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The Drunken Driver and Punitive Damages: A Survey of the Case Law and the Feasibility of a Punitive Damage Award in North Dakota

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THE DRUNKEN DRIVER AND PUNITIVE DAMAGES: A SURVEY OF THE CASE LAW AND THE FEASIBILITY OF A PUNITIVE DAMAGE AWARD IN NORTH DAKOTA

I. INTRODUCTION

In the last decade approximately 25,000 people have died each year as a result of automobile accidents involving drunken drivers.[1] The legislative response to these staggering figures has taken a variety of forms. Mandatory jail sentences,[2] revocation or suspension of driver's licenses,[3] higher fines,[4] and mandatory rehabilitation programs[5] are examples of some current penalties for driving while intoxicated.[6] While state legislatures are imposing

1. *See* NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 13, 52 (1982) (number of motor vehicle deaths in the last ten years averages more than 50,000 deaths each year; half of these deaths are attributable to drunken drivers).

2. *See* Note, *Criminal Law — Mandatory Jail Sentences: An Effective Solution to the Drunk Driver Crisis? — Wash. Rev. Code § 46.61.515, (1979).* 55 WASH. L. REV. 677 (1979).

3. *See* Drexler, *California's New Drunk Driving Law.* 5 L.A. LAW., Mar. 1982, at 34, 36; Hammer, *The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving,* 55 WIS. B. BULL., Apr. 1982, at 9; Hammer, *The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving,* 55 WIS. B. BULL., May 1982, at 15.

4. *See* Walta, *Review of New Legislation Relating to Criminal Law,* 11 COLO. LAW. 2148, 2160-61 (1982).

5. *See* Cameron, *The Impact of Drinking-Driving Countermeasures: A Review and Evaluation,* 8 CONTEMP. DRUG PROBS. 495, 525-27 (1979).

6. *See generally* Winter, *States Get Tougher on Drunk Drivers,* 68 A.B.A. J. 140 (1982) (more severe sanctions against drunken driving went into effect on January 1, 1982, in California and Illinois); Note, *Alcohol Abuse and the Law,* 94 HARV. L. REV. 1660, 1674-81 (1981) (presents and evaluates various programs to deter drunken driving).

more severe criminal penalties upon those who drink and drive, the victims of drunken drivers are also venting their anger by requesting punitive damages in tort claims against intoxicated drivers.[7]

Presently, twenty-one jurisdictions favor imposition of punitive damages against an intoxicated driver who causes personal injury to another person.[8] A minority of nine jurisdictions refuse to award punitive damages in a drunken driver case.[9] Although the New Hampshire Supreme Court refused to award punitive damages in a recent case,[10] the legislature subsequently enacted legislation allowing double damages under certain circumstances.[11] The remaining jurisdictions have not addressed the issue.

This Note discusses the historical background and theoretical foundation of punitive damages and also analyzes the cases involving drunken drivers in which courts have awarded or denied punitive damages. The courts vary substantially in what is necessary to support an award.[12] Some courts have assessed

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7. *See* Comment, *Punitive Damages and the Drunken Driver*, 8 PEPPERDINE L. REV. 117 (1980). *See generally* 65 A.L.R. 3D 656 (1975) (discussion of the case law on punitive damages and drunken drivers).

8. The following states allow punitive damages for injuries caused by an intoxicated driver: Alabama (*see* Fritz v. Salva, 406 So. 2d 884 (Ala. 1981)); Arizona (*see* Ross v. Clark, 35 Ariz. 60, 274 P. 639 (1929)); Arkansas (*see* Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948)); California (*see* Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979)); Colorado (*see* Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980)); Connecticut (*see* Infeld v. Sullivan, 151 Conn. 506, 199 A.2d 693 (1964)); Delaware (*see* Walczak v. Healy, 280 A.2d 728 (Del. Super. Ct. 1971)); Florida (*see* Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976)); Georgia (*see* Chitwood v. Stoner, 60 Ga. App. 599, 4 S.E.2d 605 (Ct. App. 1939)); Illinois (*see* Madison v. Wigal, 18 Ill. App. 2d 564, 153 N.E.2d 90 (App. Ct. 1958)); Iowa (*see* Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954)); Kentucky (*see* Wigginton's Adm'r v. Rickert, 186 Ky. 650, 217 S.W. 933 (1920)); Mississippi (*see* Southland Broadcasting Co. v. Tracy, 210 Miss. 836, 50 So. 2d 572 (1951)); Missouri (*see* Smith v. Sayles, 637 S.W.2d 714 (Mo. Ct. App. 1982)); Montana (*see* Allers v. Willis, ____ Mont. ____, 643 P.2d 592 (1982)); New Mexico (*see* Svejcara v. Whitman, 82 N.M. 739, 487 P.2d 167 (1971)); New York, (*see* Colligan v. Fera, 76 Misc. 2d 22, 349 N.Y.S.2d 306 (Civ. Ct. 1973)); Ohio (*see* Payne v. Daley, 51 Ohio Misc. 65, 367 N.E.2d 75 (C.P. 1977)); Oregon (*see* Dorn v. Wilmarth, 254 Or. 236, 458 P.2d 942 (1969)); Pennsylvania (*see* Focht v. Rabada, 217 Pa. Super. 35, 268 A.2d 157 (Super. Ct. 1970)); Tennessee (*see* Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (Ct. App. 1945)).

Although the Wisconsin courts have not addressed the issue of punitive damages and drunken drivers, an award may be allowed in that state. *See* Durham v. Pekrul, 104 Wis. 2d 339, 311 N.W.2d 615 (1981) (punitive damages allowed for conduct equivalent to gross negligence); Ayala v. Farmers Mut. Auto. Ins. Co., 272 Wis. 629, 76 N.W.2d 563 (1956) (intoxication and negligence on the highway constitutes gross negligence).

9. The following jurisdictions deny punitive damage awards: Alaska (*see* Nisson v. Hobbs, 417 P.2d 250 (Alaska 1966)); Indiana (*see* Thompson v. Pickle, 136 Ind. App. 139, 191 N.E.2d 53 (Ct. App. 1963)); Kansas (*see* Gesslein v. Britton, 175 Kan. 661, 266 P.2d 263 (1954)); Maryland (*see* Davis v. Gordon, 183 Md. 129, 36 A.2d 699 (1944)); Michigan (*see* McLaren v. Zeilinger, 103 Mich. App. 22, 302 N.W.2d 583 (Ct. App. 1981)); North Carolina (*see* Brake v. Harper, 8 N.C. App. 327, 174 S.E.2d 74 (Ct. App. 1970)); Oklahoma (*see* Ruther v. Tyra, 207 Okla. 112, 247 P.2d 964 (1952)); Texas (*see* Sears Roebuck & Co. v. Jones, 303 S.W.2d 432 (Tex. Civ. App. 1957)); Virginia (*see* Baker v. Markus, 201 Va. 905, 114 S.E.2d 617 (1960)).

10. Johnsen v. Fernald, 120 N.H. 440, 416 A.2d 1367 (1980).

11. *See* N.H. REV. STAT. ANN. § 265-89(a) (1982).

12. *Compare* Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976) (act of drinking and driving itself supports a finding of recklessness in Florida) *with* Madison v. Wigal, 18 Ill. App. 2d 564, 153 N.E.2d 90 (App. Ct. 1958) (plaintiff must show specific facts alleging recklessness).

punitive damages against a driver based solely on his or her voluntary drunkenness;[13] other courts have imposed very stringent proof requirements on the plaintiff.[14] In all cases, however, the courts focus on the act of driving while intoxicated as a basis for an award of punitive damages.[15] Finally, this Note will discuss the application of appropriate North Dakota laws to determine the feasibility of awarding punitive damages against a drunken driver in North Dakota.

II. PUNITIVE DAMAGES: THE THEORY, PURPOSE, AND REQUIREMENTS

The first award of punitive damages in a drunken driver case was upheld by a Kentucky court in 1920.[16] The theory underlying punitive damage awards, however, dates back several thousand centuries.[17] Early laws required that thieves repay their victims in quantities several times greater than the amount of goods stolen.[18] This form of restitution overcompensated the victim and resulted in an economic punishment or penalty to the thief.[19] Although punitive damages are no longer awarded for mere theft, the theory of punishment persists today in punitive damage awards.[20]

A. HISTORY

As early as 2000 B.C., *The Code of Hammurabi* described a form of punitive damages.[21] The Babylonian laws of restitution provided: "If a man steal an ox, or sheep, or ass, or pig, or boat, from a temple or palace, he shall pay thirty-fold; if it be from a freeman, he shall pay tenfold."[22] Hittite law from the fourteenth century B.C. similarly allowed a multiple recovery for theft.[23] Early

13. *See, e.g.*, Harrell v. Ames, 265 Or. 183, 508 P.2d 211 (1973).
14. *See, e.g.*, Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).
15. *See* K. REDDEN, PUNITIVE DAMAGES § 4.2, at 79 (1980).
16. Wigginton's Adm'r v. Rickert, 186 Ky. 650, 657, 217 S.W. 933, 936 (1920).
17. *See infra* notes 21-26 and accompanying text.
18. *E.g.*, THE CODE OF HAMMURABI § 8, *reprinted in* A. KOCOUREK & J. WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 391 (1915).
19. *See infra* notes 21-26 and accompanying text.
20. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 205-06 (1973) (general discussion of the purposes and theories underlying punitive damage awards).
21. THE CODE OF HAMMURABI, *supra* note 18, at 387-442. *See also* Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 2-5 (1980) (historical development of punitive damages); Comment, *Punitive Damages and the Drunken Driver*, 8 PEPPERDINE L. REV. 117, 121-23 (1980) (general discussion of the history of punitive damages). *See generally* K. REDDEN, PUNITIVE DAMAGES § 2, at 23-46 (1980) (analysis of punitive damages, including history, policy, purpose, and an analysis of each state's laws and policies).
22. THE CODE OF HAMMURABI, *supra* note 18, § 8, at 391.
23. J. SMITH, THE ORIGIN AND HISTORY OF HEBREW LAW 246 (1960).

Hebrew,[24] Roman,[25] and Hindu[26] laws also provided for punishment that resembled a punitive damage award.

The English common law courts did not recognize punitive damages until the *Huckle v. Money* case in 1763.[27] In *Huckle* the English court characterized the award as exemplary damages.[28] Twenty-seven years later, a New Jersey court became the first American court to instruct a jury in awarding exemplary damages for a breach of a promise to marry.[29] In 1851 the United States Supreme Court in *Day v. Woodworth*[30] recognized punitive damages as an established common law principle.[31]

B. PURPOSE

The Code of Hammurabi and other early forms of punitive damage awards indicate that those laws were intended to punish wrongdoers.[32] As in these early applications of punitive or exemplary damages, the present purpose of the award is to punish wrongdoers for their outrageous conduct[33] and to deter them from

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24. A. KOCOUREK & J. WIGMORE, *supra* note 18, at 391. The Hebrew laws, written in the seventh century B.C., are known as the *Pentateuch* and are located in the first five chapters of the Bible. The verses that address punitive damages state: "If a man shall steal an ox or a sheep, and kill it, or sell it, he shall pay five oxen for an ox, and four sheep for a sheep. . . . If the theft be found in his hand alive, whether it be ox, or ass, or sheep, he shall pay double." *Exodus* 22:1, :4.

25. THE TWELVE TABLES, *reprinted in* A. KOCOUREK & J. WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 465 (1915). The Twelve Tables were enacted in 450 B.C. *Id.* n.1.

26. THE LAWS OF MANU, *reprinted in* A. KOCOUREK & J. WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 469 (1915). This Hindu code is believed to date about 200 B.C. Many of the laws contained in the code, however, are probably much older. *Id.* n.1.

27. 95 Eng. Rep. 768 (K.B. 1763). *See generally* 1 T. SEDGWICK, SEDGWICK ON THE MEASURE OF DAMAGES §§ 347-352 (rev. 9th ed. 1913) (early history of punitive damages in England and the United States).

28. Huckle v. Money, 95 Eng. Rep. 768, 768-69 (K.B. 1763). Lord Camden stated:

> The personal injury done to [the plaintiff] was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps [£]20 . . . damages would have been thought damages sufficient; but the small injury done to the plaintiff . . . did not appear to the jury in that striking light . . . ; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom . . . . These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.

Id.

29. Coryell v. Colbaugh, 1 N.J.L. 90, 91 (1790). *See generally* 1 G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 396-400 (1893) (discusses punitive damages in several American states).

30. 54 U.S. (13 How.) 363 (1851).

31. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851). The Court held:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.

Id.

32. *Id.* at 370. *See supra* notes 16-21 and accompanying text.

33. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1979). Section 908 defines punitive damages as follows:

performing similar acts in the future.[34] An award also is designed to discourage and deter others from engaging in such conduct.[35] Courts do not award punitive damages to compensate victims for their injuries, but rather to punish and deter wrongdoers.[36]

C. POLICY DEBATE

Although courts clearly have espoused the purpose of punitive damages,[37] whether an award actually accomplishes its purpose is unclear.[38] Critics argue that punitive damages do not effectively deter the wrongdoer or others[39] and that the award is a windfall to the plaintiff.[40] Another criticism is that the award is left to the caprice of the jury.[41] Further, although the doctrine is criminal in nature, it fails to grant any procedural safeguards, such as the privilege against self-incrimination or proof beyond a reasonable doubt.[42] Critics also have argued that punitive damages are a form of double jeopardy because the defendant may be subject to both civil and criminal penalties.[43] The United States Supreme Court in *Day v. Woodworth*,[44] however, upheld the constitutionality of punitive damages.[45] Another criticism of punitive damages focuses

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(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Id.

34. *Id.*

35. *Id.*

36. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9 (4th ed. 1971). Dean Prosser states that "[s]uch damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." *Id.*

37. *See, e.g.*, Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980); Madison v. Wigal, 18 Ill. App. 2d 564, 153 N.E.2d 90 (App. Ct. 1958).

38. For a discussion of the merits of punitive damages, see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 219-21 (1973); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77, at 275-78 (1935); W. PROSSER, *supra* note 36, § 2, at 11; Belli, *supra* note 21, at 5-8; Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 642-50 (1980); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1176-88 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520-26 (1956); Comment, *supra* note 21, at 128.

39. *E.g.*, D. DOBBS, *supra* note 38, § 3.9, at 220; Comment, *supra* note 21, at 128.

40. *E.g.*, D. DOBBS, *supra* note 38, § 3.9, at 219; C. MCCORMICK, *supra* note 38, § 77, at 276; W. PROSSER, *supra* note 36, § 2, at 11; Comment, *supra* note 21, at 131.

41. D. DOBBS, *supra* note 38, § 3.9, at 219.

42. D. DOBBS, *supra* note 38, § 3.9, at 219; W. PROSSER, *supra* note 36, § 2, at 11; Comment, *supra* note 21, at 130.

43. D. DOBBS, *supra* note 38, § 3.9, at 219; W. PROSSER, *supra* note 36, § 2, at 11; Comment, *supra* note 21, at 130.

44. 54 U.S. (13 How.) 363 (1851).

45. Day v. Woodworth, 54 U.S. (13 How.) 363, 373 (1851).

upon the insurability of the award.[46]

The argument supporting punitive damages emphasizes punishing the defendant[47] and the deterrent nature of the award.[48] Furthermore, proponents of the doctrine argue that the award is not a windfall to the plaintiff because it compensates the victim for the actual expenses of litigation and attorney's fees.[49] Other arguments advanced in support of the doctrine are that the jury should be allowed to vent its anger when the conduct of the wrongdoer is outrageous[50] and that the award prevents lawless self-help.[51]

Whether the doctrine of punitive damages accomplishes its intended purposes of deterrence and punishment is a debate that is likely to continue, particularly when awards are granted in such controversial cases as those involving drunken drivers. Although critics have attacked the effectiveness of the award, the courts have firmly established the type of conduct that will support an award.

D. CONDUCT

The type of conduct that justifies an award of punitive damages is an act that is committed with an evil motive or with reckless indifference to the rights or safety of others.[52] An evil motive may include a defendant's hatred or ill will toward another person,[53] while recklessness is a careless or indifferent attitude.[54] Both types of conduct contain elements of outrage[55] similar to

46. For a discussion of the insurability of punitive damages, see D. DOBBS, *supra* note 38, § 3.9, at 216-17; Conley & Bishop, *Punitive Damage and the General Liability Insurance Policy*, 25 FED'N INS. COUNS. Q. 309 (1975); Scheil, *Punitive Damage Awards: The Insurance Industry is Placed on Notice*, 45 INS. COUNS. J. 350 (1978); Young, *Insurability of Punitive Damages*, 62 MARQ. L. REV. 1 (1978); Zuger, *Insurance Coverage of Punitive Damages*, 53 N.D.L. REV. 239 (1978); Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431 (1976); Comment, *Punitive Damages and the Drunken Driver*, 8 PEPPERDINE L. REV. 117 (1980).

47. *See* Walther & Plein, *Punitive Damages: A Critical Analysis: Kirk v. Combs*, 49 MARQ. L. REV. 369, 383 (1965-1966); Comment, *supra* note 21, at 128.

48. *See* Walther & Plein, *supra* note 47, at 382-83.

49. D. DOBBS, *supra* note 38, § 3.9, at 220; C. MCCORMICK, *supra* note 38, § 77, at 277; W. PROSSER, *supra* note 36, § 2, at 11; Comment, *supra* note 21, at 129-30.

50. D. DOBBS, *supra* note 38, § 3.9, at 220.

51. D. DOBBS, *supra* note 38, § 3.9, at 205; C. MCCORMICK, *supra* note 38, § 77, at 277; Comment, *supra* note 21, at 129.

52. RESTATEMENT (SECOND) OF TORTS § 908 (2) (1979).

53. *Id.* An evil motive implies express malice, which is defined as "ill will or wrongful motive. A deliberate intention to commit an injury." BLACK'S LAW DICTIONARY 862 (5th ed. 1979). The distinction between express and implied or inferred malice appears necessary in drunken driver cases because the intoxicated driver probably has no hatred or ill will toward the plaintiff.

54. RESTATEMENT (SECOND) OF TORTS § 908 (1979). Recklessness is akin to implied malice, which is defined as "[m]alice inferred by legal reasoning and necessary deduction from the *res gestae* or the conduct of the party." BLACK'S LAW DICTIONARY 863 (5th ed. 1979).

55. W. PROSSER, *supra* note 36, § 2, at 9-10. Dean Prosser states, "There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton." *Id.* (footnotes omitted.)

conduct that would require imposition of criminal sanctions.[56] The variety of terms that courts use to describe an evil motive or recklessness include malicious, wicked, oppressive, wanton, and morally culpable.[57] Regardless of the terminology courts use to describe the conduct, proving an evil motive or recklessness involves an inquiry into the defendant's state of mind.[58] To prove that a defendant's act was wanton, wilful, or reckless[59] the plaintiff must show the actor knew, or should have known, that a high degree of risk of harm would follow from his actions.[60] The plaintiff must show that the defendant deliberately acted or failed to act in conscious disregard of that risk or with reckless indifference to that risk.[61]

The defendant, however, need not understand the potentially harmful nature of his or her conduct.[62] If a reasonable person in the actor's position would recognize the harm that could follow from the act, courts will hold the wrongdoer to the standard of a reasonable person.[63]

The plaintiff must establish the requisite state of mind of the

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56. RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979). The comment to § 908 states that "[t]hese damages can be awarded only for conduct for which this remedy is appropriate — which is to say, conduct involving some element of outrage similar to that usually found in crime." *Id.*

57. D. DOBBS, *supra* note 38, § 3.9, at 205. Professor Dobbs concluded that "[s]ince all of these words refer to the same underlying culpable state of mind . . . almost any term that describes misconduct coupled with a bad state of mind will describe the case for a punitive award." *Id.*

58. D. DOBBS, *supra* note 38, § 3.9, at 205. Professor Dobbs notes, "It is usually the defendant's mental state that is said to justify a punitive award against him, rather than his outward conduct." *Id.*

59. *See* W. PROSSER, *supra* note 36, § 34, at 185. Dean Prosser explains:

> The usual meaning assigned to "wilful," "wanton," or "reckless," according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences . . . .

Id. (footnotes omitted).

60. RESTATEMENT (SECOND) OF TORTS § 500 (1979). Section 500 defines reckless disregard of safety, often called wanton or wilful misconduct, as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id.

61. *Id.* § 500 comment b. The Restatment (Second) of Torts discusses two types of reckless conduct: first, the actor knows of facts which create a high risk of harm; second, the actor has knowledge, or reason to know of such facts, but fails to appreciate the risk involved, even though a reasonable person would recognize the risk. *Id.*

62. *Id.*

63. *Id.* The tortfeasor, regardless of his or her actual understanding of the potential harm, is held to the objective standard of the reasonable person. *Id.*

defendant to recover punitive damages.[64] Mistake, error of judgment, and inadvertence will not support an award.[65] The plaintiff also must establish facts that will support his or her claim for injuries because courts will not award punitive damages in the absence of compensatory or nominal damages.[66]

In the following cases involving drunken drivers and punitive damages, courts vary substantially in their analyses of the problem. Some courts require the plaintiff to prove that the defendant's state of mind was reckless, while other courts presume that drinking and driving is a reckless act.[67] The terminology describing the defendant's conduct also varies from state to state.[68] In all these cases, however, the courts have focused on whether the act of drinking and driving is sufficiently outrageous to support an award of punitive damages.

III. DEVELOPMENT OF THE LAW

A. EARLY CASES

In 1920 the Kentucky Supreme Court addressed the issue of drunken drivers and punitive damages in *Wigginton's Administrator v. Rickert.*[69] In that case the defendant and his companions were drinking in several saloons for a period of two to three hours prior to the accident.[70] While on their way to another saloon, Wigginton hit a streetcar at a speed of forty-five miles per hour.[71] Two passengers in the streetcar were injured and brought an action against Wigginton's estate.[72] The jury awarded $4000 in punitive damages.[73]

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64. *See* D. DOBBS, *supra* note 38, § 3.9, at 205. *See also* Infeld v. Sullivan, 151 Conn. 506, 199 A.2d 693 (1964) (rejected defendant's claim that driving under the influence could not be wanton misconduct because intoxication precludes necessary state of mind).

65. RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979) (ordinary negligence will not support an award of punitive damages).

66. *Id.* § 908 comment c. The comment to § 908 states, "It is essential . . . that facts be established, that apart from punitive damages, are sufficient to maintain a cause of action." *Id.*

67. *Compare* Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (plaintiff must prove that the defendant was aware of the probable dangerous consequences of drinking and driving) *with* Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976) (court presumed that the act of driving while intoxicated was sufficiently reckless to support an award of punitive damages).

68. *See* D. DOBBS, *supra* note 38, § 3.9, at 205.

69. 186 Ky. 650, 217 S.W. 933 (1920).

70. Wigginton's Adm'r v. Rickert, 186 Ky. 650, 651, 217 S.W. 933, 934 (1920).

71. *Id.* at 651, 217 S.W. at 933-34. Wigginton and a fellow passenger were killed. Two occupants in the car survived and testified that the car was traveling at a speed of 12-15 miles per hour. Four other witnesses estimated the speed at 40-45 miles per hour. *Id.*

72. *Id.* at 652, 217 S.W. at 933. Mrs. Rickert and her daughter were not seated on the side of the streetcar that was stuck. The impact of the collision, however, threw Mrs. Rickert and her daughter against the window. *Id.* at 934.

73. *Id.* at 655, 217 S.W. at 935. The jury awarded $100 for medical expenses and $300 for lost

On appeal Wigginton's administrator challenged the admissibility of the evidence concerning the defendant's intoxication.[74] The court, however, stated that this evidence was relevant to the issues of speed and recklessness because:

> [I]t is a matter of common knowledge that persons under the influence of liquor are wholly unfit to operate automobiles . . . they have no thought of their own safety, and appear to be wholly possessed of a desire to run the machine as fast as it can go, without any regard to the rights of other people . . . .[75]

The court concluded that this action was an appropriate case for punitive damages because Wigginton's wanton and reckless conduct caused the accident.[76]

Nine years later the Arizona Supreme Court awarded punitive damages against a drunken driver in *Ross v. Clark*.[77] In granting the award, the court emphasized the deterrent nature of punitive damages.[78] The Clarks were traveling to a celebration during late afternoon heavy traffic.[79] A taxicab crossed the centerline and struck their car at a speed of fifty to sixty miles per hour.[80] Mrs. Clark was thrown through the windshield of the car and sustained serious injuries.[81] The evidence showed that the taxicab driver was intoxicated at the time of the accident.[82]

The court found that defendant Ross drove at a reckless and uncontrollable speed under circumstances that demanded careful driving.[83] Because the injury was serious and because the defendant displayed a reckless and wilful disregard for human life, the court found that punitive damages were appropriate.[84] Although the court considered $3000 in punitive damages a large award, it found that the award constituted a "just and wholesome"

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wages. *Id.*

74. *Id.* at 652, 217 S.W. at 934. The administrator argued that evidence of the number of drinks consumed was too remote and prejudicial. *Id.*

75. *Id.* at 653, 217 S.W. at 934. The court held that the evidence of intoxication was permissible. *Id.*

76. *Id.* at 655, 217 S.W. at 934. The court stated, "[W]e find the injury serious, and the cause such negligence as indicated a reckless and wilful disregard of human life . . . ." *Id.* at 936.

77. 35 Ariz. 60, ____, 274 P. 639, 642 (1929).

78. Ross v. Clark, 35 Ariz. 60, ____, 274 P. 639, 642 (1929).

79. *Id.* at ____, 274 P. at 640.

80. *Id.* The taxicab driver apparently lost control of his vehicle. *Id.*

81. *Id.* Mr. Clark sustained injury to his chest and lungs. *Id.*

82. *Id.* at ____, 274 P. at 642. Several passengers testified that the driver smelled strongly of alcohol. *Id.*

83. *Id.* The court stated that careful driving was important due to heavy traffic. *Id.*

84. *Id.*

example and warning to other intoxicated drivers.[85]

Wigginton and *Ross* are the forerunners of cases in which courts award punitive damages against intoxicated drivers. Evolving case law has developed three categories of punitive damage cases. In the first group of cases courts recognize that the act of drinking and driving is sufficiently reckless to warrant an award.[86] In this group the plaintiff need only show that the driver was intoxicated and that an accident occurred.[87] The courts require little or no evidence of reckless or careless driving.[88] The mere fact that the defendant voluntarily rendered himself intoxicated will support an award.[89]

In the second category of cases courts require that the plaintiff show facts establishing reckless conduct beyond the fact that the defendant was intoxicated.[90] In these cases the courts impose a heavier burden of proof upon the plaintiff by demanding specific facts establishing recklessness, proof of causation, or proof of the defendant's state of mind.[91]

The final category includes those cases in which courts have denied punitive damage awards.[92] These courts do not agree on the reasons for denying the awards.[93] In many instances, however, the injuries to the plaintiff were minor and the degree of the defendant's intoxication minimal.[94]

A final observation of the case law illustrates the willingness of courts to award punitive damages. Courts that recognize voluntary intoxication and driving as a reckless act without other proof indicate their intolerance for drunken driving.[95] Similarly, other courts acknowledge the need for punishment of the drunken driver while imposing safeguards insuring that the plaintiff prove his or her case.[96]

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85. *Id.* The court upheld the punitive damage award, but reduced the actual damages by $5000. *Id.*

86. *See supra* notes 72-85 and *infra* notes 87-98 and accompanying text.

87. *E.g.*, Ingram v. Pettit, 340 So. 2d 922, 924 (Fla. 1976).

88. *Id.* (Florida courts do not require proof of careless or abnormal driving).

89. *Id.* (driving while intoxicated is a reckless act that supports an award of punitive damages).

90. *See infra* notes 99-184 and accompanying test.

91. *E.g.*, Smith v. Chapman, 115 Ariz. 374, 565 P.2d 880 (Ct. App.), *vacated*, 115 Ariz. 211, 564 P.2d 900 (1977) (plaintiff must prove causation); Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (plaintiff must prove defendant's state of mind); Madison v. Wigal, 18 Ill. App. 2d 564, 153 N.E.2d 90 (App. Ct. 1958) (plaintiff must prove recklessness).

92. *See infra* notes 226-42 and accompanying text.

93. *Compare* Johnsen v. Fernald, 120 N.H. 440, 416 A.2d 1367 (1980) (driving while intoxicated is not actual malice) *with* McLaren v. Zeilinger, 103 Mich. App. 22, 302 N.W.2d 583 (Ct. App. 1981) (punitive damages not allowed in automobile accident cases).

94. *E.g.*, Davis v. Gordon, 183 Md. 129, 36 A.2d 699 (1944).

95. *E.g.*, *Ingram*, 340 So. 2d at 924. The Florida Supreme Court stated that "drunk drivers menace the public safety and are to be discouraged by punishment." *Id.*

96. *See, e.g.*, Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (plaintiff must prove defendant knew his act was dangerous).

B. VOLUNTARY INTOXICATION: A PRESUMPTION OF MALICE

Nearly twenty years after the *Ross* decision, the Arkansas Supreme Court faced the same punitive damages issue in *Miller v. Blanton.*[97] The *Miller* court was the first to identify a defendant's conduct as voluntary drunkenness.[98] Generally, Arkansas courts award punitive damages when the plaintiff proves malice or wilfulness.[99] In the absence of these findings, "wanton disregard of the rights and safety of others" will support an award.[100]

In *Miller* the defendant admitted that he was "half-drunk" after consuming four or five highballs and that he was driving on the wrong side of the road.[101] The court stated, "[Miller] knew that he was taking into his stomach a substance that would stupefy his senses, [and] retard his muscular and nervous reaction. . . . After Miller voluntarily rendered himself unfit to operate a car properly he undertook to drive his automobile . . . down a well traveled highway."[102]

The court emphasized that the consumption of intoxicating liquor precluded the physical control necessary for safe driving.[103] This conduct was sufficiently antisocial to warrant a finding of wanton disregard of the rights and safety of others.[104]

In addition to Arkansas, a showing of voluntary intoxication will provide the basis for an award of punitive damages in Florida,[105] Iowa,[106] New Mexico,[107] New York,[108] Ohio,[109] and Oregon.[110] For example, courts have held that the act of drinking and driving itself will support a finding of reckless indifference to

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97. 213 Ark. 246, 210 S.W.2d 293 (1948).

98. Miller v. Blanton, 213 Ark. 246, ____, 210 S.W.2d 293, 295 (1948). The court did not specifically define voluntary intoxication; the court, however, described the effect of Miller's intoxication and concluded that he voluntarily rendered himself unfit to operate an automobile. *Id.* at ____, 210 S.W.2d at 294-95.

99. *Id.* at ____, 210 S.W.2d at 294.

100. *Id.*

101. *Id.* Miller also pleaded guilty to a charge of reckless driving. *Id.*

102. *Id.* at ____, 210 S.W.2d at 294-95. The court described the automobile as a "potentially lethal machine." *Id.* at ____, 210 S.W.2d at 295.

103. *Id.*

104. *Id.*

105. *See Ingram,* 340 So. 2d at 924, *cited with approval in* Nales v. State Farm Mut. Auto. Ins. Co., 398 So. 2d 455, 456 (Fla. Dist. Ct. App. 1981). *See also* Note, *Negligent Intoxicated Driver Liable for Punitive Damages Without Proof of Abnormal or Reckless Driving,* 6 FLA. ST. U.L. REV. 221 (1978).

106. *See* Sebastian v. Wood, 246 Iowa 94, 106, 66 N.W.2d 841, 848 (1954), *cited with approval in* Nichols v. Hocke, 297 N.W.2d 205, 205 (Iowa 1980).

107. *See* Svejcara v. Whitman, 82 N.M. 739, ____, 487 P.2d 167, 168 (1971).

108. *See* Colligan v. Fera, 76 Misc. 2d 22, ____, 349 N.Y.S.2d 306, 309 (Civ. Ct. 1973).

109. *See* Payne v. Daley, 51 Ohio Misc. 65, ____, 367 N.E.2d 75, 78 (C.P. 1977).

110. *See* Dorn v. Wilmarth, 254 Or. 236, ____, 458 P.2d 942, 945 (1969), *cited with approval in* Harrell v. Ames, 265 Or. 183, ____, 508 P.2d 211, 213 (1973).

the rights and safety of others[111] or wilful and wanton negligence.[112]

In Florida "the voluntary act of driving 'while intoxicated' evinces, without more, a sufficiently reckless attitude for a jury to be asked to provide an award of punitive damages."[113] Evidence of carelessness or abnormal driving is not necessary in Florida.[114] The plaintiff, however, must prove proximate cause and an underlying award of compensatory damages before a court will award punitive damages.[115] In *Svejcara v. Whitman*[116] the New Mexico Supreme Court held that evidence of guilty pleas to charges of reckless driving and driving while intoxicated is sufficient evidence to support an award of punitive damages.[117]

In the Oregon case of *Dorn v. Wilmarth,*[118] the defendant consumed about ten highballs; he failed to recall leaving the bar and crashing through the plaintiff's bedroom wall with his automobile.[119] The *Dorn* court held that the "conduct of one who drives a car after voluntarily drinking to excess is best classified as wanton or reckless."[120] The court emphasized that the deterrent nature of punitive damages justified the award.[121]

In the cases in which courts presume that the voluntary act of drinking and driving is reckless, the plaintiff is relieved from the burden of proving recklessness or wantonness.[122] The plaintiff, however, must still prove the other elements of his or her case, such as proximate cause or compensatory damages.[123]

111. *See, e.g.,* Payne v. Daley, 51 Ohio Misc. at ____, 367 N.E.2d at 78. The court noted, "It seems impossible to argue today that the reasonable man (or woman) does not know that by drinking and driving the chances of causing injury to others is greatly increased." *Id.*

112. *See, e.g.,* Colligan v. Fera, 76 Misc. 2d at ____, 349 N.Y.S.2d at 310. The court found the moral culpability of such conduct overwhelming. *Id.*

113. *Ingram,* 340 So. 2d at 924 (court emphasizes that drunk drivers are a menace to public safety).

114. *Id.* at 925. The *Ingram* court stated, "Driving in an intoxicated condition is an intentional act which creates known risks to the public." *Id.*

115. *Id.* at 924. The plaintiff must show the traditional elements for punitive liability. *Id.*

116. 82 N.M. 739, 487 P.2d 167 (1971).

117. Svejcara v. Whitman, 82 N.M. 739, ____, 487 P.2d 167, 168 (1971). The court found that evidence of the guilty pleas was sufficient to establish liability in this case. *Id.* It is not clear whether the court would require evidence of recklessness in the absence of such charges.

118. 254 Or. 236, 458 P.2d 942 (1969).

119. Dorn v. Wilmarth, 254 Or. 236, ____, 458 P.2d 942, 943 (1969). The defendant, in his answer, admitted crashing through the plaintiff's bedroom wall. *Id.*

120. *Id.* at ____, 458 P.2d at 945. The court cited the Restatement (Second) of Torts § 500 to define recklessness and wantonness. *Id.* at 944. For the text of § 500, see *supra* note 60.

121. 254 Or. at ____, 458 P.2d at 944. The court stated that "where the violation of societal interests is sufficiently great and of a kind that sanctions would tend to prevent . . . the use of punitive damages is proper." *Id.* (quoting Noe v. Kaiser Found. Hosp., 248 Or. 420, 425, 435 P.2d 306, 308 (1967)). *See also* Mason v. Householder, 58 Or. App. 192, 647 P.2d 980 (Ct. App. 1982) (evidence of defendant's postaccident rehabilitation held inadmissible to mitigate punitive damages).

122. *See, e.g., Ingram,* 340 So. 2d at 924 (intoxication and negligence will not justify an award in all cases).

123. *Id. See also* Comment, *supra* note 21, at 131 n.91 (plaintiff must show a nexus between

C. FACTS ESTABLISHING WRONGFUL CONDUCT

In the most common approach to resolving the issue of punitive damages and the drunken driver, courts do not presume that recklessness flows from the act of drinking and driving.[124] In these jurisdictions the plaintiff must allege and prove facts that establish reckless behavior beyond the mere act of driving while intoxicated.[125]

The Colorado Supreme Court in *Mince v. Butters*[126] rejected the presumption that voluntary intoxication is sufficiently reckless to sustain an award of punitive damages.[127] In *Mince* the trial court refused to give the following jury instruction: "The operation of a motor vehicle by one who is consciously under the influence of intoxicating liquor so as to impair the ability of the operator to drive carefully, is a wanton and reckless disregard for the rights and safety of others."[128]

Butters, the plaintiff, appealed the trial court's decision, alleging that the trial court erred in refusing the requested instruction.[129] The appellate court reversed the trial court's decision.[130] The court of appeals stated that, in effect, the instruction was a request for a directed verdict because it raised a presumption of recklessness.[131] Nevertheless, the appellate court held that the instruction was permissible because "reasonable

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wrongful conduct and intoxication).

124. *See* Ross v. Clark, 35 Ariz. 60, 274 P. 639 (1929), *cited with approval in* Smith v. Chapman, 115 Ariz. 374, 565 P.2d 880 (Ct. App.), *vacated,* 115 Ariz. 211, 564 P.2d 900 (1977); Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979); Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980); Walczak v. Healy, 280 A.2d 728 (Del. Super. Ct. 1971); Madison v. Wigal, 18 Ill. App. 2d 564, 153 N.E.2d 90 (App. Ct. 1958); Collins v. Black, ___ Miss. ___, 380 So. 2d 241 (1980); Allers v. Willis, ___ Mont. ___, 643 P.2d 592 (1982); Focht v. Rabada, 217 Pa. Super. 35, 268 A.2d 157 (1970); Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (Ct. App. 1945). *Cf.* Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976) (act of driving plus voluntary intoxication constitutes recklessness).

125. *See, e.g.*, Focht v. Rabada, 217 Pa. Super. 35, ___, 268 A.2d 157, 161 (1970). The *Focht* court explained that in "*certain factual circumstances* the risk to others by the drunken driver may be so obvious and the probability that harm will follow so great that outrageous misconduct may be established without reference to motive or intent." *Id.* (emphasis added). The logical inference from this statement is that while proving motive or intent may not be necessary, the plaintiff must still provide facts showing outrageous misconduct.

126. 200 Colo. 501, 616 P.2d 127 (1980).

127. Mince v. Butters, 200 Colo. 501, ___, 616 P.2d 127, 128 (1980). The trier of fact must determine whether the evidence is sufficient to sustain an award of punitive damages. *Id.* at ___, 616 P.2d at 129.

128. *Id.* at ___, 616 P.2d at 128. Section 13-25-127(2) of the Colorado Revised Statutes requires that a claim for punitive damages be proved beyond a reasonable doubt. COLO. REV. STAT. § 13-25-127(2) (1973).

129. 200 Colo. at ___, 616 P.2d at 128.

130. Butters v. Mince, ___ Colo. App. ___, ___, 605 P.2d 922, 924 (Ct. App. 1979).

131. *Mince,* 200 Colo. at ___, 616 P.2d at 128 (the requested instruction took the issue of wanton and reckless disregard from the jury).

persons could reach only one conclusion based on the evidence: 'that [Mince's] intoxication constituted wanton and reckless disregard of [Butters'] rights and safety.' "[132]

The Colorado Supreme Court reversed the appellate court because punitive damages, which are a discretionary rather than a mandatory award, cannot be granted as a matter of law.[133] The court implied that if the tendered instruction was given to the jury, a presumption of recklessness would arise from the act of driving while intoxicated.[134] The result of this presumption would require imposition of punitive damages whenever a plaintiff shows that the defendant drove while intoxicated.[135] The court noted that in Colorado a plaintiff must prove punitive damages beyond a reasonable doubt.[136] Although a plaintiff may establish a case for punitive damages, he or she is not entitled to them as a matter of law.[137] Because punitive damages are a discretionary award, the appellate court's holding, which raised a presumption of recklessness, could not stand.[138] Therefore, the court held that the trial court's refusal to give the requested jury instruction was proper.[139]

When a jurisdiction does not recognize a presumption of recklessness or malice, the plaintiff must establish facts that support a finding of recklessness. For example, in *Madison v. Wigal*[140] the Illinois Appellate Court required the plantiff to prove the existence of aggravating circumstances such as malice or recklessness to support an award of punitive damages.[141] The plaintiff, Madison, showed that the defendant was intoxicated while driving in the wrong lane of a straight, flat, four lane highway and that the defendant's condition caused a head-on collision.[142] The court found that these facts provided the proper circumstances for the jury to infer recklessness and to award punitive damages.[143]

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132. *Id.*

133. *Id.* at ____, 616 P.2d at 129. An award of punitive damages lies in the discretion of the jury. *Id.*

134. *See id.* The instruction stated that driving while intoxicated was a reckless act. *Id.*

135. *See id.* The court rejected the presumption stating, "[L]iability to an injured person flows from the offender's action. It is quite another matter, however, to conclude that in addition to compensation, the defendant should be punished *as a matter of law* . . . ." *Id.*

136. *Id. See* COLO. REV. STAT. § 13-25-127(2) (1973).

137. *Mince,* 200 Colo. at ____, 616 P.2d at 129.

138. *Id.*

139. *Id.* at ____, 616 P.2d at 130.

140. 18 Ill. App. 2d 564, 153 N.E.2d 90 (App. Ct. 1958).

141. Madison v. Wigal, 18 Ill. App. 2d 564, 568, 153 N.E.2d 90, 95 (App. Ct. 1958). Malice, a question of fact for the jury, may be inferred if it appears that the defendant acted in reckless disregard of the plaintiff's rights. *Id.*

142. *Id.*

143. *Id.*

Several other courts also require proof of aggravating circumstances before they will allow an award of punitive damages.[144] To establish this requirement the plaintiff must allege specific facts indicating that the defendant acted recklessly.[145] For example, a Delaware court found that aggravating circumstances existed when a drunken driver was speeding and driving on the wrong side of the road.[146] A Tennessee court looked to the "condition and manner" in which the defendant operated his vehicle to justify an award,[147] while the Mississippi Supreme Court found that driving on the wrong side of the road at an unreasonable rate of speed and failing to stop after the collision provided circumstances that would uphold a punitive damage award.[148]

In *Focht v. Rabada*[149] a Pennsylvania court offered an ambiguous standard by stating that a plaintiff may receive punitive damages "under certain circumstances."[150] The court found that the act of driving and drinking, considering all the surrounding circumstances, was a proper consideration in determining the award.[151] The court did not address the facts in *Focht,* but stated that an intoxicated driver speeding through a "crowded thoroughfare where there are many pedestrians would clearly be liable for punitive damages."[152]

In Colorado, Delaware, Illinois, Mississippi, Pennsylvania, and Tennessee, a simple description of the facts and surrounding circumstances of the accident is sufficient to sustain an award of punitive damages.[153] Although these jurisdictions do not recognize

144. For a discussion of cases in which courts found aggravating circumstances, see *infra* notes 146-52 and accompanying text.

145. For a discussion of cases in which courts found aggravating circumstances, see *infra* notes 146-52 and accompanying text.

146. Walczak v. Healy, 280 A.2d 728, 730 (Del. Super. Ct. 1971) (alcohol and speeding were factors that made the defendant's conduct reprehensible).

147. Pratt v. Duck, 28 Tenn. App. 502, ____, 191 S.W.2d 562, 564 (Ct. App. 1945) (witnesses saw the defendant weave back and forth on the road just before striking a pedestrian; the defendant left the scene of the accident, but was found later in a ditch).

148. Collins v. Black, ____ Miss. ____, ____, 380 So. 2d 241, 244 (1980) (defendant was unable to safely operate an automobile). *See also* Southland Broadcasting Co. v. Tracy, 210 Miss. 836, 50 So. 2d 572 (1951). The *Tracy* court noted, "Under the facts of this case we are of the opinion that the jury would have been authorized to find . . . reckless [conduct] as to justify the infliction of punitive damages." *Id.* at 847, 50 So. 2d at 576.

149. 217 Pa. Super. 35, 268 A.2d 157 (Super. Ct. 1970).

150. Focht v. Rabada, 217 Pa. Super. 35, ____, 268 A.2d 157, 160 (Super. Ct. 1970). The court based its analysis on the Restatement of Torts §§ 500, 908. *Id.* For the current text of §§ 500 and 908, see *supra* notes 33 & 60.

151. 217 Pa. Super. at ____, 268 A.2d at 160 (court emphasized the great potential for harm and serious injury when a driver is intoxicated).

152. *Id.* at ____, 268 A.2d at 161 n.1. The court noted the high percentage of fatalities and injuries in accidents involving drunken drivers. *Id.*

153. See *Mince,* 200 Colo. at ____, 616 P.2d at 129 (plaintiff must establish claim for punitive

a presumption of recklessness, the courts require plaintiffs to do little more than allege that the defendant was intoxicated and speeding or driving in the wrong lane to recover punitive damages.[154]

The plaintiff's burden of proof to recover punitive damages is minimal when the jurisdiction recognizes that driving while intoxicated is a reckless act. The burden increases, however, when the courts require that specific facts be introduced to show reckless conduct. The courts in Arizona,[155] California,[156] and Montana[157] impose the most stringent requirements upon a plaintiff.[158] The Arizona Supreme Court has applied a detailed analysis of proximate cause.[159] The California courts, on the other hand, focus their discussion on the defendant's state of mind.[160]

1. Proximate Cause

In *Smith v. Chapman*[161] the Arizona Supreme Court stated that a plaintiff must show that the defendant's "intoxication brought about the acts which proximately caused the resulting accident and injuries" in addition to alleging facts that establish recklessness.[162]

In *Smith* the trial court granted the plaintiff's motion for a directed verdict on the issue of punitive damages.[163] The Arizona Court of Appeals overruled the trial court, stating that the jury should determine the punitive damages.[164] The appellate court held, however, that "intoxication plus negligent driving equals

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damages beyond a reasonable doubt); *Walczak*, 280 A.2d at 730 (speeding and driving on the wrong side of the road); *Madison*, 18 Ill. App. 2d at ____, 153 N.E.2d at 94 (jury should look to the circumstances of the case to determine whether to award punitive damages); *Collins*, ____ Miss. at ____, 380 So. 2d at 244 (unreasonable rate of speed); *Focht*, 217 Pa. Super. at ____, 268 A.2d at 160 (look to the surrounding circumstances); *Pratt*, 28 Tenn. App. at ____, 191 S.W.2d at 564 (condition and manner in which automobile was operated).

154. *See, e.g.*, Mince v. Butters, ____ Colo. ____, 616 P.2d 127 (1980) (refused to adopt a presumption that voluntary intoxication plus driving equals recklessness or malice).

155. *See* Smith v. Chapman, 115 Ariz. 374, 565 P.2d 880 (Ct. App.), *vacated*, 115 Ariz. 211, 564 P.2d 900 (1977).

156. *See* Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).

157. Allers v. Willis, ____ Mont. ____, 643 P.2d 592 (1980).

158. For a discussion of the plaintiff's burden of proof in Arizona, California, and Montana, see *supra* notes 124-84 and accompanying text.

159. *See Smith*, 115 Ariz. at ____, 564 P.2d at 903-04.

160. *See Taylor*, 24 Cal. 3d at 894-97, 598 P.2d at 856-57, 157 Cal. Rptr. at 695-97.

161. 115 Ariz. 211, 564 P.2d 900 (1977).

162. Smith v. Chapman, 115 Ariz. 211, ____, 564 P.2d 900, 905 (1977). The court stated that the plaintiff must show that the defendant was negligent, that the defendant's drunkenness was the proximate cause of the plaintiff's injuries, and facts showing the defendant's reckless conduct. *Id.*

163. *Id.* at ____, 564 P.2d at 902.

164. Smith v. Chapman, 115 Ariz. 374, ____, 565 P.2d 880, 881 (Ct. App. 1977). The appellate court stated that sufficient evidence existed to determine whether the defendant's negligence was the proximate cause of the accident. *Id.*

reckless disregard for the safety and rights of others.''[165] This holding raised the presumption that drinking and driving constitute recklessness.[166]

On appeal the Arizona Supreme Court agreed that the trial court's directed verdict was erroneous, but found that the court of appeal's presumption of recklessness was also improper.[167] The court explained that driving while intoxicated is a violation of a statute.[168] The court stated that although this violation is negligence per se, it is not necessarily actionable negligence.[169] The plaintiff must show that the act, driving while intoxicated, was the proximate cause of his injuries before liability will arise.[170]

The court noted that to obtain punitive damages in Arizona, the plaintiff must show that the defendant's conduct is outrageous.[171] The court defined outrageous conduct as bad acts coupled with a bad motive or reckless indifference to the interests of others.[172] The jury must then decide whether the ''driver's voluntary intoxication was an inherent part of the negligent acts which proximately caused the accident and resulting injuries, and [whether] the defendant had acted in 'reckless indifference to the interest of others.' ''[173]

The court presented a hypothetical to illustrate its point.[174] A driver, who had consumed enough alcohol to render himself intoxicated, was returning home from a New Year's office party.[175] The driver was aware that his brakes were not in good working order and that they had needed repair for several months.[176] As the driver approached a stop sign, his brakes failed and he rear-ended a car, causing injuries to the individuals ahead of him.[177] If a

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165. *Id.* at ____, 565 P.2d at 882. The court of appeals held "that voluntary intoxication on the part of the operator of a motor vehicle involved in an accident proximately caused by his negligent operation of the vehicle constitutes a reckless disregard for the safety of others." *Id.*

166. *See, e.g.,* Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976) (driving while intoxicated is considered reckless).

167. *Smith,* 115 Ariz. at ____, 564 P.2d at 903 (court of appeals did not properly state the law).

168. *Id.* (driving while intoxicated is a violation of § 28-692 of the Arizona Revised Statutes). *See* ARIZ. REV. STAT. ANN. § 28-692 (1982).

169. *Smith,* 115 Ariz. at ____, 564 P.2d at 903.

170. *Id.* The plaintiff must show by the greater weight of the evidence that the act, which is negligent per se, is the proximate cause of his or her injury. *Id.*

171. *Id.*

172. *Id.* The court cited the Restatement (Second) of Torts § 908 comment b to define outrageous conduct. *Id.* For the text of § 908, see *supra* note 33.

173. *Smith,* 115 Ariz. at ____, 564 P.2d at 904. The punitive damages issue involves a question of fact, which should properly remain with the jury. *Id. See also* Ross v. Clark, 35 Ariz. 60, 274 P. 639 (1929) (punitive damages awarded when taxicab driver sped through crowds and drove on the wrong side of the road).

174. *Smith,* 115 Ariz. at ____, 564 P.2d at 904.

175. *Id.*

176. *Id.*

177. *Id.*

reasonable and prudent person would have repaired the brakes, the driver may be negligent for failing to maintain his automobile in a safe condition.[178]

In that hypothetical, the brake failure caused the accident, rather than the driver's intoxication.[179] If a plaintiff were to allege that the driver's intoxication caused the accident, his claim for punitive damages would fail because the intoxication was not the proximate cause of his injuries.[180]

In vacating the decision of the court below, the Arizona Supreme Court stated that negligence and intoxication do not equal recklessness in all cases.[181] Such an inference "eliminates the necessity of showing proximate cause and makes a driver, who has had some alcoholic beverage previous to driving, an insurer in strict liability for punitive damages, whether or not the consumption of alcohol has anything whatever to do with a subsequent accident."[182] The *Smith* court found that under Arizona tort law, such an inference was not permissible.[183]

Arizona,[184] California,[185] Florida,[186] and Kansas[187] are the only jurisdictions that have expressly addressed the issue of causation in drunken driver cases. Of these jurisdictions, Arizona provides the most thorough analysis of the causation problem.[188] Although the California Supreme Court has not analyzed the issue, the California Legislature has adopted a statutory provision providing that "the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person."[189] Therefore, the plaintiff is relieved of proving causation.

The discussion of causation is somewhat confusing in *Ingram v. Pettit.*[190] In *Ingram* the Florida Supreme Court held that "juries may award punitive damages where voluntary intoxication is involved in an automobile accident . . . without regard to external proof of

178. *Id.*
179. *Id.*
180. *Id.* (failure to show that the intoxication contributed to the cause of the accident will result in a directed verdict for the defendant).
181. *Id.* at ____, 564 P.2d at 903. *Cf.* Anderson v. Morgan, 73 Ariz. 344, 241 P.2d 786 (1952) (defendant's intoxication was not the proximate cause of the accident).
182. 115 Ariz. at ____, 564 P.2d at 903.
183. *Id.* (whether negligence is the proximate cause of an injury is a question of fact for the jury).
184. *See* Smith v. Chapman, 115 Ariz. 211, 564 P.2d 900 (1977).
185. Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).
186. Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976).
187. Gesslein v. Britton, 175 Kan. 661, 266 P.2d 263 (1954).
188. *See Smith,* 115 Ariz. at ____, 564 P.2d at 903-04.
189. CAL. CIV. CODE § 1714(b) (West Supp. 1983).
190. 340 So. 2d 922 (Fla. 1976). *See* Case Comment, *Negligent Intoxicated Driver Liable for Punitive Damages Without Proof of Abnormal or Reckless Driving,* 6 FLA. ST. U.L. REV. 221 (1978). *See generally* Comment, *supra* note 21, at 133-38 (discussion of causation in cases involving punitive damages and drunken drivers).

carelessness or abnormal driving."[191] A plaintiff, however, must establish proximate cause and prove that he is entitled to compensatory damages.[192]

Dissenting Justice Sundberg argued that this holding, in fact, imposed strict liability upon the intoxicated driver.[193] The dissent noted that to find the defendant liable, the plaintiff need only prove that the accident occurred and present evidence of the defendant's intoxication.[194] Although the majority in *Ingram* holds that proof of causation is necessary,[195] they also state that "driving 'while intoxicated' evinces, without more, a sufficiently reckless attitude for a jury to . . . award . . . punitive damages if it determines liability exists for compensatory damages."[196] The first statement appears to require proof that the intoxication caused the accident, while the latter requires only proof of intoxication.[197]

The Florida Supreme Court has not expressly resolved the issue of causation. In *Nales v. State Farm Mutual Automobile Insurance Co.*,[198] however, an appellate court stated that "punitive damages are recoverable in automobile accident cases, and specifically may be awarded where voluntary intoxication is involved."[199] The court of appeals did not address the issue of causation.[200] The Florida Supreme Court subsequently denied the petition for review.[201]

Although the issue of causation remains unclear in Florida, the Kansas Supreme Court firmly established its punitive damages rule

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191. Ingram v. Pettit, 340 So. 2d 922, 924 (Fla. 1976).

192. *Id.* at 924. The court also stated, "We do not hold that intoxication coupled with negligence will always justify an award of punitive damages." *Id.*

193. *Id.* at 926 (Sundberg, J., dissenting).

194. *Id.* The dissent stated that the "intoxicated driver becomes an insurer, to the full extent of punitive damages, irrespective of any showing that his conduct in the operation of the automobile fell below that standard of care which is expected of a reasonable, prudent [person] under similar circumstances." *Id.*

195. *Id.* at 924.

196. *Id.* The majority holding is based upon the policy consideration that drunken drivers are a menace to the public and should be discouraged by punishment. *Id.* at 925.

197. *Id.* at 926. (Sundberg, J., dissenting). Justice Sundberg stated:

> The majority opinion extends the strict liability concept to the recovery of punitive damages, but says that the traditional elements such as proximate causation and an underlying award of compensatory damages must still be proved. But what does this mean — that the accident caused injury or that the intoxication, without more, caused the accident to occur?

Id.

198. 398 So. 2d 455 (Fla. Dist. Ct. App.), *petition for review denied,* 408 So. 2d 1092 (Fla. 1981).

199. Nales v. State Farm Mut. Auto. Ins. Co., 398 So. 2d 455, 456 (Fla. Dist. Ct. App.) (plaintiff sought a punitive damage award even though he was subject to the Florida no-fault law and could not receive compensatory damages), *petition for review denied,* 408 So. 2d 1092 (Fla. 1981).

200. 398 So. 2d at 456. Although the court did not award compensatory damages, it did award punitive damages. *Id.*

201. 408 So. 2d 1092 (Fla. 1981).

in *Gesslein v. Britton.*[202] In *Gesslein* the plaintiff merely alleged that the defendant acted wantonly, wrongfully, and recklessly.[203] The plaintiff did not allege that the defendant's intoxication caused him to drive on the wrong side of the road or caused him to fail to keep his vehicle under proper control.[204] The court found that the plaintiff's allegation was only descriptive in nature and did not establish facts to support a claim for punitive damages.[205] Therefore, the court denied the plaintiff's claim for punitive damages because the plaintiff failed to establish causation.[206]

In sum, few courts specifically address the issue of causation. The *Gesslein* case, however, demonstrates the importance of alleging and proving proximate cause. To avoid a denial of punitive damages, a plaintiff should allege that the defendant's intoxication caused the negligent acts. Proof of abnormal or careless driving would also assist in his or her case.

2. Awareness of the Consequences

Because the California Legislature recognizes that the "consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person,"[207] the court did not dwell on the issue of causation in *Taylor v. Superior Court.*[208] Rather, the court took a novel approach to the issue of drunken drivers and punitive damages by emphasizing the foreseeability of harm that would follow from the act of drinking and driving.[209]

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202. 175 Kan. 661, 664, 266 P.2d 263, 265 (1954).

203. Gesslein v. Britton, 175 Kan. 661, 663, 266 P.2d 263, 265 (1954). The plaintiff's petition alleged the following:

> At said time and place, said defendant, while under the influence of intoxicating liquor and without regard to the safety of plaintiff, wrongfully, wantonly and recklessly drove his automobile upon the wrong side of the highway and into and against the automobile in which plaintiff was riding, by which plaintiff is entitled to punitive damages in the sum of $5,000.00.

Id. at 662, 266 P.2d at 264.

204. *Id.* at 664, 266 P.2d at 265. The court stated that the plaintiff must allege facts showing gross and wanton negligence. *Id.*

205. *Id. Wantonly, recklessly,* or *wrongfully* are words that merely state a conclusion and cannot substitute for facts disclosing that type of conduct. *Id.*

206. *Id.* at 663-64, 266 P.2d at 265. The allegations in the plaintiff's petition failed to state a cause of action for punitive damages. *Id.*

207. CAL. CIV. CODE § 1714(b) (West 1978).

208. 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).

209. Taylor v. Superior Court, 24 Cal. 3d 890, 895-96, 598 P.2d 854, 856, 157 Cal. Rptr. 693, 696 (1979). A wealth of legal writing resulted from the *Taylor* decision. *See* Note, *Taylor v. Superior Court: Punitive Damages for Nondeliberate Torts — The Drunk Driving Context,* 68 CALIF. L. REV. 911 (1980); Note, *Punitive Damages and the Intoxicated Driver: An Approach to Taylor v. Superior Court,* 31 HASTINGS L. J. 307 (1979); Comment, *Punitive Damages and the Drunken Driver,* 8 PEPPERDINE L. REV.

The *Taylor* decision is particularly significant in the area of punitive damages and drunken drivers because it overruled[210] the California Court of Appeals' decision in *Gombos v. Ashe.*[211] The *Gombos* court held that punitive damages were not allowed in drunken driver cases in California.[212]

In *Gombos* a California appellate court stated that "[o]ne who becomes intoxicated, knowing he intends to drive his automobile on the highway, is of course negligent, and perhaps grossly negligent. It is a reckless and wrongful and illegal thing to do. But it is not a malicious act."[213] Merely characterizing a defendant's conduct as reckless, wrongful, or illegal did not establish the element of actual malice required by California courts in 1958.[214]

In *Taylor,* decided in 1979, the California Supreme Court held that the element of malice was fulfilled by showing the defendant's conscious disregard for the safety of others.[215] Conscious disregard exists when the defendant is "aware of the probable dangerous consequences of his conduct, [but] he wilfully and deliberately fail[s] to avoid those consequences."[216]

The plaintiff in *Taylor* presented evidence of the defendant's history of alcoholism and prior arrests and convictions for drunken driving to show that defendant Stille knew of the safety hazard he created when driving while intoxicated.[217] The court stated that it was not necessary to present this evidence, although these facts would serve to heighten the foreseeability and probability of an accident.[218] The court did not elaborate on what facts must be

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117 (1980); Case Comment, *Punitive Damages Properly Awarded Against Intoxicated Drivers — Taylor v. Superior Court,* 20 SANTA CLARA L. REV. 1013 (1980); Case Comment, *California Supreme Court Permits Punitive Damage Claim Against Intoxicated Driver,* 2 WHITTIER L. REV. 775 (1980). *But see* Note, *Malice in Wonderland: Taylor v. Superior Court,* 8 SAN FERN. V.L. REV. 219 (1980).

210. *Taylor,* 24 Cal. 3d at 900, 598 P.2d at 859, 157 Cal. Rptr. at 699.

211. 158 Cal. App. 2d 517, 322 P.2d 933 (Ct. App. 1958).

212. Gombos v. Ashe, 158 Cal. App. 2d 517, 527, 322 P.2d, 933, 940 (Ct. App. 1958). In *Gombos* the plaintiff alleged that the defendant was "knowingly and wilfully intoxicated" and that he drove recklessly with "absolute disregard and callous indifference to the rights and safety" of others. *Id.* at ____, 322 P.2d at 939. The court held, however, that no express or implied malice existed. *Id.* (quoted in *Taylor,* 24 Cal. 3d at 856, 598 P.2d at 857, 157 Cal. Rptr. at 696).

213. *Gombos,* 158 Cal. App. 2d at 527, 322 P.2d at 940.

214. *Taylor,* 24 Cal. 3d at 896, 598 P.2d at 857, 157 Cal. Rptr. at 696-97 (quoting *Gombos,* 158 Cal. App. 2d at 527, 322 P.2d at 940).

215. *Taylor,* 24 Cal. 3d at 895, 598 P.2d at 856, 157 Cal. Rptr. at 696. Quoting Dean Prosser, the court stated that punitive damages would be allowed when there are "circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton." *Id.* at 894-95, 598 P.2d at 856, 157 Cal. Rptr. at 696 (emphasis omitted) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971)).

216. *Taylor,* 24 Cal. 3d at 896-97, 598 P.2d at 856, 157 Cal. Rptr. at 696 (showing of conscious disregard justifies an award of punitive damages).

217. *Id.* at 896, 598 P.2d at 857, 157 Cal. Rptr. at 697. The court stated that the combination of drinking and driving was "lethal whether or not the driver had a prior history of drunk driving incidents." *Id.* at 897, 598 P.2d at 857, 157 Cal. Rptr. at 697.

218. *Id.* at 896, 598 P.2d at 857, 157 Cal. Rptr. at 697.

presented to uphold a finding of awareness of the potential harm; rather, the *Taylor* court merely stated that driving after drinking was a commonly understood risk.[219]

To counter the allegation of awareness, Stille argued that his alcoholism rendered his drinking involuntary and that the court should not punish him because he lacked sufficient wilfulness to control his conduct.[220] The court's response to Stille's argument was that volition or wilfulness is a question of fact for the jury.[221]

The *Taylor* court summarized its holding by stating that "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 demonstrates, . . . 'a conscious and deliberate disregard of the interests of others.' "[222] The court's holding eliminates the plaintiff's requirement of proving actual malice.[223] The plaintiff, however, still must show that the defendant became voluntarily intoxicated, that he was aware of the risk created by his conduct, and that the defendant knew he would drive after becoming intoxicated when he began consuming alcohol.[224] Once the plaintiff presents this evidence, the jury may infer from these facts that the defendant exhibited a conscious disregard for the safety of others.[225]

In sum, the courts in Arizona, California, and Montana have increased the burden of proof for obtaining punitive damages in an alcohol related accident beyond that found in any other

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219. *Id.* at 896-97, 598 P.2d at 857, 157 Cal. Rptr. at 697. *See* Comment, *Taylor v. Superior Court: Punitive Damages for Nondeliberate Torts — The Drunk Driving Context*, 68 CALIF. L. REV. 911, 919 (presumption that all drunken drivers are a safety hazard should be rebuttable).

220. *Taylor*, 24 Cal. 3d at 899, 598 P.2d at 859, 157 Cal. Rptr. at 699. *See also* Infeld v. Sullivan, 151 Conn. 506, 199 A.2d 693 (1964). The theory that a defendant, because of his intoxication, did not possess the requisite state of mind was rejected by the Connecticut Supreme Court. *Id.* at ____, 199 A.2d at 695. The court held that the defendant was able to exercise a conscious choice in deciding whether to drive after drinking. *Id.*

221. *Taylor*, 24 Cal. 3d at 899, 598 P.2d at 859, 157 Cal. Rptr. at 699.

222. *Id.* (quoting W. PROSSER, *supra* note 36, § 2, at 10).

223. *Taylor*, 24 Cal. 3d at 896, 598 P.2d at 857, 157 Cal. Rptr. at 697.

224. *Id.* at 899, 598 P.2d at 859, 157 Cal. Rptr. at 699. *See also* Allers v. Willis, ____ Mont. ____, 643 P.2d 592 (1982) (court adopted the holding in *Taylor* to make an award of punitive damages available in Montana).

225. *Taylor*, 24 Cal. 3d at 897, 598 P.2d at 857, 157 Cal. Rptr. at 697. Section 3294 of the California Civil Code, which authorizes an award of punitive damages, was amended after the *Taylor* decision. Prior to the amendment the statute provided:

> 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.

CAL. CIV. CODE § 3294 (West 1970) (amended 1980). After *Taylor* the words "express or implied" were deleted and a definition of malice was provided: "Malice means conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others." *See id.* (West Supp. 1983).

jurisdiction. Although the requirements in these states may appear to impose an unduly heavy burden of proof upon the plaintiff, these courts recognize the need for proper safeguards against frivolous claims.[226]

D. DENIAL OF PUNITIVE DAMAGES

The majority of courts hold that punitive damages in a drunken driver case are permissible. A minority of jurisdictions, however, deny the award and hold that the act of driving while intoxicated does not constitute an intentional or malicious act.[227] These cases, however, are distinguishable because little or no alcohol was consumed by the defendant prior to the accident.[228]

In Maryland the court held in *Davis v. Gordon*[229] that punitive damages were not allowed because no malice or evil intent existed.[230] The court noted, however, that no evidence of intoxication was presented by the plaintiff.[231] The court also stated that the rules of the road were better regulators of safety than inflammatory verdicts.[232] A federal court later relied on the *Davis* case to deny punitive damages even though evidence of intoxication was presented by the plaintiff.[233]

An Oklahoma court denied the defendant's request for punitive damages in his cross-petition because no malice or evil

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226. For a discussion of burdens of proof in Arizona, California, and Montana, see *supra* notes 161-225 and accompanying text.

227. Jurisdictions that deny an award of punitive damages include: Indiana (*see* Thompson v. Pickle, 136 Ind. App. 139, 191 N.E.2d 53 (Ct. App. 1963) (driving while intoxicated is not sufficient to constitute willful or wanton misconduct)); new Hampshire (*see* Johnsen v. Fernald, 120 N.H. 440, 416 A.2d 1367 (1980) (act of driving while under the influence is not actual malice)); North Carolina (*see* Brake v. Harper, 8 N.C. App. 327, 174 S.E.2d 74 (Ct. App. 1970) (wantonness connotes intentional wrongdoing)); Oklahoma (*see* Ruther v. Tyra, 207 Okla. 112, 247 P.2d 964 (1952) (no malice or evil intent found)); Texas (*see* Sears Roebuck & Co. v. Jones, 303 S.W.2d 432 (Tex. 1957) (no evidence of malice)); Virginia (*see* Baker v. Markus, 201 Va. 905, 114 S.E.2d 617 (1960) (no evidence of criminal indifference or conscious disregard of the rights of others)). *See also* Note, *The Drinking Driver and Punitive Damages*, 7 WAKE FOREST L. REV. 528 (1971) (discussing the North Carolina case *Brake v. Harper*).

Three other jurisdictions have denied punitive damages on other grounds: Kansas (*see* Gesslein v. Britton, 175 Kan. 661, 266 P.2d 263 (1954) (plaintiff failed to establish causation)); Maryland (*see* Davis v. Gordon, 183 Md. 129, 36 A.2d 699 (1944) (no malice or evil intent found)); Michigan (*see* McLaren v. Zeilinger, 103 Mich. App. 22, 302 N.W.2d 583 (Ct. App. 1981) (exemplary damages not allowed in automobile accident cases)).

228. *E.g.*, Davis v. Gordon, 183 Md. 129, ____, 36 A.2d 699, 700 (1944).

229. 183 Md. 129, 36 A.2d 699 (1944).

230. *Id.* at ____, 36 A.2d at 700. To receive an award of punitive damages, the plaintiff must show an element of fraud, malice, or evil intent. *Id.* at ____, 36 A.2d at 701.

231. *Id.* at ____, 36 A.2d at 700.

232. *Id.* at ____, 36 A.2d at 701. The fear of arrest is a better deterrent than a damage award. *Id.*

233. Giddings v. Zellan, 160 F.2d 585, 585 (D.C. Cir. 1947). The evidence showed that the defendant staggered and that his speech was confused. *Id.* The *Giddings* court relied on Maryland law to reach its decision. *Id.* at 587. Hence, this case is not binding in either Maryland or the District of Columbia.

intent was found.[234] The plaintiff admitted consuming one can of beer prior to the accident; the jury, however, did not find that the plaintiff was under the influence of intoxicating liquor.[235] In a North Carolina case a highway patrolman testified that, in his opinion, the defendant was under the influence of alcohol, but the patrolman could not remember the results of the breathalyzer test.[236] In a Virginia case the defendant admitted taking two drinks of vodka.[237] The police, however, concluded that her intoxication was a "borderline case" and therefore, only charged her with reckless driving.[238]

A Michigan court denied an award of punitive damages because exemplary damages are not allowed in automobile accident cases even when the plaintiff proves gross negligence.[239] The New Hampshire Supreme Court has held that a plaintiff must establish actual malice to support an award of punitive damages.[240] The court noted, however, that the legislature was free to impose statutory punitive liability upon drunken drivers.[241]

Although several courts deny awards of punitive damages on the grounds that the act of drinking and driving is not a malicious act, this rationale may be attributed to the existence of mitigating circumstances.[242] The court's reluctance to award punitive damages is probably based on the defendant's lack of intoxication or low level of drunkenness.

IV. LIABILITY OF DRUNKEN DRIVERS FOR PUNITIVE DAMAGES IN NORTH DAKOTA

The North Dakota courts have not addressed the issue of punitive damages in drunken driver cases. Thus far, the courts use only criminal sanctions to penalize drunken drivers.[243] In North

234. Ruther v. Tyra, 207 Okla. 112, ____, 247 P.2d 964, 969 (1952).

235. *Id.* at ____, 247 P.2d at 968.

236. Brake v. Harper, 8 N.C. App. 327, ____, 174 S.E.2d 74, 75 (Ct. App. 1970). The officer recalled that the blood alcohol content was less than 0.10%. *Id. See also* Note, *Damages — The Drinking Driver and Punitive Damages,* 7 WAKE FOREST L. REV. 528 (1971) (discusses *Brake* case).

237. Baker v. Marcus, 201 Va. 905, 907, 114 S.E.2d 617, 619 (1960).

238. *Id.* at 910, 114 S.E.2d at 621. The court stated that the defendant's "conduct may have been partly due to intoxicants." *Id.*

239. McLaren v. Zeilinger, 103 Mich. App. 22, ____, 302 N.W.2d 583, 585 (Ct. App. 1981) (exemplary damages are compensatory in nature and are properly a part of actual damages).

240. Johnsen v. Fernald, 120 N.H. 440, ____, 416 A.2d 1367, 1368 (1980) (plaintiff must show ill will, hatred, hostility, or evil motive).

241. *Id.*

242. *See, e.g., Baker,* 201 Va. at 910, 114 S.E.2d at 621.

243. *See* N.D. CENT. CODE § 39-08-01 (Supp. 1981). Section 39-08-01 provides:

> 1. No person shall drive or be in actual physical control of any vehicle upon a

Dakota driving under the influence of intoxicating liquor is a misdemeanor carrying a minimum penalty of either three days in jail, a fine of one hundred dollars, or both.[244] An offender may have his driver's license suspended for one month.[245] Furthermore, once an offender has been convicted, the court may order the motor vehicle license plates impounded for the duration of the suspension.[246] The court also has the option of sentencing the

> highway or upon public or private areas to which the public has a right of access for vehicular use in this state if:
> . . . .
> b. He is under the influence of intoxicating liquor;
> . . . .
> 2. A person violating any provision of this section is guilty of a class B misdemeanor for the first conviction in a twenty-four-month period, and of a class A misdemeanor for the second conviction in a twenty-four-month period. The minimum penalty for such violation shall be either three days in jail or a fine of one hundred dollars, or both such fine and imprisonment.

Id. The 48th Legislative Assembly of the State of North Dakota amended the statutes pertaining to driving while intoxicated offenses. The amendments take effect July 1, 1983. The amendments to § 39-08-01 include: a first or second conviction within a five year period will be a class B misdemeanor, a later conviction within a five year period will be a class A misdemeanor, and a fourth or subsequent violation within a seven year period will be a class A misdemeanor.

The amendments to § 39-08-01 also change the minimum penalties applicable to driving while intoxicated offenses. For a first offense, the sentence must include both a fine of at least $250 and referral for addiction evaluation. For a second offense within five years, the sentence must include at least four days imprisonment or ten days of community service, a fine of at least $500, and referral for addiction evaluation. The third offense within a five year period requires a sentence of at least 60 days imprisonment, a fine of $1000, and referral for addiction evaluation. For a fourth conviction within seven years, the sentence must include 180 days imprisonment and a fine of $1000. These penalties are mandatory minimum sentences.

Only violations occurring after July 1, 1981, will be considered in determining the number of offenses under the amendments. S. 2373, 48th Leg., ____ N.D. Sess. Laws ____, *amending* N.D. CENT. CODE § 39-08-01 (Supp. 1981).

The North Dakota Legislature also created a new subsection to § 39-06.1-10 that mandates penalties for failing to enroll in an addiction treatment program. Following addiction evaluation under § 39-08-01, if the offender receives notification from the commissioner to enroll in an addiction treatment program and fails to enroll within 30 days of notification, the court shall suspend the offender's driver's license as follows: The suspension for the first violation within a five year period must be at least 180 days; the suspension for a second offense within a five year period must be at least one year; the suspension for a third offense within a five year period must be at least two years. If an offender has a fourth conviction within seven years, the license can only be restored after the offender completes addiction treatment and has had no alcohol or drug-related offenses for two consecutive years after completion of treatment. S. 2373, 48th Leg., ____ N.D. Sess. Laws ____ (created new subsection to N.D. CENT. CODE § 39-06.1-10 (Supp. 1981)).

244. N.D. CENT. CODE § 39-08-01(2). For the first conviction in a 24 month period, the defendant is guilty of a class B misdemeanor; for the second conviction in a 24 month period, the violation is a class A misdemeanor. *Id.* For the applicable amendments to § 39-08-01, see *supra* note 243.

245. N.D. CENT. CODE § 39-06.1-10(3)(b)(5). This section states that upon a conviction for driving while intoxicated, 15 points are assessed against the offender's driver's license. *Id.* Under § 39-06.1-10(2) this assessment results in a license suspension of seven days for each point over 11, once 13 points have been accumulated. The result is a 28 day suspension of the driver's license. *Id.* § 39-06.1-10(2).

Under the 1983 amendments to § 39-06.1-10, 24 points will be assessed if an offender has had no previous driving while intoxicated convictions within a five year period. The amendments thus provide that the suspension for a first offense within a five year period must be for 91 days, which is seven days for each point over 11. A second conviction within a five year period will result in an assessment of 63 points, which results in a suspension of one year. S. 2373, 48th Leg., ____ N.D. Sess. Laws ____, *amending* N.D. CENT. CODE § 39-06.1-10 (Supp. 1981).

246. N.D. CENT. CODE § 39-08-01(4). Section 39-08-01(4) provides:

> Upon conviction, the court may order the motor vehicle number plates of the motor

individual to a treatment facility.[247]

In addition to criminal sanctions, North Dakota courts may impose civil penalties upon drunken drivers who cause personal injury to another person. The courts may impose these civil penalties based on the tort[248] and punitive damage[249] statutes of the North Dakota Century Code. An examination of various areas of the law reveals whether an award of punitive damages is feasible in a case involving drunken drivers in North Dakota. This analysis focuses upon the elements of a tort and a determination of the requisite state of mind that will support an award of punitive damages.

A. LIABILITY IN TORT: BREACHING THE DUTY OF CARE

Before negligence becomes actionable in North Dakota, the plaintiff must show the "existence of a duty or obligation on the part of one to protect another from injury, the failure to discharge that duty, and resulting injury to another proximately caused by the breach of duty."[250] This requirement thus has four elements: a

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vehicle owned and operated by the offender at the time of the offense to be impounded . . . for the duration of the period of suspension of the offender's driver's license or driving privilege by the licensing authority.

Id.

247. *Id.* § 39-08-01(5). Section 39-08-01(5) provides:

> The court may, upon a conviction of a person under this section, but prior to sentencing, refer the person to an addiction facility licensed by the North Dakota state department of health for diagnosis. Upon receipt of the results of this diagnosis, the court may impose a sentence as prescribed in this section or it may sentence the person to treatment in a facility approved by the North Dakota department of human services.

Id. Under the 1983 amendments the sentence must include referral for addiction evaluation. *See supra* note 243.

248. N.D. CENT. CODE § 9-10-06 (1975). Section 9-10-06 provides:

> Everyone is responsible not only for the result of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person. The extent of the liability in such case is defined by sections 32-03-01 to 32-03-19, inclusive.

Id.

249. *Id.* § 32-03-07 (Supp. 1981). Punitive damages are defined as follows:

> In any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

Id.

250. Carlson Homes, Inc. v. Messmer, 307 N.W.2d 564, 566 (N.D. 1981) (negligence in landscaping). The court in *Carlson* imposed a duty to protect another person from injury. *Id.* A plaintiff could argue that given the statistical probability of an automobile accident involving a drunken driver, one who drinks and drives has breached his or her duty to protect other persons from injury.

duty, a breach of that duty, proximate cause, and damage or injury.[251]

To establish the first element, the plaintiff must show that the defendant owed a duty to the plaintiff to "refrain from injurious conduct."[252] Conduct that is merely improper or violates a moral right differs from a legal right imposed by law.[253] A moral wrong is not a tort unless a defendant violates a legal right or duty.[254]

Section 39-08-01 of the North Dakota Century Code[255] imposes on every driver a duty to refrain from driving while intoxicated.[256] The purpose of section 39-08-01 is to deter intoxicated persons from driving.[257] When an intoxicated person attempts to drive an automobile, he or she has violated a statutory duty to refrain from driving while intoxicated.[258]

Although section 39-08-01 establishes a duty, the plaintiff must also show that the defendant owed that duty to the plaintiff.[259] The injured party must be a member of the class the statute is intended to protect.[260] If he or she is not a member, the defendant owes no duty to that person.[261]

To determine whether the defendant owes a duty to the plaintiff requires an examination of the public policy underlying the statute prohibiting drinking and driving. In imposing civil liability stemming from a criminal violation, such as driving while intoxicated, courts are enforcing the policy or purpose underlying the statute.[262] The North Dakota Supreme Court recognized that "one who has been drinking intoxicating liquor should not be encouraged to test his driving ability on the highway, even for a short distance, *where his life and the lives of others hang in the balance.*"[263]

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251. W. PROSSER, *supra* note 36, § 30, at 143. *See also* RESTATEMENT (SECOND) OF TORTS § 281 (1979) (elements of a claim for negligence).

252. Vasichek v. Thorsen, 271 N.W.2d 555, 561 (N.D. 1978) (citing Moum v. Maercklein, 201 N.W.2d 399, 402 (N.D. 1972)).

253. Clairmont v. State Bank of Burleigh County Trust Co., 295 N.W.2d 154, 158 (N.D. 1980) (bank assumed a duty by informing a client that a deposit was made in his account).

254. *Id.*

255. *See* N.D. CENT. CODE § 39-08-01 (1) (b) (Supp. 1981) (prohibits driving while intoxicated).

256. *Id.*

257. State v. Ghylin, 250 N.W.2d 252, 255 (N.D. 1977) (an intoxicated driver is a threat to the safety of the public).

258. *See* N.D. CENT. CODE § 39-08-01 (1) (b) (Supp. 1981); W. PROSSER, *supra* note 36, § 36, at 190 (statutes fix standards for all members of the community).

259. *Clairmont,* 295 N.W.2d at 158 (to constitute a tort, a legal right or duty must exist in favor of the plaintiff). *See also* W. PROSSER, *supra* note 36, § 36 at 192-93 (whether a statute may be construed to include plaintiff as a member of the protected class).

260. Hennenfent v. Flath, 66 N.W.2d 533, 536 (N.D. 1954).

261. *See id. See also* W. PROSSER, *supra* note 36, § 36, at 192-93.

262. W. PROSSER, *supra* note 36, § 36, at 191. Dean Prosser describes imposition of civil penalties for violations of statutes as judicial legislation in which courts construe the conduct they believe the legislature intended. *Id.*

263. *Ghylin,* 250 N.W.2d at 255 (emphasis added) (action involved actual physical control of the vehicle; defendant was threat to safety merely by sitting behind the wheel).

The court's statement thus suggests that the class of persons section 39-08-01 protects includes the driver and those persons he or she may encounter on the road.[264]

When a plaintiff presents this evidence at trial, proof of a violation of a statutory duty is evidence of negligence, rather than negligence per se.[265] The court's theory underlying this rationale is that a reasonable person obeys the law; therefore, one who has not obeyed the law is not reasonable and may be negligent.[266] A plaintiff fulfills the first two elements of a negligence claim when he or she establishes that a person, who has a duty to refrain from driving while intoxicated, disregards that duty.

The third element of an actionable negligence claim requires the plaintiff to prove that the defendant's negligent act proximately caused the resulting injuries.[267] The " '[p]roximate cause' of an injury is a cause which in natural and continuous sequence, unbroken by any controlling, intervening cause, produces injury, and without which it would not have occurred."[268]

Another aspect of proximate cause requires that the defendant reasonably foresee the probable results of his or her act.[269] An injury is not actionable if it is not foreseeable or reasonably anticipated as a probable result of the act.[270] Courts hold the defendant to the standard of an ordinarily prudent person.[271] If a reasonable or ordinarily prudent person should have foreseen the probable results of the negligent act, the defendant is liable for the results.[272] Whether the defendant actually foresaw the results is irrelevant.[273] If a person has no knowledgeable or foreseeable grounds to anticipate that his or her actions would result in injury to another, that person is not liable.[274] The North Dakota Supreme

264. *See also* W. PROSSER, *supra* note 36, § 36, at 197 (assumption that a statute includes all risks reasonably anticipated).

265. *See* Nitschke v. Barnick, 226 N.W.2d 785, 788 (N.D. 1975) (violation of the statutory rule of the road); Glatt v. Feist, 156 N.W.2d 819, 828 (N.D. 1968) (pedestrian jaywalking); Renschler v. Baltzer, 95 N.W.2d 574, 576 (N.D. 1959) (violations of statutory rules of the road as evidence of negligence).

266. W. PROSSER, *supra* note 36, § 36, at 191.

267. Arneson v. City of Fargo, 303 N.W.2d 515, 519 (N.D. 1981). *See also* W. PROSSER, *supra* note 36, § 30, at 143.

268. Moum v. Maercklein, 201 N.W.2d 399, 402 (N.D. 1972) (injury must be direct result of negligent breach of duty).

269. *Id.* The issue in *Moum* was whether an employer's request that his employee report to work during a blizzard was negligent and the proximate cause of the plaintiff's injuries. *Id.* at 399. *See also* F-M Potatoes, Inc. v. Suda, 259 N.W.2d 487, 493 (N.D. 1977) (whether bailee was negligent in storing perishable goods).

270. *Moum*, 201 N.W.2d at 402.

271. *E.g., id.* The ordinarily prudent person is one of ordinary intelligence in light of attending circumstances. *Id.*

272. *Id.*

273. *Id.* at 403. One test of proximate cause is foreseeability. *Id.*

274. *Id.*

Court has stated, "The law requires that a person reasonably guard against probabilities — not against all possibilities."[275]

The final element of the claim requires that actual damages or injuries result from the negligent act.[276] To establish a claim, the plaintiff must prove that he or she suffered injuries or damages by the defendant's act.[277]

Applying this tort analysis to a drunken driver case, the plaintiff must establish that the defendant's act of driving while intoxicated is negligent. To prove negligence the plaintiff must show that the defendant owed the plaintiff a duty to refrain from driving while intoxicated and that the defendant breached that duty.

The plaintiff must then prove that the negligent act proximately caused the plaintiff's injuries. Furthermore, since violation of a statute is not negligence per se in North Dakota, [278] North Dakota courts are unlikely to follow other states, such as Florida, that find the act of driving while intoxicated presumptively reckless conduct.[279]

An alternative approach is to show that the defendant's intoxication caused him or her to drive in a reckless manner.[280] Showing that the plaintiff's injuries are the natural and probable consequences of the defendant's intoxication would require evidence, for example, that the defendant was driving recklessly,[281] in the wrong lane,[282] or at an excessive and uncontrollable speed.[283] The plaintiff should not merely allege that the act of driving while intoxicated is reckless, rather he or she should allege facts that establish negligent driving.[284]

The plaintiff also must show that the defendant should have foreseen the probability that his drunkenness would impair his driving.[285] The plaintiff, however, need not establish that the

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275. *Id.*

276. *Arneson,* 303 N.W.2d at 519. *See also* W. PROSSER, *supra* note 36, § 30, at 143.

277. *Arneson,* 303 N.W.2d at 519. *See also* W. PROSSER, *supra* note 36, § 30, at 143.

278. *See, e.g.,* Glatt v. Feist, 156 N.W.2d 819, 829 (N.D. 1968).

279. *See* Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976) (driving while intoxicated itself supports an award of punitive damages).

280. *See, e.g.,* Smith v. Chapman, 115 Ariz. 211, 564 P.2d 900 (1977) (intoxication must be proximate cause of injuries).

281. *See, e.g.,* Madison v. Wigal, 18 Ill. App. 2d 564, 153 N.E.2d 90 (App. Ct. 1958) (recklessness inferred from defendant driving in the wrong lane).

282. *See, e.g.,* Walczak v. Healy, 280 A.2d 728 (Del. Super. Ct. 1971) (aggravating circumstances shown).

283. *See, e.g.,* Collins v. Black, ___ Miss. ___, 380 So. 2d 241 (1980) (circumstances of the accident support an award).

284. *See, e.g.,* Gesslein v. Britton, 175 Kan. 661, 266 P.2d 263 (1954) (punitive damages denied for failure to state a claim).

285. *See Moum,* 201 N.W.2d at 403. *See also* Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (defendant must be aware of the probable consequences of his act).

defendant himself was able to reasonably foresee an accident resulting in injuries.[286] If a reasonably prudent person could anticipate that the consumption of alcoholic beverages to the point of intoxication is likely to result in an accident, liability will follow.[287]

B. PROVING MALICE IN NORTH DAKOTA

Once the plaintiff has established liability for actual damages by proving the elements of a tort, North Dakota law permits an award of punitive damages.[288] In North Dakota, courts award punitive damages when a defendant is guilty of oppression, fraud, or malice in a breach of an obligation not arising from a contract.[289] The legislature has stated that the award is for the sake of example and for the punishment of the defendant.[290]

In an early assault and battery case in North Dakota, the court stated that actual malice involves personal hatred or ill will of one person to another.[291] The court noted that presumed or implied malice, which will also support an award of punitive damages, refers to a state of mind that reflects a reckless attitude toward the law and the legal rights of another citizen.[292] While malice means a wish to vex, annoy, or injure another person, courts have not limited it to ill will or hatred.[293] Presumed malice exists when a defendant's conduct is unjustifiable or when his wrongful act is done intentionally without just cause or excuse.[294]

In *Dahlen v. Landis*[295] the North Dakota Supreme Court addressed the issue of the defendant's state of mind in relation to punitive damages.[296] The court did not require direct evidence of a person's mental state.[297] Rather, the court stated that it may look to the character of the act and its surrounding circumstances to

286. *See Moum*, 201 N.W.2d at 403.
287. *Id.*
288. *See* N.D. CENT. CODE § 32-03-07 (1976) (punitive damages allowed in addition to actual damages).
289. *Id.*
290. *Id.*
291. Shoemaker v. Sonju, 15 N.D. 518, 524, 108 N.W. 42, 44 (1906) (assault and battery). *See also*, Kerzmann v. Rohweder, 321 N.W.2d 84 (N.D. 1982) (fraud); Dahlen v. Landis, 314 N.W.2d 63 (N.D. 1981) (assault and battery); Remmick v. Mills, 165 N.W.2d 61 (N.D. 1969) (action for conversion of hay); Neidhardt v. Siverts, 103 N.W.2d 97 (N.D. 1960) (action for conversion of hay).
292. *Shoemaker*, 15 N.D. at 524, 108 N.W. at 44.
293. *Remmick*, 165 N.W.2d at 71 (malice need not be directed against the plaintiff).
294. *Id.*
295. 314 N.W.2d 63 (N.D. 1981).
296. Dahlen v. Landis, 314 N.W.2d 63, 69 (N.D. 1981) (citing *Neidhart*, 103 N.W.2d at 102.)
297. 314 N.W.2d at 69.

determine the actor's motive or purpose.[298] If the plaintiff shows that the motive is improper and unjustifiable, a finding of maliciousness is proper.[299]

To establish that a drunken driver is liable for punitive damages, a plaintiff should attempt to show presumed or implied malice because personal hatred or ill will usually does not exist between the parties. Presumed or implied malice requires a showing by the plaintiff that the drunken driver recklessly ignored the law or the rights of another citizen.[300]

To determine the motive or purpose underlying the defendant's act, a plaintiff may raise the disputable or rebuttable presumption that an unlawful act is committed with an unlawful intent.[301] A wrongful or improper motive, which is unjustifiable, supports a finding of recklessness.[302]

Alternatively, a court may find recklessness by emphasizing the defendant's disregard or indifference to the consequences of his or her act.[303] A second disputable or rebuttable presumption states that a person intends the ordinary consequences of his or her voluntary act.[304] Therefore, one who attempts to drive while intoxicated may be presumed to intend the consequences of that act. Indifference to those consequences also establishes a wrongful and improper motive that will support an award of punitive

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298. *Id.*

299. *Id. See also Kerzmann,* 321 N.W.2d at 87 n.2 (jury instruction stating that malice includes wrongful and improper motives was proper).

300. *Dahlen,* 314 N.W.2d at 69.

301. N.D. CENT. CODE § 31-11-03(2) (1976). Section 31-11-03(2) provides:

> All presumptions other than those set forth in section 31-11-02 are satisfactory if uncontradicted. They are denominated disputable presumptions and may be contradicted by other evidence. The following are of that kind:
>
> . . . .
>
> (2) That an unlawful act was done with an unlawful intent.

Id. See also N.D. R. EVID. 301 (a). Rule 301 states:

> [I]f facts giving rise to a presumption are established by credible evidence, the presumption substitutes for evidence of the existence of the fact presumed until the trier of fact finds from credible evidence that the fact presumed does not exist, in which event the presumption is rebutted and ceases to operate. A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Id.

302. *Dahlen,* 314 N.W.2d at 69.

303. *Neidhardt,* 103 N.W.2d at 102 (wanton disregard of the rights and interests of the plaintiff constitutes a malicious act).

304. N.D. CENT. CODE § 31-11-03(3) (1976). This section states "[t]hat a person intends the ordinary consequences of his voluntary act." *Id. See also Remmick,* 165 N.W.2d at 72 (citing N.D. CENT. CODE § 31-11-03(3) (1960)).

damages.[305]

Because the surrounding circumstances and the character of the act are proper areas of inquiry for the fact finder to determine the defendant's state of mind,[306] the actual facts of the case may be sufficient to establish reckless conduct.[307] For example, evidence that the defendant drove his or her automobile in a highly irregular manner may constitute reckless driving and, therefore, establish a reckless state of mind.[308] In any event, a plaintiff should not rely on a mere allegation of recklessness without facts to support that claim.[309] Malice is a question of fact for the jury.[310] A failure to allege the relevant facts would undoubtedly lead to a denial of punitive damages.

V. CONCLUSION

As early as 1920 courts awarded punitive damages against a drunken driver. Presently, the vast majority of courts favor imposition of punitive damages in drunken driver cases. While courts in some jurisdictions presume that driving while intoxicated is a reckless act, other courts place a greater burden upon the plaintiff to prove his or her case. These courts require that the plaintiff prove every element of the negligence claim. By requiring proof of proximate cause and the defendant's awareness of the probable consequences of his or her act, courts guard against the imposition of liability in nonmeritorious cases. These requirements also shield defendants from becoming insurers in strict liability for punitive damages. Nevertheless, given the current intolerance for drunken drivers on our highways, it is likely that courts will be particularly receptive to a plaintiff's request for punitive damages.

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305. *Neidhardt,* 103 N.W.2d at 102 (defendant intended to commit the act and knew the act was wrongful when he acted).

306. *Dahlen,* 314 N.W.2d at 69 (in an assault and battery case, the circumstances included the swiftness of the attack, profanity, and repeated blows to the plaintiff).

307. *See, e.g.,* Madison v. Wigal, 18 Ill. App. 2d 564, ____, 153 N.E.2d 90, 95 (App. Ct. 1958) (recklessness inferred from improper driving).

308. *Id.*

309. *Cf.* Gesslein v. Britton, 175 Kan. 661, 266 P.2d 263 (1954) (plaintiff failed to allege that defendant's intoxication caused negligent driving).

310. *Dahlen,* 314 N.W.2d at 69. The *Dahlen* court stated, "Malice in fact or actual malice relates to the actual state of mind of the person who did the act and is a question of fact upon the circumstances of each particular case to be found by the jury." *Id.*