Punitive Damages and the Intoxicated Driver: An Approach to Taylor v. Superior Court

Santiago Fernandez
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By Santiago Fernandez*

Introduction

"[T]he great potential for human suffering which attends the presence on the highways of intoxicated drivers" presents one of the most complex legal and social problems of our times. Studies of the various methods currently employed have failed to identify the most effective means of deterring intoxicated drivers. Although many experts still stress the need for rehabilitative programs, a growing number have begun to question their effectiveness, suggesting instead more stringent

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5. In a recent report prepared by the California Department of Motor Vehicles and the Department of Alcohol and Drug Abuse, the findings showed that a 12-month alcohol abuse treatment program was not superior to mandatory licensing controls either in improving driving or life style. CALIFORNIA DEP'T OF MOTOR VEHICLES & DEP'T OF ALCOHOL AND DRUG ABUSE, AN EVALUATION OF ALCOHOL ABUSE TREATMENT AS AN ALTERNATIVE TO DRIVERS LICENSE SUSPENSION OR REVOCATION 7 (1978). In fact, program participants had worse subsequent accident and conviction records than did nonparticipants. Id. at 4; Drunk Drivers Just Don't Listen, S.F. Examiner, January 5, 1979, at 58, col. 1. Reports such as the one presented above have led some commentators to conclude that "[r]ehabilitative measures for the drinking driver are expensive and their efficacy is questionable at best. It would be difficult to justify the expenditure of large sums to treat huge numbers of drivers . . . using measures that we cannot demonstrate to be effective." Waller, Drinking and Highway Safety, in DRINKING, supra note 2, at 135.
application of existing criminal sanctions.\textsuperscript{6} Punitive damages\textsuperscript{7} also have been suggested as an alternative means of deterring intoxicated drivers.\textsuperscript{8} The majority of jurisdictions which have considered the latter proposal have favored the imposition of punitive awards.\textsuperscript{9} Although the California courts, following the minority position,\textsuperscript{10} traditionally have denied punitive damages in such cases,\textsuperscript{11} the California Supreme

\textsuperscript{6} "In the present state of knowledge the expenditure of funds on the more costly of these measures, especially those designated as therapeutic, is without return in terms of subsequent behavior on the highway. In the absence of other considerations, the courts should restrict themselves to fining the offenders." Ross & Blumenthal, \textit{Sanctions for the Drinking Driver: An Experimental Study}, 3 J. Legal Stud. 53, 61 (1974).


\textsuperscript{11} See notes 28-39 & accompanying text \textit{infra}. 
Court has never specifically addressed the issue. A case now pending before the court, *Taylor v. Superior Court*, affords it that opportunity.

The facts of *Taylor* are not uncommon. On September 1, 1977, the vehicle driven by the defendant Clair William Stille collided head-on with seventeen year old Cameron Taylor's Volkswagen van. The defendant, a salesman for a wholesale liquor distributor, was intoxicated at the time of the collision. The plaintiff suffered severe facial disfigurement and the permanent loss of his teeth. In addition, he was unable to continue his undergraduate studies for an extended period of time.

The allegations of the complaint established that the defendant (1) was an alcoholic; (2) previously had been arrested and convicted for driving while under the influence of alcohol; (3) recently had completed a period of probation imposed as the result of a conviction for driving while intoxicated; (4) was required by the terms of the probation to refrain from driving a motor vehicle for at least six hours following the consumption of any alcoholic beverage; (5) was, at the time of the accident, facing "an additional, separate and distinct criminal charge of driving a motor vehicle while under the influence of alcohol"; (6) previously had caused an automobile accident while driving under the influence of alcohol; and (7) was consuming an alcoholic beverage at the time of the collision. On the basis of these facts the plaintiff sought punitive damages, alleging that the defendant, although aware of his inability to drive while intoxicated, nevertheless attempted to drive while intoxicated, resulting in injury to the plaintiff.

The defendant demurred to Taylor's claim for punitive damages on the ground that the complaint failed to allege the requisite malice. The court sustained the demurrer on the ground that an allegation of intoxication alone was insufficient to support an allegation of malice. Taylor's application for a writ of mandamus was denied by the court of appeal. On May 16, 1978, the California Supreme Court granted a hearing in the case.

This Note examines the applicability of punitive damages to cases
involving intoxicated drivers. The current state of the law regarding punitive damages and intoxicated drivers, and possible alternative approaches to the problem, are considered. Particular attention is paid to the concept of malice as required for the allowance of punitive awards under Civil Code section 3294, and the adoption of an alternative standard for defining malice under the statute is suggested. This Note concludes that as a matter of public policy, and as a means of deterring intoxicated drivers, punitive damages should be allowed when the facts and circumstances of a case demonstrate a conscious disregard on the part of the defendant for the safety of others.

Punitive Damages in California

In California, any award of punitive damages must conform to the requirements of section 3294 of the Civil Code, which provides: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant." Punitive damages, under section 3294, are awarded not for the sake of compensating the injured party, but strictly as punishment. They are not favored by the courts and are to be granted only with "the greatest caution" and "in the clearest of cases." Such damages cannot be claimed as a matter of right, but are granted or withheld solely

18. The term "intoxicated driver" will be used throughout this Note to mean any driver found to have a blood-alcohol level above .10%. This use of the term is in keeping with the presumption of intoxication set out in CAL. VEH. CODE § 23126(a)(3) (West 1971). Statistics show that the risk of being responsible for an automobile accident increases significantly above the .10% level. See DRINKING, supra note 2, at 122-25; Cranton, Driver Behavior and Legal Sanctions, 67 MICH. L. REV. 421, 437-38 (1969); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS 14 (1967).


20. "The issue of exemplary damages is separate and distinct from that of actual damages, for they are assessed to punish the defendant and not to compensate for any loss suffered by the plaintiff." Brewer v. Second Baptist Church, 32 Cal. 2d 791, 801, 197 P.2d 713, 720 (1948). See Finney v. Lockhart, 35 Cal. 2d 161, 163, 217 P.2d 19, 20 (1950); Di Giorgio Fruit Corp. v. AFL-CIO, 215 Cal. App. 2d 560, 580, 30 Cal. Rptr. 350, 361 (1963) (citing RESTATEMENT OF TORTS § 908(1) (1939)).


22. Id.

at the discretion of the trier of fact. Because they are assessed as punishment, "a positive element of conscious wrongdoing is always required." Public policy and the interest of society in deterring flagrant misconduct serve as the principal justifications for allowing punitive damage awards. Accordingly, the applicability of punitive damages to cases involving intoxicated drivers is apparent once one recognizes that "Intoxication of a driver is egregious social misconduct which should sufficiently aggravate a defendant's negligence to permit recovery of punitive damages . . . ."

California's Present Position Regarding Intoxicated Drivers

In California, the ability of an injured party to recover punitive damages from an intoxicated driver was first addressed in the case of *Strauss v. Buckley.* The undisputed facts in *Strauss* showed only that the defendant was intoxicated at the time of the accident. At the conclusion of the trial, judgment was entered for the plaintiff in the amount of $5,000. The defendant appealed the judgment on the ground that the award was excessive. In ruling that the judgment was "manifestly excessive," the court stated:

The damages recoverable in a case of this kind are to be compensatory only; punitive damages are not recoverable because of the drunkenness of the defendant. That is an offense in itself for which punishment may be imposed in the ordinary course of law. Evidence of the drunkenness may be offered, of course, to show the negligence of the driver, but it may not be used to enhance the award of damages beyond that which will fairly compensate the plaintiff for injuries suffered.

Because the award in *Strauss,* albeit excessive, was compensatory, the court's statement regarding the applicability of punitive damages to such cases was mere dictum. More importantly, the court's reasoning that punitive damages could not be awarded when punish-

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29. *Id.* at 8, 65 P.2d at 1353.
30. *Id.*
ment might otherwise be imposed in the ordinary course of law was
contrary to the clear weight of authority in California. Nevertheless, twenty-one years after Strauss, the court of appeal in Gombos v. Ashe accepted as settled law the rule set forth in Strauss that a claim alleging only the intoxication of an automobile driver is insufficient to show the requisite malice for a punitive award in such cases.

In Gombos, the plaintiffs alleged, inter alia, that the defendant did

... One who becomes intoxicated, knowing that he intends to
drive his automobile on the highway, is of course negligent, and per-
haps grossly negligent. It is a reckless and wrongful and illegal thing
to do. But it is not a malicious act.\textsuperscript{39}

The \textit{Strauss} and \textit{Gombos} decisions demonstrate that the primary obstacle to the allowance of punitive damages in cases of intoxicated drivers is the malice in fact requirement of section 3294.\textsuperscript{40} Thus, if the supreme court is to alter existing law, a re-examination of the concept of malice is required.

\section*{Malice}

\subsection*{Current State of the Law}

The California courts have not been consistent in applying the malice requirement of section 3294.\textsuperscript{41} While some courts have adhered to the view first set out in the case of \textit{Davis v. Hearst},\textsuperscript{42} that malice may be found only in cases involving a wilful or intentional act evincing an "evil motive,"\textsuperscript{43} other courts have found "conscious disregard of another's rights"\textsuperscript{44} or "safety"\textsuperscript{45} to be "an appropriate description of the
animus malus requisite to an award of punitive damages." 46 Indeed, in some instances, even reckless disregard of another's rights or safety has been held sufficient to support a finding of malice. 47 The effect of these divergent and, at times, contradictory decisions has been to cast the law regarding the availability of punitive damages in non-deliberate tort cases into a state of confusion and uncertainty. 48

Conscious Disregard of Another's Rights or Safety: The Emergence of a New Standard

Recent cases indicate a trend toward the adoption of conscious disregard of another's rights or safety as an appropriate description of malice. 49 Arguably, this trend reflects a growing awareness that something less than an actual intent to injure should be characterized as malice. 50 A brief review of the relevant cases serves to illustrate the point.

Silberg v. California Life Insurance Co., 51 involving an insurance bad faith claim, was one of the first cases to adopt conscious disregard of another's rights as an adequate description of the requisite malice. 52

49. See notes 44-45 & accompanying text supra.
52. The phrase "conscious disregard of another's rights" had been employed by the courts prior to the Silberg decision. See, e.g., Roth v. Shell Oil Co., 185 Cal. App. 2d 626, 8 Cal. Rptr. 514 (1960), wherein the court noted that "a tort committed . . . without such
The trial court in *Silberg* granted a motion for a new trial on the ground that the evidence did not sustain the award of punitive damages. The supreme court, upholding the trial court's finding that the plaintiff failed to establish oppressive conduct by the insurance company, noted that "[i]n order to justify an award of exemplary damages . . . [the defendant] must act with the intent to vex, injure or annoy, or with a conscious disregard of plaintiff's rights." Fortunately, the court in *Silberg* did not go on to explain the meaning of the conscious disregard formula or its significance.

After carefully reviewing the varied judicial interpretations of the malice requirement, the court of appeal in *G.D. Searle & Co. v. Superior Court*, 64 adopted the *Silberg* formulation and suggested "conscious disregard of safety as an appropriate description of the *animus malus* which may justify an exemplary damage award when non-deliberate injury is alleged." The court noted that while "adherence to the *Davis v. Hearst* formulation is not troublesome when the plaintiff charges a deliberate tort," 56 in some instances in which the defendant's conduct warrants punishment under the statute, the plaintiff may be unable to prove actual, "wrongful, personal intention to injure." 57 In such cases, the court felt that the concept of malice should be extended "beyond deliberate injury [to] characterize aggravated and culpable instances of non-deliberate conduct." 58

The court in *Mason v. Mercury Casualty Co.* 59 emphasized the fact that conscious disregard of another's rights or safety can serve as an alternative to the "actual-intent-to-injure" test. 60 The plaintiff in *Mason* sought punitive damages from the defendant insurer on the grounds that it had "wilfully and wantonly" 61 breached its fiduciary re-

35. 11 Cal. 3d at 462, 521 P.2d at 1100, 113 Cal. Rptr. at 718 (emphasis added). Interestingly, in Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 523 P.2d 662, 114 Cal. Rptr. 622 (1974), decided shortly after *Silberg*, Justice Tobriner, quoting from Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), noted that "malice . . . may be established by a showing that the defendant's wrongful conduct was willful, intentional, and done in reckless disregard of its possible results." 11 Cal. 3d at 922, 523 P.2d at 671, 114 Cal. Rptr. at 631 (emphasis added). The *Silberg* opinion was not cited in *Schroeder*.

55. Id. at 32, 122 Cal. Rptr. at 225.
56. Id. at 30, 122 Cal. Rptr. at 223.
58. 49 Cal. App. 3d at 30, 122 Cal. Rptr. at 223.
59. 64 Cal. App. 3d 471, 134 Cal. Rptr. 545 (1976).
60. See note 43 & accompanying text *supra*. See generally Franson, *supra* note 12, at 94-95; *Punitive Damages in Products Liability Cases*, *supra* note 41, at 902-04.
61. Note that the court accepted this allegation as "adequate to meet the requirement of allegation of oppression [sic] fraud or malice required by Civil Code section 3294 and
relationship... by refusing payment" on his claim. The jury awarded punitive damages in the amount of $25,000, but a motion for judgment notwithstanding the verdict was granted by the trial court. The court's ruling was affirmed on appeal on the ground that the plaintiff had failed to produce sufficient evidence to show that the defendant acted "with intent... to vex, injure or annoy... or in the alternative... acted with a conscious disregard of plaintiff's rights."

Although the alternative standard for malice set forth in Searle had been recognized by courts, as in Mason, not until Seimon v. Southern Pacific Transportation Co. was decided was the conscious disregard formula actually applied in favor of a plaintiff. In Seimon, the plaintiff, a truck driver, brought suit against the railroad alleging, inter alia, willful misconduct in failing to provide adequate warning at a railroad crossing. The evidence showed that although the defendant knew of the dangerous conditions, it took no remedial action. The trial court granted the defendant's motion for nonsuit to the plaintiff's claim for punitive damages. The court of appeal reversed, holding that, under the Searle formula, it was improper for the trial court to say "as a matter of law, that there was such a paucity of evidence on the issue of malice to preclude the jury from considering the propriety of an award of punitive damages."

O'Hara v. Western Seven Trees Corp. is perhaps the most significant recent decision in that the court specifically relied on the conscious disregard formula to find the requisite malice. The plaintiff, a rape vic-

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63. Emphasis omitted.

64. Emphasis added. Cf. Liodas v. Sahadi, 19 Cal. 3d 278, 284, 562 P.2d 316, 319, 137 Cal. Rptr. 635, 638 (1977) (alternative instruction for punitive damages based on "reckless disregard" held to be in error).

65. 64 Cal. App. 3d at 474, 134 Cal. Rptr. at 547 (citation to Silberg omitted).


67. The evidence did not show that the defendant intended to injure the plaintiff; it showed only that the defendant knowingly disregarded a potentially serious risk of harm. Id. at 608, 136 Cal. Rptr. at 792.

68. "The Searle court, after exhaustively reviewing the various judicial formulations of malice in cases of non-deliberate tortious conduct settled upon conscious disregard of safety as an appropriate description of the animus malus requisite to an award of punitive damages. Using this yardstick, we turn now to plaintiff's most serious allegation concerning defendant's failure to provide adequate crossing protection." 67 Cal. App. 3d at 607, 136 Cal. Rptr. at 791.

69. Id. at 609, 136 Cal. Rptr. at 792. The court noted that "the jury could have gleaned from [the] evidence that defendant had displayed a conscious and callous indifference to, or disregard of, probable harm to motorists..." Id.

70. 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).
tim, alleged that the defendants, owners of the plaintiff's apartment complex, negligently had failed to provide adequate security and to warn the plaintiff of the known danger of rape. Punitive damages were sought on the ground that the defendants—through their authorized agents—acted with conscious disregard for the plaintiff's safety. At trial, the defendants' demurrer to the plaintiff's claim for punitive damages was sustained. The court of appeal, however, reversed the ruling and held:

In a case such as this one, where the injury is not deliberately inflicted by the defendant, the plaintiff must prove that the defendant acted with conscious disregard of the plaintiff's safety. . . .

Here, the individual [defendants] allegedly knew of the serious potential danger to [the plaintiff] as a female tenant. Yet they intentionally misled her in order to advance their pecuniary interest in renting an apartment. [On these facts] conscious disregard of [plaintiff's] safety was sufficiently alleged.

The *O'Hara* decision establishes that although a defendant may not have an actual, "wrongful, personal intention to injure" his or her conduct may nevertheless evince such a conscious disregard of a "serious potential danger" as to warrant an award of punitive damages.

### Conscious Disregard Defined

The foregoing cases illustrate that the courts, by adopting the conscious disregard formula, have been willing to expand the concept of malice to encompass instances of aggravated, yet nondeliberate misconduct, thereby obviating the need to prove actual intent to injure. Interestingly enough, however, the courts have rejected "recklessness" as sufficient for a finding of malice. The only conclusion possible is that the term conscious disregard describes a state of mind which lies somewhere between the realms of intentionality and recklessness.

An actor's conduct is characterized as reckless if he or she performs an act or intentionally fails to perform an act which he or she knows or has reason to know will unreasonably increase the risk of

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71. *Id.* at 801, 142 Cal. Rptr. at 489. "[T]he same person who had been depicted in the composite drawings which had earlier been supplied to [the defendants] and were still in their possession" was later identified by the plaintiff as the rapist. *Id.* at 802, 142 Cal. Rptr. at 489.

72. *Id.* at 806, 142 Cal. Rptr. at 492. The court's statement seems to indicate that punitive damages could have been awarded on the basis of fraud. Yet, the holding clearly shows that the award was predicated on a finding of malice.

73. See Franson, *supra* note 12, at 94.

physical harm to another.\textsuperscript{75} In determining whether an actor’s actions are reckless, an objective standard, \textit{i.e.}, the “reasonable person” test, is applied.\textsuperscript{76} Under this test no attempt is made to distinguish between an actor whose actions knowingly created an unreasonable risk of harm, and one who should have known. When the issue of punitive damages is raised, however, the subjective state of mind of the actor becomes all-important.\textsuperscript{77} Knowledge, or awareness of the risks, is what distinguishes the concept of conscious disregard from mere recklessness.

An actor who acts in knowing disregard of an unreasonable risk of harm to others exhibits a much greater degree of moral culpability than one who acts unaware of the risk. The element of choice is the decisive factor. A recklessness standard, embracing both actual knowledge and imputed knowledge, overlooks the element of choice. A conscious disregard standard, on the other hand, emphasizes the element of choice: an actor who consciously disregards an obvious risk effectively chooses to increase the potential for harm. Should the harm occur, a punitive sanction is warranted.

In applying the foregoing standard, a jury in an intoxicated driver case could be instructed as follows:

If you find that, before becoming intoxicated, the defendant knew or was conscious of the potentially serious\textsuperscript{78} risk of harm to another in driving while intoxicated and, having full knowledge of such a risk acted in disregard thereof [\textit{e.g.}, by placing himself or herself in a position that requires intoxicated driving], you may then find that the defendant acted with such conscious disregard of the plaintiff's rights or safety as to evince malice.\textsuperscript{79} Upon such a finding, punitive damages may be awarded.

Framing the concept of conscious disregard in terms of a defendant's actual knowledge places a heavy burden of proof on the plaintiff. For example, merely proving that the defendant had a drink before undertaking to drive, in most circumstances, would not sustain a finding that the defendant was fully aware of his or her inability to drive

\textsuperscript{75} Restatement (Second) of Torts § 500 (1965); W. Prosser, Handbook of the Law of Torts § 34, at 185 (4th ed. 1971).

\textsuperscript{76} W. Prosser, Handbook of the Law of Torts § 34, at 185 (1971). See Franson, supra note 12, at 147.

\textsuperscript{77} Franson, supra note 12, at 147.

\textsuperscript{78} See note 72 & accompanying text supra.

\textsuperscript{79} Cf. California Jury Instructions Civil: BAJI § 14.71 (6th rev. ed. 1977) (“Malice . . . may be inferred . . . by showing that the defendant's conduct was wilful, intentional, and done in reckless disregard of its possible results”). But see G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d at 31, 122 Cal. Rptr. at 224: “[In Toole v. Richardson-Merrell] the court declares that malice may be established by evidence of conduct which is ‘wilful, intentional and done in reckless disregard of its possible results.’ [Citation omitted.] According to dictionary definitions, willfulness and intent denote deliberation or design; recklessness, in contrast, connotes action which is insensate, heedless or negligent. To apply these adjectives conjunctively to a single course of conduct is self-contradictory.”
and acted in conscious disregard thereof. Similarly, a greater degree of proof would be required to show that young drivers, presumably inexperienced both in driving and in the use of alcohol, actually knew of their inability to drive while intoxicated or of the amount of alcohol that would render them incapable of operating a motor vehicle. The stringent burden is justified, however, because the conscious disregard formula exposes the intoxicated driver to potentially greater liability. Thus, the adoption of conscious disregard of another's rights or safety as an alternative description of the requisite malice not only would allow punitive damages to be recovered against intoxicated drivers, it would provide the necessary check to runaway damage awards in such cases.

Approaches to Taylor

In deciding Taylor, the supreme court may either affirm the trial court's ruling on the basis of Gombos and Strauss, limit the Gombos-Strauss rule to cases in which intoxication is the sole allegation, or adopt conscious disregard of another's safety as an adequate description of malice and remand the case for determination on that basis. Each of these alternatives will be examined.

The trial court's ruling in Taylor could be affirmed by the supreme court on the grounds that, under Gombos, "punitive damages may not be recovered because of the intoxication of an automobile driver." Such a ruling would overlook the obvious factual distinctions between Taylor and the previous cases and would unnecessarily limit the availability of punitive damages to cases where an actual intent to injure has been shown. As previously noted, the trend in recent punitive damage cases has been to the contrary.

Unlike Taylor, the facts in both Gombos and Strauss reveal only that the defendants allegedly were intoxicated at the time of the accident. In neither case was there an allegation of concurrent, aggravated misconduct. Consequently, one could argue that the decisions in both cases stand solely for the proposition that allegations of intoxication alone will not satisfy the malice requirement of section 3294. Indeed, this interpretation of those cases finds support in a court of appeal decision, Pelletti v. Membrila.

In Pelletti, the plaintiff alleged that the defendant engaged in a
course of misconduct consisting of (1) intoxication, (2) "speed excessive for the time and place and condition of the driver," (3) gross inattention or incapacity, and (4) flight from the scene of the accident. In holding the plaintiff's allegations sufficient to support a finding of wilful misconduct, the court stated:

It has been said that intoxication by itself is insufficient evidence to support a charge of wilful misconduct. . . . [However,] the present case does not depend upon intoxication alone, but on intoxication combined with other factors, which added together support an inference that defendant's misconduct falls within the category described as flirting with danger and thereby acquires the attribute of wilfulness. . . . When several elements of misconduct, including intoxication, are present, the sum of these elements may add up to wilful misconduct even though no single element alone might suffice.

On the basis of the court's rationale in Pelletti, the supreme court, in deciding Taylor, simply could limit the application of the Gombos-Strauss rule. Punitive damages could then be recovered in cases where intoxication is but one element of an entire course of misconduct. By adopting this approach and requiring that an entire course of misconduct be shown, the court would, however, effectively limit the applicability of punitive damages to cases in which such damages might otherwise have been recovered regardless of the intoxication of the driver. Thus, an intoxicated driver, whose driving behavior up until the time of the accident was for all practical purposes normal, could still avoid liability. Under this approach, then, the application of punitive damages in these cases would depend to a large extent on factors other than the primary misconduct, i.e., intoxicated driving, to justify the punitive award.

Another problem with merely limiting the Gombos-Strauss rule is that even if an entire course of misconduct is shown, courts still must satisfy the malice requirement for punitive damages. In doing so, the courts will be forced to infer intent from the defendant's erratic driving behavior. Such a tortuous inference would not be necessary, however, if the conscious disregard formula were adopted.

For example, in Taylor, the defendant's long history of alcohol abuse and his numerous prior convictions for driving while intoxicated indicate that he was fully aware of his inability to drive while intoxicated and that he knew of the potential risks involved in driving in such a state. On the basis of these facts, a jury could find that by placing himself in a position which practically insured his having to drive while

85. Id. at 611-12, 44 Cal. Rptr. at 591.
86. Id. at 612, 44 Cal. Rptr. at 591 (citations omitted).
intoxicated, and by in fact driving while intoxicated, the defendant acted with conscious disregard for the plaintiff's safety. If conscious disregard of another's safety were adopted by the supreme court as an alternative description of malice, the defendant in Taylor could be found to have acted maliciously. Upon such a finding, punitive damages could be awarded under section 3294.

As has been shown, adoption of the conscious disregard formula not only would alleviate the current confusion by establishing a more flexible standard for malice, but would allow punitive damages to be awarded against intoxicated drivers. For these reasons, this Note urges adoption of the conscious disregard formula.

Policy Considerations

The "catastrophic personal and economic impact"\(^8\) of vehicular accidents involving intoxicated drivers is well documented. In California alone, fifty-two percent of all fatal motor vehicle accidents in 1977 were alcohol related.\(^9\) Nationwide, sixty percent of the drivers killed in single car crashes were found to have been drinking.\(^9\) Perhaps in response to these and other staggering statistics,\(^9\) and as a result of the apparent failure of alternative methods of deterrence,\(^9\) many jurisdictions have allowed punitive damages to be recovered from intoxicated drivers.\(^9\)

The decisions allowing punitive damage awards have been based largely on public policy considerations.\(^9\) In most instances, the courts

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89. DEPT OF CALIFORNIA HIGHWAY PATROL, 1977 ANN. REPORT OF FATAL & INJURY MOTOR VEHICLE TRAFFIC ACCIDENTS 70. Driving under the influence of alcohol or alcohol and drugs was found to be the primary collision factor in 31.4% of all fatal motor vehicle accidents. Id. at 67. Alcohol was implicated in 22% of all motor vehicle accidents which resulted in physical injury. Id. at 70.

90. DRINKING, supra note 2, at 77.

91. "In the year 1976 there were 257,846 adult misdemeanor arrests for drunk driving reported in California.... Considering the fact that this number, large as it is, represents arrests only, and does not include the marginal or undetected drivers who have imbibed, the figure may well represent only the tip of a statistical iceberg." Coulter v. Superior Court, 21 Cal. 3d 144, 154, 577 P.2d 669, 675, 145 Cal. Rptr. 534, 540 (1978) (emphasis in original) (citation omitted).

92. See note 5 supra.


94. See Colligan v. Fera, 76 Misc. 2d 22, 26, 349 N.Y.S.2d 306, 310 (Civ. Ct. N.Y. 1973); Harrell v. Ames, 265 Or. 183, 190-91, 508 P.2d 211, 215 (1973); 22 AM. JUR. 2d Dam-
simply have recognized that such flagrant misconduct as driving while intoxicated "deserve[s] punishment more severe than would result from an award of compensatory damages only."}\textsuperscript{95} As noted by the Oregon Supreme Court in \textit{Harrell v. Ames}\textsuperscript{96}:

It may be debatable whether either awards of punitive damages or the imposition of criminal penalties will effectively deter persons from driving after drinking. However, in the absence of a showing of substantial evidence to the contrary, we are not prepared to hold that law enforcement officials and courts, who have a heavy responsibility in this area, are wrong in their present apparent assumption that both criminal penalties and awards of punitive damages may have at least some deterrent effect in dealing with this serious problem.\textsuperscript{97}

Contrary to the court's opinion in \textit{Harrell}, opponents of punitive damages\textsuperscript{98} question the effectiveness of such awards in deterring intoxicated drivers. Deterrence based on fear, they argue, depends upon a number of factors which may not be present in such cases.\textsuperscript{99} They note that the general public is, for the most part, unaware of the implications of punitive damage awards and thus will not be deterred by them.\textsuperscript{100} Further, opponents suggest that "when balanced against the need to control drinking [drivers], the individual's desire to use his vehicle as an extension of his personality [and] to engage in pleasurable activity such as partying or drinking may well be preferred by a large portion of the populace."\textsuperscript{101} Finally, they argue that the high incidence of drunk driving which currently goes undetected lends little credence to

\begin{footnotes}
\item[{95}]{Annot., 65 A.L.R.3d 656, 661-62 (1975). "Automobiles represent the most lethal and deadly weapons today entrusted to our citizenry. When automobiles are driven by intoxicated drivers, the possibility of death and serious injury increases substantially. Every licensed driver is aware that driving while under the influence of intoxicating liquor presents a significant and very real danger to others in the area. Thus, we have no hesitancy in concluding that an intentional assault with fists may, in certain instances, constitute action less outrageous than attempting to drive while under the influence of intoxicating liquor . . . [and that] evidence of driving under the influence of intoxicating liquor may constitute a sufficient ground for allowing punitive damages." Focht v. Rabada, 217 Pa. Super. Ct. 35, 41-42, 268 A.2d 157, 161 (1970).}
\item[{96}]{265 Or. 183, 508 P.2d 211 (1973).}
\item[{97}]{Id. at 190-91, 508 P.2d at 215. "The possible imposition of a civil penalty in the form of punitive damages may well be, at least as to some drivers, a more effective deterrent than any possible criminal penalty which may be imposed." Colligan v. Fera, 76 Misc. 2d 22, 26, 349 N.Y.S.2d 306, 310 (Civ. Ct. N.Y. 1973).}
\item[{98}]{See DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES (D. Hirsch & J. Pouros eds. 1969).}
\item[{99}]{The Problem of the Drinking Driver, supra note 2, at 997-98.}
\item[{100}]{See DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES II (D. Hirsch & J. Pouros eds. 1969).}
\item[{101}]{Cramton, Driver Behavior and Legal Sanctions, 67 Mich. L. Rev. 421, 441 (1969).}
\end{footnotes}
any fears of being apprehended and punished, and that problem drinkers, lacking the capacity to choose rationally not to drive while intoxicated, should be treated and not punished for their actions. Thus, opponents of punitive damages conclude that the imposition of punitive liability on intoxicated drivers will not only prove ineffective, but, in most instances, detrimental.

These arguments invite several comments. First, one could argue that the public is not unaware of the implications of money damage awards in civil cases. The immediate public reaction to the California Supreme Court's ruling in the "host-liability" case, indicates not only that the public is aware of the effects of civil damage awards, but that in at least some instances the spectre of punitive damages will have some deterrent effect. Second, while it may be that many Americans drink and drive, and do so regularly, it cannot be assumed that the vast majority will not be deterred by the prospect of suffering the imposition of stricter penalties. Third, as noted by the court in Colligan v. Fera, the availability of punitive damage awards "may not infrequently induce the victim, otherwise unwilling to proceed because of the attendant trouble and expense, to take action against the wrongdoer." Finally, although there is general agreement that alcoholism is a disease, the fact that a driver, whose intoxicated state has caused an accident, is an alcoholic should not excuse his or her misconduct.

102. The Problem of the Drinking Driver, supra note 2, at 998.
103. See note 113 & accompanying text infra.
104. The Problem of the Drinking Driver, supra note 2, at 998.
106. "This finding stirred so much controversy that the California Legislature earlier this year passed a law limiting liability in such cases to the drinker." Why Everybody is Suing Everybody, U.S. NEWS AND WORLD REPORT, December 4, 1978, at 54.
110. Id. at 24, 349 N.Y.S.2d at 308 (quoting Walker v. Sheldon, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490 (1961)).
112. Under the United States Supreme Court's ruling in Robinson v. California, 370 U.S. 660 (1962), it would be unconstitutional to punish a person solely for being an alcoholic. DRINKING, supra note 2, at 317. However, as recognized by the Supreme Court in Powell v. Texas, 392 U.S. 514 (1968), the fact that a person is an alcoholic does not absolve him or her from liability for criminal acts committed while in an intoxicated state: 
113. [Appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in Robinson; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for
Conclusion

Twenty-one years have passed since *Gombos* was decided. In that time, the number of fatal and injury motor vehicle accidents caused annually by intoxicated drivers has increased significantly. Yet, laboring under the precedential weight of *Gombos* and *Strauss*, and apparently disregarding the trend in other jurisdictions, the California courts have continued to reject the application of punitive damages as a means of deterring intoxicated drivers. In view of "the appalling, perhaps incalculable, cost of torn and broken lives incident to alcohol abuse, in the area of automobile accidents alone,"113 continued adherence to the *Gombos-Strauss* rule is no longer tenable.

In deciding *Taylor*, the California Supreme Court must not allow obscure legal distinctions to prevent it from adopting a position mandated by public policy.114 If the standards for malice set forth in *Davis*115 and in *Gombos*116 have proven too inflexible to accommodate this change, they should be set aside and a new, more flexible standard should be adopted. That standard, as proposed by this Note, should include conscious disregard of another's rights or safety as an alternative description of malice.

Adoption of the conscious disregard standard will facilitate the allowance of punitive damages in cases involving aggravated, yet nondeleterious torts. More importantly, it will allow the imposition of public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community." *Id.* at 532. For a general discussion of both the *Robinson* and *Powell* decisions, see *Drinking*, supra note 2, at 316-20.


114. "Our jurisprudence reflects a history of difficulty in dividing negligence into degrees. The distinctions articulated in labeling particular conduct as 'simple negligence', 'culpable negligence', 'gross negligence', and 'willful and wanton misconduct' are best viewed as statements of public policy. These semantic refinements also serve a useful purpose in advising jurors of the factors to be considered in those situations where the lines are indistinct. We would deceive ourselves, however, if we viewed these distinctions as finite legal categories and permitted the characterization alone to cloud the policies they were created to foster. Our guide is not to be found in the grammar, but rather in the policy of the state in regard to highway accidents. From that perspective, we see that the courts and the Legislature have evolved the notion that drunk drivers menace the public safety and are to be discouraged by punishment." Ingram v. Pettit, 340 So.2d 922, 924 (Fla. 1976) (footnotes omitted).

115. See notes 42-43 & accompanying text *supra*.

116. "In order to warrant the allowance of [punitive] damages the act complained of must not only be wilful, in the sense of intentional, but it must be accompanied by some aggravating circumstance, amounting to malice. Malice implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy or injure." *Gombos* v. *Ashe*, 158 Cal. App. 2d 517, 526-27, 322 P.2d 933, 939 (1958).
punitive damages in cases involving intoxicated drivers. As experience has shown, intoxicated drivers must be deterred. If punitive damages will aid in deterring such drivers, they should be allowed.117

117. "[T]he criminal courts have not been altogether effective and adequate in the control of the automobile traffic problems, and if punitive damages in an automobile tort action can in any way help to solve this problem and decrease the highway slaughter, then they should have a place in our system." Logan, *Punitive Damages in Automobile Cases*, 1961 INS. L.J. 27, 27.
While this Note was being published, the California Supreme Court rendered its decision in *Taylor v. Superior Court*. The court held that operating a motor vehicle while intoxicated may constitute an act of malice when the circumstances evince a conscious disregard by the driver of the probable dangerous consequences. Accordingly, the court issued a writ of mandate directing the trial court to reinstate Taylor's claim for punitive damages.

In reaching its decision the court adopted the conscious disregard formula set forth in *G.D. Searle & Co. v. Superior Court*. The court stated that to justify an award of punitive damages on the basis of conscious disregard, the plaintiff would have to establish that the defendant was "aware of the probable dangerous consequences of his conduct," and that "he wilfully and deliberately failed to avoid those consequences." In the case of an intoxicated driver, the court found that

[one who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others.]

Addressing defendant's contention that the rule of *Gombos v. Ashe* precluded a finding of malice based solely upon the intoxication of the driver, the court simply noted that although at the time *Gombos* was decided it was unclear whether an award of punitive damages could be based upon a finding of conscious disregard, "it has now become generally accepted that such a finding is sufficient."

Other than referring to Dean Prosser's work on torts and adopting the *Searle* formula, however, the court did not discuss any of the California cases supporting its position or otherwise attempt to buttress its
conclusion. In addition, the court failed to acknowledge the Davis line of cases or to explain the impact of its decision on the trial courts' continuing application of the "actual-intent-to-injure" standard for malice.

Much emphasis was placed by the court on the need to deter intoxicated drivers. The statistics cited by the court, as well as those referred to in this Note, point out the urgency of adopting measures to prevent the continued deluge of intoxicated drivers on the state's highways. In holding that under the conscious disregard standard, punitive damages could be awarded against intoxicated drivers, the court thus proved itself sensitive to societal needs.

10. The court, it should be noted, was correct in observing that conscious disregard of another's rights or safety has emerged as an appropriate standard for malice. Indeed, this Note so argues. See notes 49-74 & accompanying text supra. Nonetheless, in view of the foreseeable impact of the Taylor decision on lower courts faced with applying the new standard, it was incumbent on the court to elucidate further the development and meaning of the conscious disregard formula.

11. The Davis line of cases holds that actual intent to injure must be found before punitive damages may be awarded. See notes 42-43 & accompanying text supra. Justice Clark, in his dissenting opinion, noted the continuing vitality of the Davis line of cases. 24 Cal. 3d at 906-07. Moreover, he acknowledged that, "[i]n the absence of direct evidence of motive to vex, harass, annoy or injure, recent California decisions have recognized the requisite motive and willingness to injure in two situations based on outrageous conduct and a conscious disregard of the plaintiff's rights." Id. at 907. (emphasis added). Interestingly enough, however, in light of his own comments, Justice Clark went on to state that the majority opinion established "a new test for punitive damages." Id. at 908.

12. See notes 74-82 & accompanying text supra.

13. 24 Cal. 3d at 897. Justice Clark, however, argued that allowing punitive damages to be imposed against intoxicated drivers would "not reduce the number of drunk drivers on our highways." Id. at 901.

14. Id. at 898.

15. See notes 90-93 & accompanying text supra.

16. In his dissent, Justice Clark set forth numerous reasons for disallowing the imposition of punitive damages in intoxicated driver cases. While a full discussion of his dissenting opinion is beyond the scope of this Note, some of the reasons noted by Justice Clark have been discussed briefly above. See notes 100-13 & accompanying text supra.