added).

302. *Adams*, 54 Cal. 3d at 130, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting).

303. *See Fenlon*, 216 Cal. App. 3d at 1182, 265 Cal. Rptr. at 328.

304. *Adams*, 54 Cal. 3d at 130, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting).

mation, through the state's constitution³⁰⁵ and statutes.³⁰⁶ For example, except in specific situations, the California Revenue Code prohibits discovery of either federal or state tax returns in "a judicial or administrative proceeding."³⁰⁷ The California Government Code greatly restricts access to and disclosure of the financial records of financial institutions' customers.³⁰⁸ When a party obtains a subpoena duces tecum,³⁰⁹ under the Civil Procedure Code the opposing party can move "to quash or modify the subpoena"³¹⁰ for unreasonable "violations of a witness's or consumer's right of privacy."³¹¹ The California Supreme Court's decision, *requiring* a plaintiff to reveal a defendant's financial information, is, at the least, inconsistent with the considerable body of California law designed to protect personal and financial privacy. It is quite likely that a number of potential defendants, especially wealthy ones, worry about the prospect of a supreme court mandate to probe into their private financial affairs.³¹²

In *Fenlon v. Brock*³¹³ the court of appeal observed that requiring a plaintiff to discover information about a defendant's financial condition could lead to delays during the trial.³¹⁴ Section 3295(c) of the Civil Code provides that no pretrial discovery of a defendant's financial condition

305. "All people . . . have inalienable rights. Among these [is] . . . privacy." CAL. CONST. art. I, § 1.

306. There are many California statutes protecting the privacy of financial and other personal information. A few examples are: CAL. EVID. CODE §§ 1156-1157 (West 1966 & Supp. 1992) (protecting privacy of medical research and contents of hospital reports and meetings); CAL. CIV. CODE § 1799.3 (West Supp. 1992) (prohibiting release of any customer record prepared or maintained by renter or seller of video cassettes); CAL. PENAL CODE § 637.6 (West Supp. 1992) (prohibiting release of personal information gained from establishing or operating ridesharing program); CAL. VEH. CODE § 1808.21 (West Supp. 1992) (prohibiting disclosure of residence addresses contained in Department of Motor Vehicle files). See also *infra* notes 307-11 and accompanying text for examples of financial privacy statutes in California.

307. CAL. REV. & TAX. CODE § 19283 (West 1983 & Supp. 1992); see, e.g., *Sav-On Drugs, Inc. v. Superior Court*, 15 Cal. 3d 1, 6, 538 P.2d 739, 742-43, 123 Cal. Rptr. 283, 286-87 (1975) (declaring personal income tax returns privileged information); *Webb v. Standard Oil Co.*, 49 Cal. 2d 509, 513, 319 P.2d 621, 624 (1958) (same); *In re Marriage of Sammut*, 123 Cal. App. 3d 557, 562, 163 Cal. Rptr. 193, 196 (1980) (denying discovery of tax returns in action to modify support agreement).

308. CAL. GOV'T CODE §§ 7460-7493 (West 1980 & Supp. 1992).

309. Under California law, a subpoena duces tecum is issued pursuant to CAL. CIV. PROC. CODE § 1985 (West Supp. 1992).

310. *Id.* § 1985(g) (West Supp. 1992).

311. *Id.* § 1987.1 (West 1983).

312. See Slind-Flor, *supra* note 235, at 3 (interviewing general counsel of Association for California Tort Reform who said that many members were daunted by this prospect).

313. 216 Cal. App. 3d 1174, 265 Cal. Rptr. 324 (1989), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

314. *Id.* at 1182, 265 Cal. Rptr. at 329.

may take place until a prima facie case for punitive damages is established.³¹⁵ If the plaintiff cannot show this prima facie case for punitive damages before trial and finds the information at trial obtained by subpoena is inaccurate, incomplete or misleading, the plaintiff "will be forced to request a continuance during trial to obtain accurate information which he was barred from obtaining earlier."³¹⁶ But, if the plaintiff is not required and elects not to present evidence of the defendant's wealth, this problem could be avoided.³¹⁷

Finally, what would happen in a case where the defendant simply decides not to show up? If a defendant simply ignores a lawsuit and does not submit to discovery, the plaintiff would be unable to recover punitive damages from the resulting default judgment because there is no proof of the defendant's wealth.³¹⁸

Requiring that the plaintiff prove the defendant's financial condition was an improper decision. It forces the plaintiff to preserve the defendant's record for appeal, an inequitable outcome for any litigant.³¹⁹ It impinges on attorneys' rights to exercise their professional judgment in assessing trial strategy by requiring them to introduce evidence not related to the cause of action.³²⁰ It requires unnecessary prying into the private financial records of defendants even if both parties wish to avoid this,³²¹ and it delays trials and otherwise further impedes the already overburdened California court system.³²²

315. CAL. CIV. CODE § 3295(c) (West Supp. 1992). Although the plaintiff is not allowed pretrial discovery until a prima facie case is shown, the plaintiff is allowed to subpoena documents or witnesses to be available at trial. *Id.*

316. *Fenlon*, 216 Cal. App. 3d at 1182, 265 Cal. Rptr. at 329.

317. *Id.*

318. See Stacy Adler, *Financial Data Required for Punitive Damages*, BUS. INS., Sept. 2, 1991, at 1 (interview with Adams's attorney) ("This can be an impediment to plaintiffs in getting punitive damages.").

319. See *Fenlon*, 216 Cal. App. 3d at 1182, 265 Cal. Rptr. at 328; *Vossler v. Richards Mfg. Co.*, 143 Cal. App. 3d 852, 963-64, 192 Cal. Rptr. 219, 226 (1983), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991); see also *Adams*, 54 Cal. 3d at 127, 813 P.2d at 1363, 284 Cal. Rptr. at 333 (Mosk, J., dissenting).

320. The *Adams* majority did address this issue in their decision but summarily dismissed it, stating: "The issue is not merely a question of trial strategy. . . . [A] law suit is not a game where the spoils of victory go to the clever and technical regardless of the merits" *Adams*, 54 Cal. 3d at 120, 813 P.2d at 1358, 284 Cal. Rptr. at 328 (quoting *Simon v. City of San Francisco*, 79 Cal. App. 2d 590, 600, 180 P.2d 393, 399 (1947)). However, in "trial practice reality," as the court termed it, *id.*, decisions of whether to include or exclude evidence are routinely made by lawyers on the basis of whether they think it would help or hinder their case.

321. See *Fenlon*, 216 Cal. App. 3d at 1182, 265 Cal. Rptr. at 328-29.

322. This is especially true if the ruling is applied retroactively.

C. *The Court Unnecessarily Reached and Improperly Applied Constitutional Analysis*

To support the decision in *Adams*, the California Supreme Court used the recent United States Supreme Court holding in *Pacific Mutual Life Insurance Co. v. Haslip*.³²³ Justice Kennard, in her concurrence, wrote that a court should not resort to deciding constitutional questions “when other bases for decision [were] present generally.”³²⁴ It is generally appropriate judicial restraint to refrain from ruling on constitutional issues when a case can be decided on other grounds.³²⁵ The California Supreme Court could have reached its decision without addressing the constitutionality of the California system for reviewing awards of punitive damages.³²⁶

In *Adams* the constitutional issues were not raised in the trial court,³²⁷ were never mentioned in the opinion of the Court of Appeal³²⁸ and were never briefed before *Adams* reached the supreme court.³²⁹ Given these facts, the court should have waited until “constitutional ramifications for California law were plainly at issue” and the constitutional issues were properly before the court.³³⁰

Despite these circumstances, utilizing the criteria from *Haslip*, the court in *Adams* performed a constitutional analysis of California’s method of awarding punitive damages.³³¹ Notwithstanding that the constitutional issues were not properly before the court, the issues addressed in *Haslip* were irrelevant because of the vast differences between the Cali-

323. 111 S. Ct. 1032 (1991). The court in *Adams* did not explicitly rule that the defendant’s financial condition was necessary for punitive damage awards to be found constitutional, but did note the United States Supreme Court’s concern about excessive punitive damages awards and states with lax standards for reviewing the awards. *Adams*, 54 Cal. 3d at 118 & n.9, 813 P.2d at 1356 & n.9, 284 Cal. Rptr. at 326 & n.9.

324. *Adams*, 54 Cal. 3d at 124, 813 P.2d at 1360, 284 Cal. Rptr. at 330 (Kennard, J., concurring).

325. See, e.g., *Syrek v. California Unemployment Ins. Appeals Bd.*, 54 Cal. 2d 519, 354 P.2d 625, 7 Cal. Rptr. 97 (1960).

326. *Adams*, 54 Cal. 3d at 124, 813 P.2d at 1360, 284 Cal. Rptr. at 330 (Kennard, J., concurring) (citing *People v. Stankewitz*, 51 Cal. 3d 72, 793 P.2d 23, 270 Cal. Rptr. 817 (1990), cert. denied, 111 S. Ct. 1342 (1991); *Estate of Johnson*, 139 Cal. 532, 73 P. 424 (1903)).

327. See *id.*, 813 P.2d at 1361, 284 Cal. Rptr. at 331 (Kennard, J., concurring) (explaining that court should wait until constitutional issue raised in trial court).

328. See *Adams v. Murakami*, 228 Cal. Rptr. 885 (Cal. Ct. App. 1990) (deleted opinion) (opinion does not discuss constitutional issues), *rev’d*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

329. See *Adams*, 54 Cal. 3d at 124, 813 P.2d at 1360-61, 284 Cal. Rptr. at 330-31 (Kennard, J., concurring) (explaining that court should wait until briefed and determined in lower courts before reaching constitutional issue).

330. *Id.* (Kennard, J., concurring).

331. *Id.* at 116, 813 P.2d at 1354, 284 Cal. Rptr. at 324.

for California and Alabama systems of awarding punitive damages.³³²

In Alabama the jury, "in assessing punitive damages, . . . is not allowed to consider the financial position of the defendant."³³³ The defendant's financial condition is only revealed to the judge in a "post-judgment critique,"³³⁴ but nevertheless the jury's award is "afforded a great deal of discretion."³³⁵ Therefore, Alabama's system recognizes that a jury need not know the financial condition of a defendant to properly award punitive damages in the amount appropriate to punish and deter the defendant.³³⁶

In *Haslip* the United States Supreme Court did not resolve whether consideration of a defendant's financial condition was required when a trial or appellate court reviews the award.³³⁷ The Court found only that Alabama's review procedures were constitutionally sufficient, in which a number of factors "could be taken into consideration in determining whether the award was excessive or inadequate."³³⁸ Among these factors were a "reasonable relationship between the punitive damages award and the harm" caused by defendant's actions,³³⁹ the reprehensibility of the defendant's actions,³⁴⁰ and the defendant's "financial position."³⁴¹ California has consistently used these same criteria to evaluate punitive damages on appeal since the California Supreme Court decided *Neal v. Farmers Insurance Exchange*.³⁴²

The defendant in *Haslip* argued that its financial condition should

332. See *id.* at 128, 813 P.2d at 1363, 284 Cal. Rptr. at 333 (Mosk, J., dissenting) (accusing majority of engaging in "creative lawyering when they attempt[ed] to employ the [*Haslip* opinion because] it lacks all relevance").

333. *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989); see also *Southern Life & Health Ins. Co. v. Whitman*, 358 So. 2d 1025 (Ala. 1978).

334. *Green Oil*, 539 So. 2d at 222.

335. *Id.*

336. See *id.* ("[T]he jury is not allowed to consider the financial position of the defendant."); see also *Adams*, 54 Cal. 3d at 129, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting) (recognizing that Alabama does not require jury to know defendant's wealth).

337. See *Haslip*, 111 S. Ct. at 1045 (holding that substantive review plan is required but setting no rigid criteria).

338. *Id.* (emphasis added).

339. *Id.*

340. *Id.*

341. *Id.* The other factors considered in Alabama's post-verdict review are the profitability to the defendant of the conduct giving rise to the punitive damage award, the total cost of litigation, the mitigating effect of criminal sanctions already imposed against the defendant and the mitigating effect of other civil awards against the defendant for the same conduct. *Id.*; see *Green Oil*, 539 So. 2d at 222-23 (listing what could be taken into consideration when reviewing punitive damages); see also *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986) (listing criteria for post-judgment review of punitive damages awards).

342. 21 Cal. 3d 910, 928, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978) (setting "certain established principles" by which reviewing court assesses punitive damages). See *supra* notes

not be considered, even on review.³⁴³ The United States Supreme Court did not directly rule on whether the jury should see this financial information; however, it did give some guidance: “[T]he fact finder must be guided by more than the defendant’s net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with deep pockets.”³⁴⁴ This reasoning indicates that, contrary to the holding in *Adams*,³⁴⁵ the United States Supreme Court recognized that, especially in the case of wealthy defendants, the jury should not hear evidence of a defendant’s wealth or at least that the defendant’s wealth should not be emphasized.³⁴⁶

Alabama’s scheme only requires that liability for punitive damages be proven by a preponderance of the evidence.³⁴⁷ California, on the other hand, requires that liability be proven by “clear and convincing evidence.”³⁴⁸ On this issue, the United States Supreme Court felt that “[t]here is much to be said in favor of a State’s requiring, as many do, . . . a standard of ‘clear and convincing evidence.’”³⁴⁹ Therefore, because of its proof requirements, California’s punitive damages scheme would be constitutionally more favorable than that of Alabama.³⁵⁰

The majority in *Adams* should not have considered the constitutionality of California’s system for awarding punitive damages. The differences between Alabama’s system and California’s system, in light of *Haslip*, make it difficult to measure the constitutionality of punitive damage awards in California. However, because California before *Adams* did not require showing the jury evidence of the defendant’s wealth and because California’s review procedures and higher standard of proof exacted stringent constitutional standards, the system existing before the *Adams* decision was more constitutionally sufficient than the system now

94-101 and accompanying text for a discussion of the appellate review criteria established by the *Neal* decision.

343. *See Arguments Before the Court*, 59 U.S.L.W. 3315, 3316 (U.S. Oct. 30, 1990) (considering defendants’ wealth “only insures that multi-million dollar awards will happen”); *see also Adams*, 54 Cal. 3d at 129, 813 P.2d at 1364, 284 Cal. Rptr. at 334 (Mosk, J., dissenting) (discussing defendant’s arguments).

344. *Haslip*, 111 S. Ct. at 1045.

345. *Adams*, 54 Cal. 3d at 118, 813 P.2d at 1356, 284 Cal. Rptr. at 326 (omitting evidence of defendant’s financial condition raises doubt about constitutionality of punitive damage award).

346. *See id.* (discussing jury’s role in award of punitive damages).

347. *See Haslip*, 111 S. Ct. at 1046 n.11 (holding as constitutionally sufficient, “standard prevailing in Alabama—‘reasonably satisfied from the evidence’”).

348. CAL. CIV. CODE § 3294 (West Supp. 1992).

349. *Haslip*, 111 S. Ct. at 1046 n.11 (citations omitted).

350. *See id.* (favorably discussing standards of proof greater than preponderance of evidence).

mandated by the *Adams* decision.³⁵¹

VI. RECOMMENDATIONS

The California Supreme Court now requires evidence of a defendant's wealth at trial, finding that effective review of punitive damage awards cannot be accomplished without it.³⁵² If the supreme court insisted on making a rule more appropriately left to the legislature,³⁵³ it should at least have attempted to have made its decision meaningful. Although requiring disclosure of a defendant's financial condition, the court failed to provide any better guidelines for the effective review of punitive damages.³⁵⁴ In large part, this is due to the difficulties inherent in measuring a defendant's ability to pay a punitive damage award. A defendant's financial status for the purposes of awarding punitive damages may be measured in several ways: net worth, income, liquid assets and profit derived from the defendant's conduct that resulted in the punitive damage award.³⁵⁵ The court refused, however, to establish a standard "for measuring a defendant's ability to pay."³⁵⁶ If *Adams v. Murakami* were meant to be meaningful, the court should have set con-

351. The court in *Adams* noted the high Court's concern about punitive damage schemes lacking detailed review procedures on appeal. Schemes in which an award would be set aside only when the award was "manifestly and grossly excessive" or showed "passion, bias, and prejudice" on the part of the jury were of particular concern. *Adams*, 54 Cal. 3d at 118 n.9, 813 P.2d 1356 n.9, 284 Cal. Rptr. at 327 n.9 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 n.10 (1991)). The California Supreme Court overlooked the existing detailed procedures for review, similar to those in Alabama, which address these concerns. See *supra* notes 84-108 and accompanying text (discussing California's review criteria for punitive damage awards). Similarly, the California court overlooked the United States Supreme Court's concern about juries considering the defendant's wealth when awarding punitive damages. See *Haslip*, 111 S. Ct. at 1045 (discussing how jury should not be guided by defendant's worth).

352. See *Adams*, 54 Cal. 3d at 110, 813 P.2d at 1351, 284 Cal. Rptr. at 321 (reviewing punitive damage award cannot be effectively accomplished absent evidence of defendant's wealth).

353. See *infra* notes 362-64 and accompanying text for a discussion of the legislature's role in making rules concerning punitive damages.

354. For example, assume a defendant engaged in a particularly despicable action which did not significantly benefit the defendant financially but which society has a definite interest in discouraging and punishing. Further, suppose this defendant has no net worth, perhaps is even in debt, and at the time of trial the defendant has been out of work for eight months. Is \$1000 too much in punitive damages to punish him because he does not have the money? See *Adams*, 54 Cal. 3d at 111, 813 P.2d at 1351, 284 Cal. Rptr. at 321 ("[T]he award can be so disproportionate to defendant's ability to pay that the award is excessive for that reason alone."). If the same defendant has a net worth of \$1 million dollars, is an award of \$990,000 acceptable? Although the latter defendant would be left with some net worth, the punishment given the latter is arguably disproportionate to that given the former.

355. See *id.* at 116 n.7, 813 P.2d at 1355 n.7, 284 Cal. Rptr. at 325 n.7 (discussing means of measuring defendant's ability to pay).

356. *Id.*

crete criteria for measuring a defendant's wealth. Because the court failed to do so, the legislature must establish such standards. Otherwise, *Adams* will do little to curtail the jury speculation that it was meant to eliminate because appellate courts still do not have a standard financial measure of a defendant's wealth that can be compared to the amount of punitive damages.³⁵⁷

Instead of attempting to limit the amount of punitive damages,³⁵⁸ the court should strive to make punitive damages more consistent. This can be accomplished by improving jury instructions. Before awarding punitive damages, a jury should clearly understand that punitive damages are not meant to destroy the defendant but only to punish and deter future misconduct.³⁵⁹

A jury instruction that may be helpful is the "West Virginia instruction."³⁶⁰ This instruction was designed to "lessen the possibility of juries administering excessive punishment by overlooking a punitive effect that a compensatory damage award may have."³⁶¹ With such an instruction, the jury will at least contemplate the consequences of a large punitive damage award when added to the compensatory damage award, and punitive damage awards may become more consistent.

The court in *Adams* acknowledged the California code provision stating that punitive damages serve a public purpose to punish wrongdoing and to deter future misconduct.³⁶² Because punitive damages do serve *the public*, any attempt to limit the amount should be carefully thought out and passed by the legislature.³⁶³ In the future, the California

357. See *id.* at 114, 813 P.2d at 1353, 284 Cal. Rptr. at 323 (disapproving of jury speculation as to defendant's financial condition). Given the *Adams* decision, it may be best to simply allow into evidence all factors relevant to a defendant's ability to pay.

358. See *supra* note 235 and accompanying text.

359. See RILEY, *supra* note 262, § 15.4(9).

360. *Id.*

361. This instruction is especially effective in jurisdictions, like California, where, for reasons of public policy, liability insurance does not cover awards of punitive damages. See CAL. INS. CODE § 533 (West 1966). The text of the West Virginia jury instruction is:

If, after the jury has assessed damages to fully compensate the plaintiff for injury, such damages are still not sufficient in amount to punish the defendant . . . and . . . to prevent the repetition of the same or the commission of similar wrongs, they may add such further sum, in their judgment, as may be necessary for this purpose, but if the damages assessed as compensatory are sufficient in amount to operate at the same time as a punishment and a warning, the jury are not authorized to add still a further and greater sum, and thus subject the defendant to a double punishment in the same case for the same wrong.

RILEY, *supra* note 262, § 15.4(9) (quoting *Mayer v. Trobe*, 22 S.E. 58, 63 (1895)).

362. CAL. CIV. CODE § 3294(a) (West 1970 & Supp. 1992); *Adams*, 54 Cal. 3d at 110, 813 P.2d at 1350, 284 Cal. Rptr. at 320.

363. The purpose of punitive damages is to publicly deter future misconduct, and the public's duly elected representatives are the legislators. Therefore, it should be the legislature's

Supreme Court should refrain from any judicial attempts at fixing the amounts of punitive damages. The legislature should decide what is the best way to balance the public's interest in the punishment and deterrence of wrongful acts against the detrimental effects of large punitive damage awards.³⁶⁴

VII. CONCLUSION

In *Adams v. Murakami* the California Supreme Court unnecessarily compelled plaintiffs to produce evidence of a defendant's financial condition.³⁶⁵ The decision is questionable because of the court's failure to weigh the supposed benefits to appellate courts against the burdens shouldered by litigants and the California court system. As a result, the decision causes the following adverse effects: (1) the plaintiff is forced to prove the defendant's financial condition, which may be detrimental to the plaintiff's own case on appeal; (2) a plaintiff is not only permitted, but compelled to probe a defendant's financial records which could have remained private; (3) the California courts are further burdened through delays produced by increased discovery; (4) attorneys are not allowed to exercise their own professional judgment and discretion when deciding how to best handle their client's case; and, perhaps worst of all, (5) while increasing the burden on both plaintiffs and defendants, the decision still provides no better guidelines for effective review of punitive damage awards than existed prior to the decision.

Because the defendant's financial condition already is introduced in many cases, this decision may not have a great effect on many punitive damage cases heard in California,³⁶⁶ but it will undoubtedly place time and financial burdens on some litigants and on the civil justice system in general.³⁶⁷ Perhaps the most significant impact is "the message that the

duty to enact any legislation affecting the amount and the effectiveness of punitive damage awards.

364. See *supra* notes 272-78 and accompanying text for a discussion of a recent legislative attempt to limit punitive damages in California. See also *Adams*, 54 Cal. 3d at 131, 813 P.2d at 1365, 284 Cal. Rptr. at 335 (Mosk, J., dissenting) (accusing majority of judicially legislating).

365. See *Adams*, 54 Cal. 3d at 123, 813 P.2d at 1360, 284 Cal. Rptr. at 330 (placing burden on plaintiff to produce evidence of defendant's financial condition).

366. Most punitive damage claims are a result of bad faith claims against large insurers. Most jurors perceive insurance corporations as having enormous wealth, and plaintiffs generally attempt to tell the jury about insurance corporations' wealth. See *Stansky*, *supra* note 235, at 1 (interviewing plaintiff's lawyer who describes typical punitive damages trial).

367. See *Fenlon v. Brock*, 216 Cal. App. 3d 1174, 1182-83, 265 Cal. Rptr. 324, 328-29 (1989) (giving reasons why plaintiff should not be compelled to produce defendant's financial information), *overruled by Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

[California Supreme Court] has sent to trial lawyers, judges and juries.”³⁶⁸ The court may no longer show great deference to juries in awarding punitive damages and may show an increased willingness in the future to attempt to limit punitive damage awards.³⁶⁹

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368. Stansky, *supra* note 235, at 1.

369. *Id.* (speculating on court's decision); *see Adams*, 54 Cal. 3d at 124, 813 P.2d at 1361, 284 Cal. Rptr. at 331 (Mosk, J., dissenting) (indicating willingness of court to rid “world of what [it] apparently perceive[s] to be [the] social menace” of punitive damages).

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