Taylor v. Superior Court: Punitive Damages for Nondeliberate Torts—The Drunk Driving Context

In *Taylor v. Superior Court*,[1] the supreme court overturned the twenty-one-year-old appellate court decision of *Gombos v. Ashe*[2] and held that punitive damages can be recovered in a personal injury action against an intoxicated driver.[3] In so holding, the court reinterpreted California's punitive damage statute, Civil Code section 3294,[4] which requires (in the absence of "oppression" or "fraud") that a defendant act with "malice." *Gombos* had concluded that drunk driving did not satisfy the malice provision of section 3294 since it read that section as requiring a malicious intent, manifested by aggravating circumstances denoting ill will.[5] The *Taylor* court disagreed, concluding that "the act of operating a motor vehicle while intoxicated may constitute an act of "malice" under section 3294 if performed under circumstances which

1. 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (Richardson, J.) (4-2-1 decision).

2. 158 Cal. App. 2d 517, 322 P.2d 933 (1st Dist. 1958).

3. The majority set forth no rule requiring a minimum blood alcohol level or even the taking of a sobriety test. Presumably, the issue of intoxication will be decided solely on the discretion of the jury, as long as plaintiff presents some evidence of defendant's inebriety.

A statutory scheme for determining intoxication is provided in California Vehicle Code § 23126, which sets a presumption of intoxication for all drivers whose blood alcohol concentration (BAC) reaches .1%. No presumption of intoxication arises for drivers with BAC levels between .05% and .1%, although this fact may be considered by the jury in determining whether the person was under the influence. CAL. VEH. CODE § 23126 (West 1971). Studies have indicated that accident frequency increases rapidly as blood alcohol content exceeds .05%. Waller, *Drinking and Highway Safety*, in DRINKING 117, 119 (Ewing & Rouse eds. 1978); Cramton, *The Problem of the Drinking Driver*, 54 A.B.A.J. 995, 996 (1968). This statutory scheme will not necessarily govern the jury's decision on intoxication, however, since one appellate court has recently held that failure in a civil case to give a jury instruction based on Vehicle Code § 23126 is not prejudicial error. Hyatt v. Sierra Boat Co., 79 Cal. App. 3d 325, 333-35, 145 Cal. Rptr. 47, 51-53 (1st Dist. 1978).

4. CAL. CIVIL CODE § 3294 provides that

> 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 the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

The terms "oppression, fraud, or malice" are in the disjunctive and proof of any one of them, either express or implied, is enough for recovery of punitive damages. The only element in issue in this case is malice. 24 Cal. 3d at 906, 598 P.2d at 863, 157 Cal. Rptr. at 703 (Clark, J., dissenting).

5. 158 Cal. App. 2d at 526-27, 322 P.2d at 939.

disclose a *conscious disregard of probable dangerous consequences*."[6]

Part I of this Note presents the facts of the case and the court's holding. Part II sets forth the prior case law interpretation of "malice" under section 3294. Part III argues that the "conscious disregard of probable dangerous consequences" test proposed by the court logically satisfies the malice provision of section 3294, but that the test is apt to deter few drunk drivers. In light of this fact, the court's presumption that all drunk drivers pose "probable dangerous consequences" should be interpreted as rebuttable. This would ensure that the test is fair and that it is appropriately applied in all nondeliberate tort cases.

I

THE OPINION

As a result of an automobile accident, Taylor brought a civil action against Stille, the real party in interest, seeking punitive as well as compensatory damages. Taylor alleged that Stille was a long-time alcoholic with an extensive drinking and driving record that included one prior alcohol-related car accident.[7] The complaint charged that despite this history and despite an awareness of the hazards of drunk driving, Stille was drinking and intoxicated at the time of the collision and thus was acting "in conscious disregard of Plaintiff's safety."[8]

Defendant demurred to the complaint, arguing that punitive damages cannot be sought from a negligent drunk driver absent an alleged intent to injure. The trial court sustained the demurrer to the complaint insofar as it sought recovery of punitive damages. Taylor then filed a writ of mandate, requesting that the trial court be directed to reinstate the portion of the complaint that sought recovery of punitive damages. The court of appeal denied plaintiff's petition for writ of mandate, and Taylor appealed to the California Supreme Court.

Justice Richardson, writing for a majority of four, reversed the lower court decision and offered two reasons for the court's result. The first concerned the interpretation of Civil Code section 3294, which authorizes recovery of punitive damages when the defendant is guilty of "malice."[9] The court observed that this term has long been interpreted

6. 24 Cal. 3d at 892, 598 P.2d at 855, 157 Cal. Rptr. at 694 (emphasis added).

7. Plaintiff alleged that defendant had (1) previously inflicted severe and permanent injury upon others while driving a motor vehicle under the influence of alcohol; (2) previously been charged and convicted of driving while intoxicated; and (3) recently completed a period of probation following a drunken driving conviction. *Id.* at 893, 598 P.2d at 855, 157 Cal. Rptr. at 695.

8. *Id.* Plaintiff also alleged that defendant, aware of his propensity to drink and drive, continued to hold a job in the alcoholic beverage industry, which required frequent contact with taverns and other alcohol retail outlets and which required him to transport alcoholic beverages in his car. *Id.*

9. *See* note 4 *supra*.

to mean "malice in fact," which can be proved either expressly or by inference. The court held, however, than an "actual intent of defendant to harm plaintiff or others" is not essential to prove "malice in fact."[10] The court instead concluded that a "conscious disregard of the safety of others may constitute malice within the meaning of section 3294."[11] To recover on this basis, "plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct" and deliberately failed to avoid those consequences.[12] Thus, the majority's test for recovery of punitive damages in cases of nondeliberate injury can be seen as having two components. First, defendant must "consciously disregard" the safety of others and second, the defendant's conscious disregard must pose "probable dangerous consequences."

In the drunk driving context, the majority held that the first part of its test is met by "one who voluntarily commences and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle. . . ."[13] Three elements are apparent in the first component of the test. The driver must have (1) drunk "to the point of intoxication";[14] (2) done so *voluntarily*;[15] and (3) known "from the onset that he must thereafter operate a motor vehicle"[16] in an intoxicated state.[17] The court less clearly described the requirements of the second component of the conscious disregard test, "probable dangerous consequences." While the court twice referred to the component in a general way,[18] it apparently assumed that *all* drunk drivers create risks of this magnitude. While recognizing that "a history of prior arrests, convictions and mishaps may heighten the probability and foreseeability of an accident" the court did not deem these aggravating factors "essential prerequisites to the assessment of punitive damages in drunk driving cases."[19] Thus, any complaint, like Taylor's, which alleges the three

10. 24 Cal. 3d at 895, 598 P.2d at 856, 157 Cal. Rptr. at 696.

11. *Id.*

12. *Id.* at 895-96, 598 P.2d at 856, 157 Cal. Rptr. at 696.

13. *Id.* at 899, 598 P.2d at 859, 157 Cal. Rptr. at 699. *See also id.* at 897, 598 P.2d at 857, 157 Cal. Rptr. at 967.

14. *Id.* at 899, 598 P.2d at 859, 157 Cal. Rptr. at 699. *See* note 3 *supra.*

15. *Id.*

16. *Id.*

17. The opinion's language does not make this explicit, but this interpretation seems the most reasonable construction. A literal reading of the unqualified "thereafter" in the quoted passage would suggest the nonsensical result that punitive damages would be available after becoming drunk, sobering up, and *then* driving.

18. 24 Cal. 3d at 892, 895, 598 P.2d at 855, 856, 157 Cal. Rptr. at 694, 696.

19. *Id.* at 896-97, 598 P.2d at 857, 157 Cal. Rptr. at 697.

elements that make up the "conscious disregard" component of the majority test, states a cause of action for punitive damages.

The second reason given by the majority for its decision was deterrence of drunk driving. Stating that section 3294 provides that punitive damages may be awarded for the "sake of example," the court concluded, without empirical evidence, that allowing punitive damages against an intoxicated driver will deter drunk driving.[20]

Chief Justice Bird, joined in her concurring opinion by Justice Newman, agreed with the majority that the facts of the case presented a jury question as to whether Stille had acted "maliciously with a conscious indifference to the fact that others would probably be harmed by his actions."[21] She disagreed, however, with the portion of the majority opinion that she read as allowing "a cause of action for punitive damages in every case where a person has driven under the influence of alcohol."[22] The Chief Justice's disagreement stemmed from her belief that people who drive under the influence of alcohol "often lack a conscious appreciation of the high risk of harm they present to others."[23]

Justice Clark, in dissent, raised seven characteristics of punitive damages that, in his view, weighed heavily against their imposition in accident cases.[24] He also argued that the majority's test as applied inappropriately reduced the malice requirement of section 3294 to simple negligence. Specifically, Justice Clark criticized the majority for not adhering to the "probable dangerous conseqences" component of its test.[25] He stated that although an accident is a *possible* consequence

20. *Id.* at 897-99, 598 P.2d at 857-59, 157 Cal. Rptr. at 697-99. The court also noted in this section that its holding accorded with the views of the majority of other state courts that had considered the question. These out-of-state decisions are of limited precedential value in California, however, since a punitive damage award in California must meet a statutory requirement of malice. *Reckless* conduct is a sufficient basis for punitive damages in many of the jurisdictions which have held drunk drivers liable. *See* Note, *Punitive Damages and the Intoxicated Driver: An Approach to* Taylor v. Superior Court, 31 HASTINGS L.J. 307, 308 n.9 (1979); Annot., 65 A.L.R. 3d 656 (1975).

21. 24 Cal. 3d at 901, 598 P.2d at 860, 157 Cal. Rptr. at 700.

22. *Id.* at 900, 598 P.2d at 859, 157 Cal. Rptr. at 699.

23. *Id.* at 901, 598 P.2d at 860, 157 Cal. Rptr. at 700.

24. In Justice Clark's view: (1) punitive damages may result in unjust enrichment to the plaintiff; (2) the punishment function of punitive damages is best served by the criminal law and a punitive award constitutes double punishment; (3) no standards govern the imposition of punitive damages, leaving the award to the whim of the jury; (4) punitive damages trials allow introduction of defendant's financial status, distracting the jury from its function of determining liability; (5) punitive damages do not serve a deterrence function in situations where the act is punished criminally, is likely to result in injury to defendants, or depends on fortuitous rather than certain consequences; (6) insurance does not cover willful acts (which have been defined to include malicious acts), and therefore, plaintiffs, in most cases, will be unwilling to include a cause of action for punitive damages; and (7) a recovery of punitive damages requires a showing of willfulness, and this bars the intoxicated driver from recovering for his or her own injury, even against a negligent defendant. *Id.* at 902-06, 598 P.2d at 860-63, 157 Cal. Rptr. at 700-03.

25. *Id.* at 907-08, 598 P.2d at 864-65, 157 Cal. Rptr. at 704.

every time an intoxicated driver steps behind the wheel, it is not *probable*.[26] The majority's real test, he concluded, turned on an "awareness of substantial possibility—not probability," which in essence amounts to negligence.[27] This he viewed as insufficient to support an award of punitive damages.

Finally, Justice Clark argued that the majority's decision will have, at best, only a marginal deterrent effect on drunk driving. He reasoned that (1) punitive damages are limited to situations where accidents occur and stronger deterrents, such as criminal sanctions and possibility of injury to driver and others, already exist; (2) punitive damages are awarded against an intoxicated driver only at the discretion of the jury and only for the driver's "unintended and unanticipated consequences"; and (3) that many drivers, if not most, will never be aware of the new punitive sanction.[28]

II

PRIOR CASE LAW INTERPRETATION OF "MALICE" UNDER SECTION 3294

A significant number of cases outside the drunk driving context have required *deliberate* injury in order to satisfy the malice provision of section 3294.[29] *Davis v. Hearst*,[30] the earliest and leading case, was a libel decision holding that the malice intended by section 3294 referred to malice in fact, which the court defined as "the motive and willingness to vex, harass, annoy or injure."[31] The court stated that it is the "wrongful personal intention to injure" that warrants a punitive damages award, and it characterized this conduct as the malice of "evil motive."[32]

Compliance with the *Davis* "intent" formulation is not difficult when the defendant is accused of a deliberate tort. In a case of nondeliberate injury, however, defendants have no subjective intention to injure the person harmed. Nevertheless, a large number of recent cases have held that "malice extends beyond deliberate injury."[33] These

26. *Id.* at 907, 598 P.2d at 864, 157 Cal. Rptr. at 704.

27. *Id.* at 908, 598 P.2d at 865, 157 Cal. Rptr. at 704.

28. *Id.* at 909-910, 598 P.2d at 865-66, 157 Cal. Rptr. at 705.

29. *See, e.g.*, Wofsen v. Hathaway, 32 Cal. 2d 632, 647, 198 P.2d 1, 10-11 (1948); Fidelity Appraisal Co. v. Federal Appraisal Co., 217 Cal. 307, 319, 18 P.2d 950, 955 (1933); Henderson v. Security Nat'l Bank, 72 Cal. App. 3d 764, 771-72, 140 Cal. Rptr. 388, 392 (1st Dist. 1977).

30. 160 Cal. 143, 116 P. 530 (1911).

31. *Id.* at 162, 116 P. at 539.

32. *Id.* at 162-63, 116 P. at 539.

33. G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d at 30, 122 Cal. Rptr. at 223. *See* notes 37-47 and accompanying text *infra*.

cases *infer*[34] the existence of an evil motive, "the personal intention to injure," from conduct that subjects others to a high risk of injury. Prosser illustrates this principle with the example of the anarchist who throws a bomb into the royal carriage.[35] Although the anarchist may earnestly hope to kill no one but the King, he knows, or should know, that it is very likely other passengers will also perish. Thus, when he goes ahead with the deed, "it must be said that he intends to kill them."[36] A person who consciously disregards the safety of others by subjecting them to probable dangerous consequences can thus indicate by his or her conduct the "evil motive" necessary for a finding of malice under section 3294.

The scope of this broader definition of malice is not clear, however. The cases use a variety of ambiguous phrases to specify the degree of hazard that defendants must create before their acts will evince malice. Several cases have held punitive damages to be awardable when a defendant acts in "callous disregard of plaintiff's rights" knowing that his conduct is "substantially certain" to injure plaintiff.[37] Punitive damages were actually awarded on this basis in *Schroeder v. Auto Driveaway Co*.[38]

A second group of decisions, most of which concern negligence predicated on bad faith refusals to settle insurance claims, have held punitive damages awardable on the basis of a "conscious disregard of plaintiff's rights."[39] Plaintiffs in two cases, *Cain v. State Farm Mutual*

34. Malice can be proven either expressly or by inference. *See* CAL. CIV. CODE § 3294 (West 1970); Bertero v. National Gen. Corp., 13 Cal. 3d 43, 66, 529 P.2d 608, 625, 118 Cal. Rptr. 184, 201 (1974); Davis v. Hearst, 160 Cal. 143, 162, 116 P. 530, 539-40 (1911); Seimon v. Southern Pac. Transp. Co., 67 Cal. App. 3d 600, 607, 136 Cal. Rptr. 787, 791 (2d Dist. 1977).

35. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 31-32 (4th ed. 1971).

36. *Id.* at 32.

37. Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 922, 523 P.2d 662, 671, 114 Cal. Rptr. 622, 631 (1974); Farmy v. College Hous. Inc., 48 Cal. App. 3d 160, 174, 121 Cal. Rptr. 658, 664 (2d Dist. 1975).

38. 11 Cal. 3d 908, 523 P.2d 662, 114 Cal. Rptr. 622 (1974). The court found that a common carrier's misrepresentations about ship and weight restrictions were substantially certain to injure the plaintiff financially. The carrier was thus subject to punitive damages. *Id.* at 922, 523 P.2d at 671, 114 Cal. Rptr. at 631. The *Schroeder* court noted the *Davis* intent requirement for a finding of actual malice, *id.* at 922, 523 P.2d at 671, 114 Cal. Rptr. at 631, but stated that " 'intent,' in the law of torts, denotes not only those results the actor desires, but also those consequences which he knows are *substantially certain* to result from his conduct." *Id.* (emphasis added). The court apparently used the word "knows" in an objective sense. *See id.*

Farmy v. College Hous. Inc., 48 Cal. App. 3d 166, 174, 121 Cal. Rptr. 658, 664 (2d Dist. 1975), applied the *Schroeder* standard and rejected an award of punitive damages, stressing the good faith attempt of the defendant to remedy the alleged nuisance.

39. *See* Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 922, 582 P.2d 980, 986, 148 Cal. Rptr. 389, 395 (1978); Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); Mason v. Mercury Cas. Co., 64 Cal. App. 3d 471, 474, 134 Cal. Rptr. 545, 547 (2d Dist. 1976); Beck v. State Farm Mut. Auto. Ins. Co., 54 Cal. App. 3d 347, 355, 126

Auto Insurance Co.[40] and *Neal v. Farmers Insurance Exchange*,[41] recovered punitive damages under this formula. This result can be explained partially by special circumstances that indicated a substantial likelihood or significant probability of injury to the plaintiffs.[42] Where bad faith is *all* that is shown, however, courts have consistently denied punitive damages.[43]

Most similar to *Taylor* is a third line of cases, in which courts have recognized, either explicitly or implicitly, that defendants are liable for punitive damages where they act in conscious disregard of *probable* harm to others.[44] The first of these cases, *G. D. Searle v. Superior Court*,[45] upheld a demurrer to plaintiff's punitive damages claim, stating that "the complaint [did] not charge Searle with knowledge of the dangerous potential of its product but only with awareness that unspecified products of this 'type' might cause injury."[46] Although the court's decision appears to have been based on the absence of conscious disregard, the *Searle* court indicated that more than a possibility of injury is

Cal. Rptr. 602, 607 (2d Dist. 1976); Cain v. State Farm Mut. Ins. Co., 47 Cal. App. 3d 783, 794, 121 Cal. Rptr. 200, 207 (1st Dist. 1975).

In one noninsurance case, a California court has permitted a cause of action for punitive damages based on the defendant's conscious disregard of plaintiff's interests. O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1st Dist. 1977). In *O'Hara*, the plaintiff, a rape victim, brought an action for deceit based on misrepresentations made to her by defendant's agents about the security of its building. In overruling a demurrer to plaintiff's claim for punitive damages, the court held plaintiff's complaint contained sufficient allegations of defendant's "conscious disregard of plaintiff's safety." *Id.* at 806, 142 Cal. Rptr. at 492. The court emphasized defendant's knowledge of the "serious potential danger to plaintiff as a female tenant," indicating an implicit weighing of defendant's wrongdoing on the basis of the severity, as well as the likelihood, of injury. *Id.*

40. 47 Cal. App. 3d 783, 121 Cal. Rptr. 200 (1st Dist. 1975).

41. 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978).

42. The defendant insurance company in *Cain* failed to pay a judgment against its insured, despite contrary protestation from its own attorney and an awareness that such failure would lead its insured into bankruptcy. 47 Cal. App. 3d at 794, 121 Cal. Rptr. at 207. Defendant also refused to settle before trial despite its knowledge that sufficient evidence existed to support an award for plaintiff far in excess of Cain's policy limits. *Id.* at 791, 121 Cal. Rptr. at 205. In *Neal*, the defendant exploited plaintiff's "lamentable circumstances" and "exigent financial situation" in an attempt "to force a settlement more favorable to the company than the facts would otherwise have warranted." 21 Cal. 3d at 923, 582 P.2d at 987, 148 Cal. Rptr. at 396.

43. Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462-63, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); Mason v. Mercury Cas. Co., 64 Cal. App. 3d 471, 474-75, 134 Cal. Rptr. 545, 547 (2d Dist. 1976); Beck v. State Farm Mut. Auto Ins. Co., 54 Cal. App. 3d 347, 355, 126 Cal. Rptr. 602, 607 (2d Dist. 1976).

44. Nolin v. National Convenience Stores, Inc., 95 Cal. App. 3d 279, 283-84, 157 Cal. Rptr. 32, 34 (2d Dist. 1979); Seimon v. Southern P. Transp. Co., 67 Cal. App. 3d 600, 608-09, 136 Cal. Rptr. 787, 791-92 (2d Dist. 1977); G.D. Searle v. Superior Court, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (3d Dist. 1975).

45. 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (3d Dist. 1975). Plaintiff sought punitive damages based on the allegation that defendant widely distributed a dangerous product.

46. *Id.* at 32, 122 Cal. Rptr. at 255.

required for recovery.[47]

A fourth group of cases has awarded punitive damages solely on the basis of reckless conduct.[48] These cases focus on the possibility, rather than the probability, of injury posed by the defendant's behavior. However, commentators[49] and courts[50]—including the *Taylor* majority[51]—have criticized this line of cases as inconsistent with the intent

47. *Id.* The supreme court in *Taylor* evidently interpreted *Searle* in this vein since *Taylor* cited *Searle* for the proposition that an awareness of "probable dangerous consequences" is necessary to recover punitive damages on the basis of "conscious disregard." 24 Cal. 3d at 896, 598 P.2d at 857, 157 Cal. Rptr. at 696.

The other two cases in the *Searle* line involved actual awards of punitive damages where the defendants acted in conscious disregard of probable harm to others. In Seimon v. Southern P. Transp. Co., 67 Cal. App. 3d 600, 608-09, 136 Cal. Rptr. 787, 791-92 (2d Dist. 1977), evidence at trial indicated that the defendant had been aware of the "peculiarly dangerous" railroad crossing at which the plaintiff was injured, but had failed to take any corrective action. The court stated that a jury could glean from the evidence that "defendant had displayed a conscious and callous indifference to, or disregard of, *probable* harm to motorists." *Id.* at 609, 136 Cal. Rptr. at 792 (emphasis added). In Nolin v. National Convenience Stores, Inc., 95 Cal. App. 3d at 283-84, 157 Cal. Rptr. at 34 (2d Dist. 1979), one of the pumps at the defendant's self-service gas station had a defective nozzle that consistently over-flowed gasoline. In upholding a punitive damage award, the court stated that "defendant's established inattention to the danger showed a complete lack of concern regarding the harmful potential—the *probability* and *likelihood* of injury." *Id.* at 289, 157 Cal. Rptr. at 37 (emphasis added). *Nolin* cited Donnelly v. Southern P. Co., 18 Cal. 2d 863, 118 P.2d 465 (1941), with approval in reaching this result. In dicta, *Donnelly* had stated that punitive damages are recoverable on the basis of "wanton and reckless misconduct." It is significant that under this test, the defendant must "intentionally perform an act so unreasonable and dangerous that he knows, or should know, it is *highly probable* that harm will result." *Id.* at 869-70, 118 P.2d at 468, *cited in* Nolin v. National Convenience Stores, Inc., 95 Cal. App. 3d at 286, 157 Cal. Rptr. at 36.

The defendants in *Seimon* and *Nolin*, by knowingly maintaining a dangerous condition, effectively assured *probable* injury to someone at some time. Inference of an intent to injure, or evil motive, thus could be drawn from their conduct.

48. Templeton Feed & Grain v. Ralston Purina Co., 69 Cal. 2d 461, 471, 446 P.2d 152, 158, 72 Cal. Rptr. 344, 350 (1968); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 713, 60 Cal. Rptr. 398, 415 (1st Dist. 1967); Cohen v. Groman Mortuary, Inc., 231 Cal. App. 2d 1, 9, 41 Cal. Rptr. 481, 486 (2d Dist. 1964); Sturges v. Charles L. Harney, Inc., 165 Cal. App. 2d 306, 322, 331 P.2d 1072, 1081 (1st Dist. 1958); McDonell v. American Trust Co., 130 Cal. App. 2d 296, 299, 279 P.2d 138, 141 (1st Dist. 1955). Another group of cases has characterized conduct as malicious when done in willful, intentional, and reckless disregard of possible dangerous consequences. Colson v. Standard Oil Co., 60 Cal. App. 3d 913, 921-22, 131 Cal. Rptr. 895, 900 (2d Dist 1976); Black v. Shearson, Hammil & Co., 266 Cal. App. 2d 362, 369, 72 Cal. Rptr. 157, 162 (1st Dist. 1968); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 713, 60 Cal. Rptr. 398, 415 (1st Dist. 1967). Even one post-*Taylor* decision has applied the above standard. Miller v. Elite Ins. Co., 100 Cal. App. 3d 739, 758, 161 Cal. Rptr. 322, 332 (1st Dist. 1980). As pointed out by the court in *Searle*, however, conduct is either willful and thus deliberate, or reckless and thus nondeliberate. It cannot be both. 49 Cal. App. 3d at 31, 122 Cal. Rptr. at 224.

49. Franson, *Exemplary Damages in Vehicle Accident Cases*, 50 CAL. ST. B.J. 94, 147 (1975); Comment, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA LAW. 895, 901-06 (1976).

50. Liodas v. Sahadi, 19 Cal. 3d 278, 284-85, 562 P.2d 316, 319, 137 Cal. Rptr. 635, 638 (1977); G.D. Searle v. Superior Court, 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218, 224-25 (3d Dist. 1975); Ebaugh v. Rabkin, 22 Cal. App. 3d 891, 896, 99 Cal. Rptr. 706, 709 (1st Dist. 1972).

51. 24 Cal. 3d at 895, 598 P.2d at 856, 157 Cal. Rptr. at 696.

and literal construction of section 3294.

Recent cases demonstrate, then, that at the time *Taylor* was decided, the interpretation of section 3294's "malice" provision had moved considerably beyond the narrow confines of the *Davis* intent requirement. The cases suggested that punitive damages would be available in instances where defendants were aware that their actions were creating a probability, or substantial certainty, of injury to others. Yet in the drunk driving context, the law of punitive damages remained closely tied to the *Davis* formulation. The 1958 court of appeal decision in *Gombos v. Ashe* had reasoned that a malicious act under section 3294 not only had to be willful in the sense of intentional, but also that it had to be accompanied by aggravating circumstances denoting ill will.[52] Under this analysis, the *Gombos* court concluded that driving while intoxicated could not be malicious.[53] *Taylor* expressly overruled this interpretation.[54]

III

"MALICE" AND DRUNK DRIVING: A SOUND BUT INEFFECTIVE RESULT IN DANGER OF MISINTERPRETATION

This Note argues that *Taylor*'s general endorsement of punitive damages is appropriate, and that its two-component test is logical and consistent with the statute. The decision, however, cannot reasonably be expected to do much to solve the drinking driver problem. Rather, the measure of the opinion should be the fairness with which it applies section 3294 to the drunk driver situation and the wisdom with which it sets a general standard for recovery of punitive damages in all nondeliberate tort actions. The majority threatens to spoil an otherwise admirable realization of both goals by presuming that all drunk drivers pose a risk of "probable dangerous consequences," but this problem can be avoided by interpreting the presumption as rebuttable.

52. 158 Cal. App. 2d 517, 526-27, 322 P.2d 933, 939 (1st Dist. 1958). An earlier California case had considered the availability of punitive damages against drunk drivers, but had stated in dicta that punitive damages could not be awarded because drunk drivers were already subject to criminal punishment. Strauss v. Buckley, 20 Cal. App. 2d 7, 65 P.2d 1352 (1st Dist. 1937). As the *Gombos* court noted, 158 Cal. App. 2d at 528, 322 P.2d at 940, this rationale was inconsistent with Californuia decisions explicitly holding that prior criminal punishment does not bar an award of punitive damages. Bundy v. Magness, 76 Cal. 532, 534, 18 P. 668, 669 (1888); Wilson v. Middleton, 2 Cal. 54 (1852).

53. 158 Cal. App. 2d at 527, 322 P.2d at 939.

54. One recent case relying on the *Gombos* decision has held that *Taylor* does not apply retroactively. Mau v. Superior Court, 101 Cal. App. 3d 875, 161 Cal. Rptr. 895 (2d Dist. 1980). However, since *Taylor* is based primarily on a statutory interpretation, the decision in *Mau* appears erroneous.

A. Punitive Damages and Policy Goals

The *Taylor* decision expands liability for punitive damages. Some commentators[55] and courts[56] argue, however, that punitive damages are never appropriate, and therefore oppose any extension of punitive awards. An assessment of the asserted harmful ramifications of punitive damages suggests that they are either outweighed by competing policy concerns or easily remedied.

It has been suggested that an award of punitive damages results in a windfall to a plaintiff already fully compensated for the loss sustained.[57] This criticism overlooks the fact that attorneys' fees consume a large portion of any compensatory award so that punitive damages are often necessary to fully restore the plaintiff to the financial position he or she occupied before the injury.[58] A second criticism is that juries are given too much unguided discretion in determining when and to what extent punitive damages are warranted.[59] This discretion, however, reflects a lack of judicial supervision rather than an inherent fault of punitive damages. Furthermore, the availability of punitive damages may prevent juries from expressing their outrage under the guise of compensatory damages.[60] A third argument is that the introduction of evidence bearing on a defendant's financial resources, permitted in trials where punitive damages are sought, jeopardizes the defendant's

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55. DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES (D. Hirsch & J. Pouros eds. 1969); Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975); Ghiardi, *Should Punitive Damages Be Abolished?—A Statement for the Affirmative*, 1965 A.B.A. SECT. INS. NEG. & COMP. L. 282, 288; Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870 (1976).

56. Four states have expressly rejected the doctrine of punitive damages. Trenchard v. Central Laundry, 154 La. 1003, 98 S. 558 (1923); Boott Mills v. Boston & M.R.R., 218 Mass. 582, 106 N.E. 680 (1914); Able v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072 (1891). In Indiana, exemplary damages cannot be awarded when the defendant is subject to criminal prosecution for the same offense. *See* Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945).

57. 24 Cal. 3d at 902, 598 P.2d at 860, 157 Cal. Rptr. at 700 (Clark, J., dissenting); *see also* D. DOBBS, LAW OF REMEDIES 219 (1973); Ghiardi, *supra* note 55, at 285.

58. D. DOBBS, *supra* note 57, at 220; Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1297 (1978). A more precise and systematic way to alleviate this problem would be to allow recovery of attorney's fees in personal injury actions. A stinging criticism of the American rule that attorney's fees are unrecoverable absent statutory authorization may be found in Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966). The criticisms are acknowledged and the supporting literature collected in Alyeska Pipeline Co. v. Wilderness Soc., 421 U.S. 240, 270 n.45 (1975).

59. 24 Cal. 3d at 902, 598 P.2d at 861, 157 Cal. Rptr. at 700 (Clark, J., dissenting). *See* D. DOBBS, *supra* note 57, at 219.

60. *See* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1179-1181 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 521 (1957); Comment, *Punitive Damages and Their Possible Application in Automobile Accident Litigation*, 46 VA. L. REV. 1036, 1049 (1960).

right to a fair trial.[61] But this difficulty can be prevented by first submitting the case to the jury on the merits and then permitting evidence of financial status in determining punitive damages.[62] Finally, it has been argued that punitive damages violate constitutional principles by subjecting defendants to double jeopardy[63] and by denying them the right to criminal safeguards such as the privilege against self-incrimination and proof beyond a reasonable doubt.[64] The courts, however, have categorically rejected these arguments, reasoning that where damages are sought for remedial purposes the action is civil, thus making criminal safeguards inapplicable.[65]

While the major criticisms leveled at punitive damages do not warrant their abolition, important policy considerations support the use of punitive damages in some cases. Punitive damages are necessary for the avowed punishment and deterrence purposes of section 3294[66] in cases when an actor's conduct is profitable to the actor even after the payment of actual damages.[67] Punitive damages are especially effective against institutional or corporate actors likely to proceed in disregard of harm to others because of a rational determination that few victims will bring law suits and even fewer will receive significant compensatory damage awards.[68] Punitive damages can also serve punishment and deterrence purposes by acting as a bounty to induce plaintiffs to bring to justice defendants whose socially detrimental conduct is not

61. 24 Cal. 3d at 902-03, 598 P.2d at 861, 157 Cal. Rptr. at 701 (Clark, J., dissenting); Ghiardi, *supra* note 55, at 287; Morris, *supra* note 60, at 1191; Note, *supra* note 60, at 528.

62. *See* Note, *supra* note 60, at 528; Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 434 n.139 (1967). California courts have to date refused bifurcation of the issue of punitive damages, both as to trial and discovery, from the underlying cause of action. Coy v. Superior Court, 58 Cal. 2d 210, 221-23, 23 Cal. Rptr. 393, 399-400, 373 P.2d 457, 463-64; Annot., 9 A.L.R. 3d 678, 689-90 (1962). Recent cases, however, have recognized the need for protective orders where discovery of plaintiff's personal wealth is sought. *See* Cobb v. Superior Court, 99 Cal. App. 3d 543, 160 Cal. Rptr. 561 (2nd Dist. 1979).

63. Ghiardi, *supra* note 55, at 287-88; Long, *supra* note 55, at 884; Note, *supra* note 60, at 524.

64. D. DOBBS, *supra* note 57, at 219; Long, *supra* note 55, at 884; Comment, *supra* note 62, at 417-18, 430-33.

65. Rex Trailer Co. v. United States, 350 U.S. 148 (1956); Helvering v. Mitchell, 303 U.S. 391 (1938); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 717, 60 Cal. Rptr. 398, 417-18 (1st Dist. 1967). *See generally* Comment, *supra* note 62. However, in the few situations where there is effective enforcement of the criminal laws and sufficient penalties to deter such violations, the compelling policy justifications for the punitive award (discussed in text accompanying notes 66-70 *infra*) lose force. Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 655 (1980); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. REV. 1158, 1173-74 (1966).

66. *See* note 4 *supra*.

67. Mallor & Roberts, *supra* note 65, at 648; Note, *supra* note 60, at 521.

68. Dowie, *Pinto Madness*, MOTHER JONES, Sept.-Oct. 1977 at 24, 28; Corboy, *Should Punitive Damages be Abolished?—A Statement for the Negative*, 1965 ABA SECT. INS. NEGL. & COMP. L. 292, 298.

subject to criminal enforcement.[69] The potential for a punitive damages recovery can make it worthwhile for some plaintiffs to sue defendants who would not be sued in the absence of such a remedy because the plaintiff's actual injury is slight.[70]

Punitive damages thus are a powerful tool with an appropriate place in the legal system. But fear of their abuse is evidenced by the controversy surrounding their use. This fear may be legitimate if punitive damages change from a penalty for egregious conduct to a typical remedy in an ordinary tort case. The *punitive* nature of punitive damages should be kept firmly in mind by unleashing their force only in response to culpability aggravated by conduct beyond that of an ordinary tort case. While courts should be free to apply section 3294's forceful sanction to nondeliberate torts where a defendant's conscious disregard of the safety of others poses probable dangerous consequences, they should do so with a careful eye. The next section examines the *Taylor* test—both as stated and as applied—from this perspective.

B. The Majority's Test and the Malice Provision of Section 3294

The majority's requirement that a defendant *consciously* disregard the safety of others in order to satisfy the first component of its test is logically mandated by the malice provision of section 3294. A requirement of "conscious disregard" recognizes the subjective quality of wrongdoing necessary for an award of punitive damages. Punitive damages are given after the court has awarded full compensation to plaintiffs for the wrong they have suffered;[71] thus, they are awarded only to punish the defendant and to make an "example of him."[72] For purposes of such an award, the law is concerned with the motive or state of mind of the actor.[73] Fairness and justice dictate there be moral culpability before punishment is imposed.[74] The three elements held

69. D. DOBBS, *supra* note 57, at 221 (1973); C. MCCORMICK, DAMAGES § 77, at 276-77 (1935); Owen, *supra* note 58, at 1287-88; Note, *The Assessment of Punitive Damages Against An Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296, 1298-99 (1961).

70. An additional consequence of providing punitive damages in cases where civil actions would not otherwise be brought is that plaintiffs are encouraged "to prefer legal action over violent self-help." Mallor & Roberts, *supra* note 65, at 650. *See also* Owen, *supra* note 58, at 1280; Note, *supra* note 60, at 522.

71. Finney v. Lockhart, 35 Cal. 2d 161, 163, 217 P.2d 19, 20 (1950); Davis v. Hearst, 160 Cal. 143, 162, 116 P. 530, 539 (1911). *But see* note 58 and accompanying text *supra*.

72. Bertero v. National Gen. Corp., 13 Cal. 3d 43, 65, 529 P.2d 608, 624, 118 Cal. Rptr. 184, 200 (1974); Merlo v. Standard Life & Accident Ins. Co., 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416, 425 (4th Dist. 1976).

73. Davis v. Hearst, 160 Cal. 143, 162-63, 116 P. 530, 538-39 (1911); McAffee v. Ricker, 195 Cal. App. 2d 630, 633-34, 15 Cal. Rptr. 920, 922-23 (4th Dist. 1961).

74. *See* C. MCCORMICK, *supra* note 69, at 280.

by the majority to fulfill the "conscious disregard" component of its test satisfy the requirement of moral culpability by subjecting to punitive damages only those who voluntarily become inebriated, knowing from the outset that they later must drive.

These limitations on the award of punitive damages logically act to *exclude* some drunk drivers from punitive damage liability.[75] The "voluntary" element should certainly exclude one unwillingly *coerced* into drinking and driving. It also may exclude alcoholics[76] where the alcholism is so extreme as to remove the volitional element from the act of becoming intoxicated *and* where the defendant's physical circumstances compel the act of driving.

The "knowing from the outset" element should also exclude some drunk drivers, although its contours are more speculative. One example might be a person who began drinking with the intention of avoiding driving, or of leaving sufficient time to sober up, but who changed plans in an alcohol-distorted state of mind due to some unforeseen and compelling happenstance. Consider one who intends to stay home for the evening and decides to drink wine with dinner. If this person drank to the point of legal intoxication and then received a phone call announcing that his or her father had been stricken with a heart attack and taken to a nearby hospital, the person would probably not satisfy the third element if he or she then decided to drive to the hospital. However, if the emergency was relatively foreseeable, the plaintiff might still present a jury question as to whether this person *consciously* disregarded the safety of others by driving to the hospital while intoxicated.[77] Where the intervening necessity to drive is foreseeable, the "conscious disregard" probably takes place before the actual decision to drive. Those who begin to drink knowing they later might have to drive consciously disregard at least two risks: first, that their judgment will at a later time be impaired by alcohol; and second, that they later will not be able to judge the extent of that impairment. In any event, the judgment about the scope of the "knowing from the outset" element requires a careful weighing of the facts of the particular case.

The second component of the majority's test, "probable dangerous consequences,"[78] is also logically consistent with the statute. Conduct that consciously creates *any* level of risk of injury to others might be considered morally culpable in *some* degree. In California, however,

75. Chief Justice Bird's concurring opinion apparently disregarded or discounted the logical meaning of the majority test. *See* text accompanying note 22 *supra*.

76. The majority so implied for some unspecific cases. 24 Cal. 3d at 899, 598 P.2d at 859, 157 Cal. Rptr. at 698-99.

77. In the criminal context in California, intoxication can negate intent. *See* CAL. PENAL CODE § 322 (West 1970).

78. *See* text accompanying note 18 *supra*.

this conscious creation of risk must (in the absence of fraud or oppression) rise to the level of "malice" before one can recover punitive damages.[79]

In interpreting the malice provision of section 3294, the court could have deemed *all* conduct performed in conscious disregard of the safety of others to be malicious. However, the court, as well as society at large, probably would have been unwilling to live with the severe implications of such a decision. If punitive damages were available whenever a conscious disregard for the safety of others created only a possibility of injury, all persons who knowingly speed, tailgate, or create any risk of danger, however small, would, if harm resulted, be subject to the harsh consequences of a punitive award.[80] Indeed, the majority expressly rejected the notion of imposing punitive damages against the negligent or even reckless driver who, absent aggravating circumstances, violates traffic laws.[81] This is sensible, since conduct like driving five miles over the speed limit to get to work on time is not normally considered egregious or malicious. Such a broad construction of "malicious" behavior would do violence to the accepted meaning of language, and such severe penalties would offend common notions of justice. As a result, judges and juries might become notoriously reluctant to apply such a policy, thus perhaps ironically diluting its deterrent effect in *all* cases.[82]

It is not completely clear whether the second component of the majority's test requires that the defendant's awareness of "probable dangerous consequences" be determined on a subjective or objective basis. However, the authority cited,[83] the existing California precedent,[84] and practical considerations in the drunk driving context[85] make an objective test of the "probable dangerous consequences" component the most reasonable.

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79. *See* note 4 *supra*.

80. *See* Franson, *supra* note 51, at 148.

81. 24 Cal. 3d at 899-900, 598 P.2d at 859, 157 Cal. Rptr. at 699.

82. Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 427 (1969).

83. The court quoted J. STEIN, DAMAGES AND RECOVERY, 373-74 (1972), as authority for its "aware of probable dangerous consequences" phrase, 24 Cal. 3d at 895-96, 598 P.2d at 856, 157 Cal. Rptr. at 696, and Stein implied such an awareness can be proved objectively. The court also relied heavily on Prosser, who finds that intent to injure can be inferred from conduct which a reasonable person in defendant's position would know has a substantial certainty of causing harm to others. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 35, at 31-32.

84. In Chappell v. Palmer, 236 Cal. App. 2d 34, 37, 45 Cal. Rptr. 686, 688 (5th Dist. 1965), the court of appeal found that awareness of probable dangerous conduct, for purposes of willful misconduct, is measured under an objective, reasonable person test.

85. A subjective requirement of awareness of probable dangerous consequences would make recovery of punitive damages against the intoxicated driver impossible, "absent proof of a depraved or suicidal mind." Franson, *supra* note 51, at 148.

This discussion suggests that the three elements which make up the first component of the *Taylor* test in the drunk driving context, as well as the "probable dangerous consequences" component of the test, appear to be both logical and consistent with precedent. Despite this legal coherence, however, the *Taylor* test is unlikely to have any significant behavioral impact on the problem of drinking drivers.

C. Deterrence

The threat of punishment is not always an effective deterrent.[86] Often, a complex chain of factors determines whether a change in legal rules will produce a change in social behavior. In the *Taylor* situation, there are five weak links between the court's decision and a resulting impact on the number of drinking drivers.

First, as a practical matter, few plaintiffs may sue for punitive damages under *Taylor*.[87] Insurance Code section 533[88] prohibits any insurance coverage for willful torts. Since the malice necessary to recover punitive damages has been interpreted to mean willfulness for the purpose of Insurance Code section 533,[89] a punitive damages award arguably may absolve the insurance carrier from liability for *both* the compensatory as well as the punitive judgment.[90] Plaintiffs thus risk

86. *See* L. FULLER, ANATOMY OF THE LAW 34-35 (1968); Owen, *supra* note 58, at 1283.

87. 24 Cal. 3d at 904-95, 598 P.2d at 862-63, 157 Cal. Rptr. at 702 (Clark, J., dissenting).

88. "An insurer is not liable for a loss caused by the willful act of the insured . . . ." CAL. INS. CODE § 533 (West 1972).

89. City Prod. Corp. v. Globe Indem. Co., 88 Cal. App. 3d 31, 37, 151 Cal. Rptr. 494, 497 (2d Dist. 1979); Maxon v. Security Ins. Co., 214 Cal. App. 2d 603, 615-16, 29 Cal. Rptr. 586, 592-93 (1st Dist. 1963). The statutory bar on punitive damage insurance is supported by policy considerations. Allowing individuals to insure against punitive awards would seriously dilute the *deterrent* function as well as defeat the *punitive* function that the award is designed to fulfill.

A court that desired to see insurance coverage of a punitive award could read the language of a policy as creating an expectation on the part of the insured that he or she is covered. *See, e.g.*, Carroway v. Johnson, 245 S.C. 200, 202, 139 S.E.2d 908, 909 (1965). *See generally* Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431, 436-39 (1976). However, if punishment and deterrence are the purposes of a punitive award, the language of an insurance policy preventing the implementation of those purposes should not be considered. Note, *Insurance Coverage of Punitive Damages*, 10 IDAHO L. REV. 263, 268 (1974). Only if compensation is the goal of punitive damages is the language of an insurance policy relevant. *Id.* at 266.

90. There is some doubt whether an award of punitive damages should preclude insurer liability for *compensatory* damages in the same case. A literal reading of the statutes would suggest that if a "malicious" act is deemed willful, *see* notes 87-88 and accompanying text *supra*, then this should prohibit *all* insurer liability. However, California courts have held that "even an act which is 'intentional' or willful within the meaning of traditional tort principles will not exonerate the insurer from liability under Insurance Code § 533 unless it is done with a 'preconceived design to inflict injury.'" Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 887, 587 P.2d 1098, 1110, 151 Cal. Rptr. 285, 297 (1978). *See also* Meyer v. Pacific Employers Ins. Co., 233 Cal. App. 2d 321, 327, 43 Cal. Rptr. 542, 546 (1965). Furthermore, since the policy reasons for not allowing insurance of punitive damages are not relevant in the compensatory damage context, the insurance contract and expectation of the insured should govern. Therefore, the best interpretation of the statutes is that they prohibit the insuring of punitive but not compensatory damages.

losing all access to the defendant's insurance coverage if they include a punitive claim. As a result, some plaintiffs may seek punitive damages only when the defendant is quite wealthy (and thus able to pay a combined compensatory and punitive award without the aid of insurance) or when the defendant is already uninsured (so that no effect arises from an added malice finding).[91]

Second, even if plaintiffs do frequently add a punitive claim, the damages will only effectively deter potential defendants who are aware of the penalty.[92] The *Taylor* decision is unlikely to create such an awareness among potential drinking drivers.[93] Even assuming widespread public awareness of current California legal developments, few outside the legal community appreciate the distinction between compensatory and punitive damages,[94] thus further dampening any deterrent effect.

Third, the new legal sanction will only have a significant deterrent effect if potential defendants perceive its imposition to be reasonably likely.[95] Unfortunately, the drunk driver's perceived and actual risk of punishment by *any* legal sanction is quite low.[96] Studies indicate that even a tremendous increase in actual drunk driving arrests fails to reduce alcohol-related car accidents,[97] and the risk of a drunk driving

91. 24 Cal. 3d at 905, 598 P.2d at 863, 157 Cal. Rptr. 702 (Clark, J., dissenting). The availability of punitive damages may offer some countervailing strategic opportunities, however. For example, a plaintiff's attorney could allege punitive damages as a ploy to encourage defendant insurance carrier to increase its settlement offer. If the insurance company was unmoved by plaintiff's strategy, the attorney could always withdraw the cause of action for punitive damages. Then if plaintiff were to receive a compensatory award in excess of the settlement offer, defendant or his assignee might have a punitive damages claim against the insurance carrier based on bad faith. *See, e.g.*, Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

92. Cramton, *supra* note 3, at 977; Ghiardi, *supra* note 55, at 288; Comment, *The Relationship of Punitive Damages and Compensatory Damages in Tort Actions*, 75 DICK. L. REV. 585, 589 (1971); Note *supra* note 20, at 322.

93. One commentator has suggested that the public reaction to the California Supreme Court decision in Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), indicates a public awareness of civil damage awards. Note, *supra* note 20, at 323. However, the unusual amount of news coverage garnered by the *Coulter* decision can be explained by two factors not present in *Taylor*. First, *Coulter* imposed liability in situations where no legal sanctions existed before. Second, Coulter affected a highly visible and influential lobby which helped inform the public both of the decision and the lobby's view of the decision.

94. Ghiardi, *supra* note 55, at 288.

95. Cramton, *supra* note 81, at 427; Owen, *supra* note 58, at 1285.

96. *See* Waller, *supra* note 3, at 134; Cramton, *supra* note 3, at 998.

97. The $88 million federally funded alcohol safety action programs that gave special training in the early seventies to police, prosecutors, judges, and community leaders, as well as widespread public education programs in twenty-nine selected areas, failed to establish a relationship between enforcement and accidents even though police increased arrests and convictions enormously. COMPTROLLER GENERAL OF THE UNITED STATES' REPORT TO CONGRESS, *The Drinking-Driver Problem—What Can Be Done About It?* 6-9 (1979); Ennis, *General Deterrence and Police Enforcement: Effective Countermeasures Against Drinking and Driving?*, 9 J. OF SAFETY RESEARCH 15, 24 (1977).

arrest is substantially higher than the risk that a drunk driver will face a complaint for punitive damages.[98] The attenuated odds—both perceived and actual—of a suit for punitive damages thus further diminish *Taylor*'s deterrent effect.

Fourth, the punitive sanction will not increase deterrence unless its threat is perceived as a significant addition to already existing penalties. Yet existing penalties are already severe. It is difficult to argue that fear of monetary judgment will stop people currently undeterred either by the spectre of personal injury or death that accompanies car accidents, or by California's harsh criminal sanction[99] which includes the prospect of imprisonment and the stigma of a criminal record. It is also hard to imagine cases where punitive damages threaten, but physical injury or criminal sanctions *do not*, since all three potentially accompany the event that triggers the possibility of punitive damages—a car accident caused while under the influence of alcohol.

Finally, deterrence is ineffective where potential defendants lack the ability to decrease their drunk driving. Alcoholics account for the majority of alcohol-related traffic accidents.[100] In cases where an alcoholic's primary access to alcohol is by automobile—probably a common situation in modern suburban society—it is doubtful whether *any* legal sanction will have much effect.[101]

For all these reasons, the *Taylor* decision is likely to have little, if any, effect on the drunk driver problem. Because the justification for extending punitive damages is weak, it is all the more desireable that the opinion be squarely defensible on grounds of fairness. Under the majority's sweeping interpretation of its test, however, the punitive sanction may be unfairly and indiscriminately applied to *all* drunk drivers, inrrespective of the actual level of culpability shown by the particular circumstances of each case.

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98. Cramton, *supra* note 82, at 445.

99. A driver under the influence of alcohol can be punished by imprisonment (for not less than forty-eight hours nor more than six months) or by fine (of not less than $275 nor more than $500) or by both. If probation is granted and the driver is convicted of the same offense in the next five years, a jail sentence is mandatory. CAL. VEH. CODE § 23102 (West Supp. 1979). A driver under the influence of alcohol who causes death or injury "shall be punished by imprisonment in the state prison for not less than 90 days nor more than one year, *and* by fine of not less than two hundred fifty dollars ($250), nor more than five thousand dollars ($5000)." CAL. VEH. CODE § 23101 (West Supp. 1979) (emphasis added).

100. Fox, *Deterrents to Drinking and Driving in Alcohol Misusers*, in THE PREVENTION OF HIGHWAY INJURY 51 (M. Selzer, P. Gikas & D. Huelke eds. 1967); Cramton, *supra* note 82 at 443; Little, *Control of the Drinking Driver: Science Challenges Legal Creativity*, 54 A.B.A.J. 555, 557-58 (1968).

101. *See* Aronson, *Let's Get the Drunk Driver Out of the Driver's Seat*, TODAY'S HEALTH, December 1974, at 42; Cramton, *supra* note 3, at 998. A logical reading of *Taylor* would exclude some such alcoholics. *See* note 76 and accompanying text *supra*. *But see* note 75 and accompanying text *supra*.

D. *Evaluating Drunk Drivers Under the* Taylor *Test*

The majority overgeneralizes by presuming that all drunk drivers create a risk of "*probable* dangerous consequences." The available meager evidence instead suggests that many drunk driving trips are unlikely to cause injury.[102] It would be unfortunate if the majority's presumption were interpreted as a dilution of the "probable dangerous consequences" element derived from section 3294, since a consistent general application of a lowered standard would make the potent punitive sanction available in an unjustifiably wide range of cases. The court instead should be understood as erecting a *rebuttable* presumption, thus shifting the burden to defendants who may attempt to demonstrate that their conduct did *not* create probable dangerous consequences. This view of the case would ameliorate *Taylor*'s potential for sanctioning unjustifiably harsh or indistinguishably inconsistent invocations of punitive damages.

The word "probable" in normal parlance means "likely to occur."[103] This implies more than a mere possibility; indeed, the word would ordinarily require at least a fifty-one per cent chance of occurrence.[104] Yet most drunk drivers, including those with a high blood

102. *See* text accompanying notes 106-10 *infra*.

103. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1132 (2d college ed. 1974).

104. While this Note argues that the court created too low a threshold for awards of punitive damages when it viewed all drunk drivers as creating "probable dangerous consequences," interpreting the "probable dangerous consequences" phrase as requiring a 51% chance of occurrence in *all* cases where punitive damages are sought is also undesirable. California cases which have referred to the term "probable" in discussions of appropriate standards for recovery of punitive damages generally have accorded the term its traditional meaning (51% or "more likely than not"). Several of these cases, however, have recognized that different analyses may be required in different factual contexts. Nolin v. National Convenience Store, Inc., 95 Cal. App. 3d 279, 287-88, 157 Cal. Rptr. 32, 37 (2d Dist. 1979); G.D. Searle v. Superior Court, 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218, 224-25 (3d Dist. 1975). The drunk driving context differs factually in several important respects from appellate cases which have heretofore considered whether punitive damages are recoverable against a defendant based on a conscious disregard of probable harm to others. *See* notes 44-47 and accompanying text *supra*. While these previous appellate decisions considered dangerous conduct which lasted over a long period of time and therefore created a greater probability of injury than that posed by the average drunk driving trip, the severity of danger created by the defendant's conduct in most of these appellate decisions did not rise to the grave danger posed by the drunk driver. Given this difference, an interpretation which focuses solely on probability of injury would fail to adequately measure culpability.

This interpretation would be similarly inadequate for purposes of deterrence since the need for deterrence is greater where conduct poses potentially grave results than where the conduct poses small or insignificant detrimental consequences. Thus, considering the punishment and deterrence purposes which underlie the punitive award, the best interpretation of the majority's "probable dangerous consequences" phrase is that it requires a balancing of the gravity, as well as the probability, of a potential injury in determining whether a defendant's "conscious disregard" poses "probable dangerous consequences." For example, acts which threaten life might satisfy the "probable dangerous consequences" component even if the probability of occurrence were very

alcohol level, do not become involved in accidents.[105]

Although research has not produced studies estimating the probability that a drunk driver will become involved in a car accident, a crude and quite conservative appraisal can be drawn by comparing the number of drunk driving arrests in California with the number of alcohol-related accidents. In 1976, 257,846 adult misdemeanor arrests occurred for drunk driving[106] while alcohol, or alcohol in combination with other drugs, was the primary collision factor in 19,333 accidents where injury resulted.[107] This suggests that only seven percent of drivers under the influence of alcohol in 1976 caused accidents in which someone was injured. Of course, these figures are rough. Some alcohol-related accidents may not have been reported or detected. When balanced against the small proportion (estimated to be from 1 in 200[108] to 1 in 2,000),[109] of intoxicated drivers actually apprehended, however, the seven percent figure seems on balance an unrealistically high estimate.[110]

These figures demonstrate that many drunk drivers, if not most, do not become involved in accidents. Thus, an assumption that all intoxicated drivers pose probable dangerous consequences is clearly wrong and cannot justify the imposition of punitive damages against all such drivers. What is needed in place of such an assumption is a case-by-case determination of the probability of dangerous consequences created by the drunk driver based on the circumstances surrounding each case. This determination could take place by interpreting the *Taylor* opinion as establishing a rebuttable presumption that drunk drivers create "probable dangerous consequences." This presumption is probably fair in the special case of intoxicated drivers due to the "very commonly understood risk which attends every motor vehicle driver who is

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low, whereas conduct which subjects others to only slight injuries may require the likelihood of occurrence to be in excess of 51%.

105. Waller, *supra* note 3, at 126.

106. Coulter v. Superior Court, 21 Cal. 3d 144, 154, 157 P.2d 669, 675, 145 Cal. Rptr. 534, 540 (1978).

107. DEP'T OF CALIFORNIA HIGHWAY PATROL, BUSINESS AND TRANSPORTATION AGENCY, 1976 REPORT OF FATAL AND INJURY MOTOR VEHICLE TRAFFIC ACCIDENTS 69 (1977).

108. Beitel, Sharp & Glauz, *Probability of Arrest While Driving Under the Influence of Alcohol*, 36 J. STUD. ON ALCOHOL 109, 114 (1975). This overall estimation assumes that the intoxicated driver will pass a police officer who is actively watching for drunk driving violations. Thus, "the threat of apprehension in general is much less." *Id.*

109. Borkenstein, *A Panoramic View of Alcohol, Drugs and Traffic Safety*, 16 POLICE 11-6, 11 (1972).

110. Assuming the probability of a drunk driver being arrested is as high as one in 200 and that all of the 176,549 reported accidents in 1976 in California, DEP'T OF CAL. HIGHWAY PATROL, BUSINESS AND TRANSPORTATION AGENCY, *supra* note 107, at 69, were alcohol-related, intoxicated drivers caused injuries on only .003% occasions.

intoxicated."[111] However, the opportunity for rebuttal, considering such factors as blood alcohol level, prior driving record, and planned length of car trip, would preserve an important limit on the scope of section 3294 by ensuring that it only applied to conduct evincing a high degree of culpability. Two case studies will illustrate how these factors can separate persons whose driving poses probable dangerous consequences from persons whose actions do not warrant punitive damages.

Thirty-year-old, one hundred five pound Mary Smith is invited by a nearby friend to dinner and a movie. Mary has never been cited for a traffic violation. She would prefer that her friend eat at her house, but he has a broken leg. Tonight he cooks dinner and serves wine. Mary drinks two three-ounce glasses of sherry before dinner and one glass of wine with dinner. One hundred ten minutes have elapsed between the first drink of sherry and the five block trip to the neighborhood theater. Mary drives within the twenty-five miles per hour speed limit, but the one other car they encounter on the trip brakes unexpectedly. Due to her slowed reaction time, Mary rams the other car and causes substantial property damage and some injury. The police who investigate the accident discover Mary's blood alcohol level to be .1 percent.[112]

Contrast with Mary Smith the case of Billy Jones. Billy receives a Porsche 928 as a present for his twenty-first birthday and suggests to a fellow member of his fraternity in Berkeley that they take a one hundred eighty-one mile test drive to Lake Tahoe. After agreeing to go, they both decide to first attend a nearby sorority party at which they intend to become thoroughly drunk. By the time they leave the party, Billy, who previously has received two citations for driving while intoxicated and has also been involved in an alcohol-related car accident, has a blood alcohol content level of .25 percent. Several hours after their departure, Billy, who has averaged ninety miles per hour on the trip, swerves over the dividing line and collides head on with a Volkswagen, killing the driver and passenger.

An examination of Billy's and Mary's blood alcohol content reveals that if they were to drive the same distance, Billy's chance of becoming involved in an accident would be at least forty times greater than Mary's.[113] But by planning to drive 180 miles further than Mary, Billy increased by approximately 180 percent his already greater chance of becoming involved in an accident. Furthermore, a history of

111. 24 Cal. 3d at 896-97, 598 P.2d at 857, 157 Cal. Rptr. at 697.

112. One tenth of one percent is the level at which intoxication is presumed in California. *See* note 3 *supra*. The blood alcohol level used in this example was taken from a chart supplied by the Center of Alcohol Studies, University of North Carolina, reprinted in J. EWING & B. ROUSE, *Drinks, Drinking and Drinkers*, in DRINKING 19 (1978).

113. Waller, *supra* note 3, at 121.

alcohol-related car accidents like Billy's may allow an inference of unusual susceptibility to the distorting effects of intoxication.[114] However, if the majority's test is read as assuming all drunk drivers pose probable dangerous consequences, Mary Smith and Billy Jones will be similarly treated despite the great differences in degrees of culpability. On the other hand, if a rebuttable presumption analysis based on the preceding factors were used, a reasonable jury would probably find that Billy Jones' conduct created probable dangerous consequences while Mary Smith's conduct did not.

This rebuttable presumption analysis would not only comport with the requirements of section 3294 but would be equitable. Most people would agree that Billy Jones' conduct is substantially more culpable than Mary Smith's. By the same token, many who would be outraged to know that Mary Smith could be subject to financial ruin as a result of her accident would agree, if not recommend, an award of punitive damages against Billy. This result can be explained by the different probabilities of danger posed by the two drivers. But only a rebuttable presumption interpretation of the court's probable dangerous consequences analysis will ensure that the Mary Smiths and Billy Joneses of California will receive different treatment.[115]

The language of the *Taylor* majority does not suggest that its presumption is rebuttable. Neither does it preclude this possibility.[116] Especially since the decision is apt to modify behavior only slightly in any event, doubts should be called in favor of promoting consistency and fairness in the law of punitive damages. Courts asked to apply *Taylor* to future drunk driving cases should require the plaintiff to allege and prove the "conscious disregard" component of the *Taylor* test, and

114. While a defendant's prior driving record is relevant, it is the least significant of the three factors mentioned in this Note.

115. It might be argued that jury discretion and judicial oversight of damage awards are sufficient to guard against an overly broad application of punitive damages. Though such discretion and oversight do make shockingly unjust results less likely, these factors require, rather than eliminate the need for, articulated guiding standards. Indeed, such standards are critical if adjudication is to be more than an unprincipled gestalt, where parties present evidence of moral worth and net wealth and ask juries to decide if an income transfer is appropriate.

116. We note that when *Gombos* was decided it was unclear whether, as general principle, an award of punitive damages could be based upon a finding of defendant's conscious disregard of the safety of others. In the evolution of this area of tort law during the ensuing 20 years it has now become generally accepted that such a finding is sufficient. Examining the pleadings before us, we have no difficulty concluding that defendant consciously disregarded the safety of others. There is a very commonly understood risk which attends every motor vehicle driver who is intoxicated. (Cite ommitted). 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. The effect may be lethal whether or not the driver had a prior history of drunk driving incidents.

24 Cal. 3d at 896-97, 598 P.2d at 857, 157 Cal. Rptr. at 697.

should give the defendant an opportunity to rebut the presumption of the "probable dangerous consequences" component.

The Courts asked to apply section 3294 to nondeliberate action *beyond* the drunk driving context should read *Taylor* as requiring a conscious disregard of the safety of others which poses probable dangerous consequences. The "probable dangerous consequences" element should be retained as part of the plaintiff's burden, unless, as in *Taylor*, the situation indicates that common understandings justify a general presumption. To avoid unfairness in these cases, the defendant should be given an opportunity to disprove the general presumption in the particular case.

CONCLUSION

Punitive damages are an appropriate sanction for egregious conduct. The *Taylor* majority set a sensible and precedented test for recovery of punitive damages in cases of nondeliberate torts by providing that the malice provision of section 3294 is met if the defendant *consciously disregards* a risk of danger to others which poses *probable dangerous consequences*. By presuming that *all* drunk driving threatens "probable dangerous consequences," the court gave force to the "very commonly understood risk" that accompanies most drunk driving. Though the court did not so indicate, this presumption should be interpreted as rebuttable, so as to maintain the "probable dangerous consequence" element as a requirement for invocation of punitive damages in all cases of nondeliberate torts. Any other course will inappropriately relax the high statutory standards that presently contain this formidable remedy.

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Neal v. Farmers Insurance Exchange,[1] *Egan v. Mutual of Omaha Insurance Co.*[2] The court held that punitive damages are appropriate where an insurer is guilty of an aggravated breach of the implied covenant of good faith and fair dealing. The court also held that an appel-

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1. 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978) (Manuel, J.) (5-2 decision).
2. 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979) (Mosk, J.) (4-2 decision).

late court should consider, in determining whether such an award is excessive, the reprehensibility of the defendant's conduct, the amount of compensatory damages awarded, and the defendant's wealth.

In *Neal*, plaintiff's decedent was injured in an automobile accident with an uninsured motorist. The insurance policy with defendant insurer included $15,000 in uninsured motorist coverage and $5,000 in medical payment coverage. Defendant asserted that its uninsured motorist liability should be mitigated by the amount paid under the medical payment coverage. Defendant refused to pay plaintiff the mitigated amount pending resolution of the offset issue. The parties then submitted the dispute to an arbitrator, who ruled for the plaintiff. Plaintiff then sued the insurer, alleging a bad faith failure to pay benefits under the insurance policy. The jury concluded that defendant's conduct constituted a breach of the implied covenant of good faith and fair dealing, and the supreme court affirmed. The court held that while a finding that an insurer breached its duty to deal reasonably and in good faith does not in itself establish the "malice in fact" necessary for punitive damages, malice could be inferred from defendant's actions in this case.[3]

The court rejected defendant's claim that the punitive damage award was excessive as a matter of law. The court set out three factors to be considered by an appellate court in reviewing a punitive damages award.[4] First, the award must be related to the degree of reprehensibility of the defendant's conduct. Second, it must be proportional to the compensatory damages awarded, since disproportionately high punitive damages cannot be justified if the actual harm suffered is small. And third, the court must consider the defendant's wealth, since deterrence will not be achieved if the defendant's wealth allows it to absorb its loss with little discomfort.

Applying these considerations to the case before it, the *Neal* court found that the punitive damages awarded by the trial court were not excessive. Defendant's calculated attempt to take advantage of plaintiff was highly reprehensible. While the plaintiff recovered only about $10,000 in compensatory damages, the court emphasized that the damages would have been higher if plaintiff's decedent had survived the

3. The court described defendant's actions as "a conscious course of conduct, firmly grounded in established company policy, designed to utilize the lamentable circumstances in which Mrs. Neal and her family found themselves, and the exigent financial situation resulting from it, as a lever to force a settlement more favorable to the company than the facts would otherwise have warranted," citing defendant's "Claims Representative Field Manual," which instructs claim representatives to take advantage of insureds' money problems when trying to settle claims. 21 Cal. 3d at 923 n.8, 582 P.2d at 987 n.8, 148 Cal. Rptr. at 396 n.8.

4. These factors, the court said, are premised on the punishment and deterrent purposes behind punitive damages. *Id.* at 928 n.13, 582 P.2d at 990 n.13, 148 Cal. Rptr. at 399 n.13.

trial, since she could have recovered for emotional distress. Finally, the award amounted to less than one tenth of one percent of defendant's gross assets, and less than one week's net income in the relevant year.

In *Egan*, plaintiff claimed disability benefits for an accidental back injury under an insurance policy purchased from defendant insurer. After paying plaintiff for three months, defendant disclaimed further liability, asserting that plaintiff was not actually disabled, but was simply unable to find work. Defendant never consulted plaintiff's physicians and disregarded plaintiff's offer to be examined by a doctor of defendant's choice. Plaintiff sued for both compensatory and punitive damages, alleging that defendant breached its duty to deal in good faith by denying him benefits under the insurance contract without adequately investigating his claim.

In reviewing the punitive damages awarded, the court reaffirmed that section 3294 of the California Civil Code[5] permits punitive damages for an aggravated breach of the implied covenant of good faith and fair dealing. The principal purpose of section 3294, the court said, is "to deter acts deemed socially unacceptable and, consequently, to discourage the perpetuation of objectionable corporate policies."[6] Insurance companies supply a vital service affected with a public interest. Further, insurance contracts are inherently imbalanced and adhesive in nature. In recognition of this public interest and in order to restore a balance between the parties to the insurance contract, the court held punitive damages to be justified.

Applying the factors enumerated in *Neal*,[7] the *Egan* court found the jury's award of $5,000,000 in punitive damages to be excessive. The award was more than forty times larger than the $123,600 recovered in compensatory damages. It represented the equivalent of two and one half months of defendant's net income from one relevant year, and seven months' net income from another relevant year.

Justice Clark dissented in both cases, arguing that punitive damages should not be awarded for improper claims settlement practices. In *Egan*, Clark argued that punitive damages unjustly enrich claimants and ultimately punish the public, since the increased costs to the insur-

5. 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.

CAL. CIV. CODE § 3294 (West Supp. 1979) (emphasis added).

An action for breach of the implied covenant of good faith and fair dealing arises in tort. *See, e.g.*, Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

6. 24 Cal. 3d at 820, 598 P.2d at 457, 157 Cal. Rptr. at 487.

7. *See* text accompanying note 4 *supra*.

ers result in higher insurance premiums.[8] He argued that the risk of high compensatory damages and litigation expenses provides a sufficient deterrent against wrongful conduct, and that any additional deterrence produced by punitive damages does not justify its public cost. Clark also argued that even if punitive damages are justified in some cases, the facts in *Egan* do not support a finding of malice, fraud, and oppression as required under section 3294.[9]

Justice Richardson also dissented in both cases. Unlike Clark, Richardson agreed with the majority that punitive damages are appropriate for an aggravated breach of the implied covenant of good faith and fair dealing, if the insurer acted with malice.[10] However, he contended that the facts in *Neal* and *Egan* do not support findings of malice. Richardson also argued in *Neal* that the punitive damages award was the result of jury passion and prejudice. He argued that plaintiff's counsel inflamed the jury by generating sympathy for plaintiff's family misfortunes and by making improper suggestions that defendant's liability should be measured by plaintiff's tort claim against a third party rather than the terms of the insurance contract.[11]

Neal and *Egan* reaffirmed earlier decisions that held that punitive damages under section 3294 are appropriate in cases involving malicious misconduct by an insurer.[12] Although the court gave some guidance for appellate review of punitive damage awards, the three factors cited are vague and general. By refusing to adopt a specific formula for determining the appropriate level of punitive damages, the court continued to give juries wide discretion in awarding such damages. Due to this discretion, insurance companies are likely to appeal a large number of punitive damage awards as excessive. Thus, all parties would be required to either bear the additional expense of an appeal or settle for less than the punitive award. Such bargaining would under-

8. 24 Cal. 3d at 825-28, 598 P.2d at 461-62, 157 Cal. Rptr. at 491-92 (Clark, J., concurring and dissenting).

9. *Id.* at 829-34, 598 P.2d at 462-66, 157 Cal. Rptr. at 492-96 (Clark, J., concurring and dissenting).

10. *Id.* at 834-35, 598 P.2d at 466-67, 157 Cal. Rptr. at 496-97 (Richardson, J., concurring and dissenting).

11. 21 Cal. 3d at 938-941, 582 P.2d at 996-99, 148 Cal. Rptr. at 405-08 (Richardson J., dissenting).

12. *See, e.g.*, Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1977). The court's holding in Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979), has raised the possibility that punitive damages can be obtained against an insurer in an action by a third party claimant. While other decisions indicate that the implied covenant of fair dealing extends only to the parties to the underlying insurance contract and that third party claimants cannot sue the insurer for its breach, the court in *Royal Globe* eliminated this obstacle by holding that third party claimants can sue the insurer directly under California Insurance Code § 790.03 (West Supp. 1978) for the specified misconduct.

mine the deterrent effect of punitive damages by removing some of their economic "sting."

The court's criteria may also inflame injury passion and prejudice against the insurer. If evidence of a defendant's wealth is introduced, a jury may be more likely to find liability for punitive damages in cases involving extremely wealthy defendants. As a possible solution, Civil Code section 3295[13] permits the court to grant a defendant a protective order requiring the plaintiff to produce prima facie evidence of liability for punitive damages before any evidence of defendant's financial condition can be introduced. A suggested alternative is to bifurcate the trial. In the initial stage the jury would consider whether defendant's conduct warrants punitive damages. Only if the jury found defendant's conduct to be oppressive, fraudulent, or malicious could the plaintiff introduce evidence of defendant's financial standing in order to assist the jury's determination of the punitive damages to be awarded.

13. CAL. CIV. CODE § 3295 (West Supp. 1980).