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THE EVIL THAT MEN DO: MALICE AND PUNITIVE DAMAGES

Sometimes, when trying to make things more clear the courts will accomplish the exact opposite. Sanders v. Daniel International Corp. is an excellent example of just that phenomenon. In Sanders, the Supreme Court of Missouri extensively overhauled the concept of malice in the context of a malicious prosecution action. Most notably, it found the theretofore recognized definition of legal malice to be incorrect. It demoted the old definition of "legal malice" to the lowest of a three level system of malice; renaming it "malice in law." The court then redefined legal malice using a definition which required a higher level of culpability. While these new definitions made the law of malice clear, it greatly confused the law of punitive damages.

To award punitive damages, the jury must find the presence of legal malice. After the Sanders decision, however, it is unclear if the old or new standard of legal malice should be used in instructing a jury. Furthermore, the Sanders court expressly refused to deal with the question of where reckless conduct should fit into the scheme of malice. The court has since addressed this issue and it will be addressed later in this comment. First, this comment will examine the Sanders decision and its impact on Missouri law. Next, it will look to the law of other states for guidance in interpreting this new law. Finally, it will suggest how these standards might be applied to the law of punitive damages in Missouri.

The first of these steps is necessary because Sanders has far wider implications than the narrow precedent which it sets in the area of malicious prosecution. The court in no way indicated that it meant for the definitions of malice set forth in Sanders to be limited to actions for malicious prosecution. To the contrary, the court's treatment of malice leads one to the conclusion that a definite statement about the law of malice was being made.

1. 682 S.W.2d 803 (Mo. 1984) (en banc).
2. Sanders changed the law as to the element of malice in malicious prosecution. Formerly, malice was a "phantom element" which could be implied from the lack of probable cause. After Sanders, "legal malice" must be proven. Id. at 810-19. Furthermore, actual malice is now required to support an award of punitive damages. Id. at 814-16.
4. See infra notes 204-18 and accompanying text.
5. 682 S.W.2d at 808.
7. The Court devoted the bulk of its seventeen page opinion to the discussion of malice, discussing the facts of the actual case only marginally.
The second step is useful because at least two of the three degrees of malice set forth in Sanders will be unclear until further interpretation is made by the courts. As with any law, the interpretations of other jurisdictions have powerful persuasive force. Furthermore, a survey of the definitions of malice in other jurisdictions allows one to see where Missouri stands along the continuum of opinion as to the definition of malice.

Malice presents a unique problem in that it intertwines two difficult concepts: state of mind and culpability. When proving malice, one is not proving whether conduct occurred, rather one is proving what a person was thinking about when he or she performed that conduct. Few people provide any direct evidence of their state of mind. Occasionally, a person, much to his later chagrin, will utter some statement such as “I hate him” or “I wish she was dead” or even put such a statement in writing. Usually, malice must be proven by indirect evidence. It is in the case of indirect proof of malice that the definition of malice becomes crucial, for it controls what a jury may consider and what inferences they may draw.

The concept of culpability is difficult because malice may turn otherwise blameless conduct into actionable conduct or impose liability beyond that necessary for compensation. In setting a standard of malice, a court must decide how much bad conduct is required to impose these additional burdens. Here again, the definition of malice will determine what evidence the jury may consider and what inferences they may draw. One area where the definition is critical in this regard is reckless conduct. A court must decide whether to impose liability for grossly negligent conduct or let a man escape liability merely because he did not form any intent.

The Sanders decision recites that the law recognizes three degrees of malice: actual malice, legal malice, and malice in law.

“Actual malice,” as defined by Sanders, is malice “as it is understood in the popular mind” meaning “ill will, spite, personal hatred, or vindictive

8. Until case law develops, the line between actual malice and legal malice and the line between legal malice and malice in law will be unclear. Currently, there exists a wealth of case law describing the boundaries of actual malice and what is now malice in law, but there is little guidance in determining the parameters of the new legal malice.

9. Case law from other jurisdictions may be particularly important since the Sanders court indicated a desire to bring the Missouri law of punitive damages into line with that of the majority of states. 682 S.W.2d at 814.

10. Id. at 807.

11. The presence of malice may turn a citizen’s duty to report crime into malicious prosecution and the presence of malice will open the door to punitive damages.

12. Sanders, 682 S.W.2d at 807.

13. Id.

14. Id. at 808.

15. Id. at 807.
motives." 16 Actual malicious conduct is "evidenced by an attempt to vex, injure, or annoy another." 17 The court added that actual malice is synomous with malice in fact. 18 This definition of actual malice is approximately that given by Black's Law Dictionary. 19

Such a definition of actual malice, however, was almost wholly foreign to Missouri law prior to Sanders. 20 Before Sanders, actual malice was generally found when a defendant with a sedate, deliberate mind and formed design injures another when motivated by spite or ill will in what he says and does with a design to willfully or wantonly injure another. 21 Despite the mention of ill will and spite, the case law seems to concentrate on the deliberate mind language. Although the practical difference between this definition and the Sanders definition may be small, the Sanders decision lowers the level of culpability required for actual malice. 22 Regardless of the effect on the degree of culpability, the decisions following Sanders have uniformly used the Sanders definition without modification. 23

Focusing on the difference between the old and new standards for actual malice, one can see how the elimination of the sedate and deliberate mind language both eliminated problems of proof and lowered the required level of culpability. A sedate and deliberate mind would seem similar to the mental state required for a premeditated act, in the criminal context. 24 As such, a sedate and deliberate mind could not occur instantaneously, and could not be had by a person inflamed by passion. Most conduct which is motivated

16. Id. (citing Peasley v. Puget Sound Tug & Barge Co., 13 Wash. 2d 485, 502, 125 P.2d 681, 689 (1942)).
17. Id. at 807 (citing Davis v. Hearst, 160 Cal. 143, 157, 116 P. 530, 537 (1911)).
18. Id. at 807.
19. Black's Law Dictionary defines actual malice as "[e]xpress malice, or malice in fact." Malice in fact is defined as "[e]xpress or actual malice." It "implies [a] desire or intent of injure." Express malice is defined as "[a]ctual malice[,] malice in fact[,] ill will or wrongful motive. A deliberate intention to commit an injury, evidenced by external circumstances." BLACK'S LAW DICTIONARY 862-63 (5th ed. 1979) [hereinafter BLACK'S].
20. See, e.g., Ozark Wood Indus. v. First Nat'l Bank of Doniphan, 625 S.W.2d 651 (Mo. Ct. App. 1981) (one of the few cases using this standard before Sanders).
22. 682 S.W.2d at 807.
24. See State v. Strickland, 609 S.W.2d 392, 394 (Mo. 1980) (en banc).
by ill will, spite, personal hatred, or vindictive motives occurs on the spur of the moment and/or when those people are inflamed by passion. Thus, by eliminating the sedate and deliberate mind language, the court has expanded the range of conduct which it considers to be actually malicious and necessarily lowers the level of culpability. Furthermore, like all state of mind evidence, proving a sedate and deliberate mind is difficult. Most often, it is proven by the mere passage of time,\footnote{Id.} which may not be probative if that time period can be construed as a festering or stewing period. Thus, by eliminating this language, the court has eliminated one of the problems of proving actual malice.

The second degree of malice discussed in Sanders is legal malice. Sanders stated: “The definition of legal malice has a broader meaning than the popularly understood definition of malice in fact. Malice in its enlarged legal sense embraces any improper or wrongful motive—that is *malo animo.*”\footnote{Id. at 808 (citing Richter v. Neilson, 11 Cal. App. 2d 503, 54 P.2d 54 (1936)); Hugie v. Pennsylvania R.R., 376 Pa. 286, 101 A.2d 740 (1954); Lewis v. Williams, 618 S.W.2d 299 (Tenn. 1981); Yelk v. Seefeldt, 35 Wis. 2d 271, 151 N.W.2d 4 (1967).} The court added that some courts had recognized that conduct which is so reckless or wantonly and willfully in disregard of one’s rights that a trier of fact could infer from such conduct bad faith or “*malo animo*” could also constitute legal malice.\footnote{Black’s Law Dictionary defines legal malice as “either an express intent to kill or inflict great bodily harm, or ... a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty which indicate[ ] an unjustified disregard for the likelihood of death or great bodily harm and an extreme indifference to the value of human life.” Black’s, supra note 19, at 806 (citation omitted). Legal malice is “the equivalent of constructive malice or malice in law. [It is an] inference of malice which can be reasonably drawn from [a] wrongful act.” Id. (citing Chrisman v. Terminal R. Ass’n of St. Louis, 237 Mo. App. 181, 192, 157 S.W.2d 230, 235 (1942)).} Again, this definition is much like that given in Black’s Law Dictionary.\footnote{See infra notes 103-04 and accompanying text.}

The question of reckless, willful, and wanton conduct turns on whether the law will imply intention to a defendant when his conduct was unintentional, but greatly in excess of a negligence standard. States which have implied this intention have done so because they felt that the grossly unthinking conduct contained more of the attributes of intentional conduct than of negligence.\footnote{See infra notes 78-200 and accompanying text.} These states reasoned that to not imply such intent would be to reward the actor for his neglect. This implied intent can become important in two settings. First, some courts have held that this grossly negligent conduct is enough to supply the evil motive necessary for the imposition of punitive damages or liability for malicious prosecution.\footnote{See infra notes 103-04 and accompanying text.}
other courts have held that a jury may infer the ill will or spite necessary for actual malice from this type of conduct.\textsuperscript{31} In this second group of states, a finding of actual malice is certain to impose heavier liability.

In \textit{Hoover's Dairy, Inc. v. Mid-America Dairymen,}\textsuperscript{32} the Supreme Court of Missouri addressed the issue of punitive damages in a negligence case. Although Missouri had previously held that a showing of malice was necessary to support punitive damages,\textsuperscript{33} the court in \textit{Hoover's Dairy} failed to mention malice at all in its opinion.\textsuperscript{34} The \textit{Hoover's Dairy} opinion required that a plaintiff show that the defendant knew or should have known that his actions created a unreasonable risk which created a high probability of substantial injury.\textsuperscript{35} The mental state required by this standard is much like that referred to as legal or even actual malice in other states.\textsuperscript{36} The court does not side step the use of the term malice because it feels the new standard lacks the requisite intent for malice, since the court states that grossly negligent conduct is tantamount to intentional wrongdoing.\textsuperscript{37} In fact, arguments such as those used by the court in \textit{Hoover's Dairy} have been used to characterize conduct as that described in the case as malicious.\textsuperscript{38}

The pre-\textit{Sanders} definition of legal malice was "the intentional doing of a wrongful act without just cause or excuse."\textsuperscript{39} Although this definition of legal malice was expressly disapproved of in \textit{Sanders},\textsuperscript{40} it has been used in one post-\textit{Sanders} decision.\textsuperscript{41}

\begin{itemize}
  \item \textsuperscript{31} See infra notes 78-200 and accompanying text.
  \item 700 S.W.2d 426 (Mo. 1985) (en banc).
  \item \textsuperscript{33} See Herron v. Wyrick, 686 S.W.2d 56 (Mo. Ct. App. 1985); Oster v. Kribs Ford, Inc., 660 S.W.2d 348 (Mo. Ct. App. 1983).
  \item \textsuperscript{34} The court discussed the award of punitive damages from page 435 to page 437 and never used the word malice. \textit{Hoover's Dairy}, 700 S.W.2d at 435-37.
  \item \textsuperscript{35} Id. at 436.
  \item \textsuperscript{36} See infra notes 78-200 and accompanying text.
  \item \textsuperscript{37} \textit{Hoover's Dairy}, 700 S.W.2d at 435.
  \item \textsuperscript{38} See infra notes 102-04 and accompanying text (discussion of Schreefel v. Okuly, 143 Cal. App. 3d 818, 192 Cal. Rptr. 402 (1983)). The \textit{Hoover's Dairy} opinion states that "an act or omission, though properly characterized as negligent, may manifest such reckless indifference to the rights of others that the law will imply that an injury resulting from it was intentionally inflicted." 700 S.W.2d at 435. \textit{Schreefel} discussed this same type of conduct stating: "It involves no intention, as does willful misconduct, to do harm and it differs from negligence in that it does involve an intention to do an act that the actor knows or should know, will very probably cause harm." 143 Cal. App. 3d at 827, 192 Cal. Rptr. at 407.
  \item \textsuperscript{40} 682 S.W.2d at 808.
  \item \textsuperscript{41} Moon v. Tower Grove Bank & Trust Co., 691 S.W.2d 399 (Mo. Ct. App. 1985).
\end{itemize}
The third and final degree of malice is malice in law. Sanders defined malice in law as "a wrongful act done intentionally without just cause or excuse." This is nearly identical to the old definition of legal malice. This definition is also very much like the definition of malice in law in Black's Law Dictionary. Little use had been made of the term malice in law in Black's Missouri before the Sanders decision. However, the few instances in which the term was used seem to equate malice in law with legal malice. The term has likewise received little attention since the Sanders decision because presently no facet of Missouri law requires the showing of mere legal malice.

When one takes a broad overview of the degrees of malice recognized in Missouri, one finds that they bear a great resemblance to the various mental states recognized in criminal law. Actual malice, with its requirement of personal hatred or vindictive motive, would seem much like the mental state of "purpose." In Missouri criminal jurisprudence, a person acts "purposely" if "with respect to his conduct or to a result thereof . . . it is his conscious object to engage in that conduct or cause that result." Thus actual malice could be defined as bad conduct done purposely.

Using the same analogy, legal malice could be compared to the mental state of "knowledge." In Missouri, a person acts "knowingly" if "(a) with respect to his conduct or to attendant circumstances when he [is] aware of the nature of his conduct or that those circumstances [exist] or (b) with respect

42. 682 S.W.2d at 808.
43. See supra notes 39-41 and accompanying text.
44. Black's Law Dictionary defines malice in law as "[t]he intentional doing of a wrongful act without just cause or excuse." Black's, supra note 19, at 863 (citing Lyons v. St. Joseph Belt Ry., 232 Mo. App. 575, 590, 84 S.W.2d 933, 944 (1935)).
45. Williams v. Kansas City Transit, 339 S.W.2d 792 (Mo. 1960) (not defined); Huffstutler v. Coates, 335 S.W.2d 70 (Mo. 1960) (wrongfully or intentionally caused by the defendant without legal justification); Coates v. News Corp., 355 Mo. 778, 197 S.W.2d 958 (1946) (equated with legal malice, defined as the intentional doing of a wrongful act without just cause or excuse); Snodgrass v. Headco Indus., 640 S.W.2d 147 (Mo. Ct. App. 1982) (not defined); Lyons v. St. Joseph Belt Ry., 232 Mo. App. 575, 84 S.W.2d 933 (1935) (equated with legal malice, defined as the intentional doing of a wrongful act without just cause or excuse). These cases appear to be the only uses of the phrase "malice in law" in Missouri jurisprudence. It may be that the phrase saw little use because it was deemed to be the equivalent of legal malice. In fact, the Black's Law Dictionary definition equates malice in law with legal malice and implied malice. Black's, supra note 19, at 863.
46. See, e.g., Wolford v. United States Leasing Corp., 692 S.W.2d 383 (Mo. Ct. App. 1985); Moon v. Tower Grove Bank & Trust Co., 691 S.W.2d 399 (Mo. Ct. App. 1985); Weniger v. Famous-Barr Co., 686 S.W.2d 553 (Mo. Ct. App. 1985); Shaffer v. Sears, Roebuck and Co., 689 S.W.2d 683 (Mo. Ct. App. 1985). Each of these cases mentions malice in law, but does not discuss it because a higher level of malice is required by the cause of action.
47. Mo. APPROVED JURY INSTRUCTIONS-CRIM. 3d 333.00 (1987) (definition of purposely).
to a result of his conduct he is aware that his conduct [is] practically certain to cause that result." Thus, the general improper purpose of legal malice could be seen as causing harm knowingly.

The result of this analysis is that we are left without a comparable mental state for malice in law. This is not a problem, however, if we believe that the standard for malice in law, the intentional doing of a wrongful act without just cause or excuse merely states the formula for the commission of an intentional tort. This is the position which Missouri has taken. This position postulates that the definition does not require the actor to know that his act is wrongful when he does it; the actor need only intend his acts, he need not intend that they be wrongful.

It is equally possible to read this definition to require that the actor intend to commit an act which he knows to be wrongful, for which there is no just cause or excuse. If this second reading is true, this definition approximates the new definition of legal malice. It is hard to imagine a situation when an actor intentionally commits an act which he knows to be wrongful without harboring some improper motive or malo animo.

In trying to sort the differences between Missouri’s degrees of malice, one sees the difficulties which can occur. To more fully understand how Missouri should draw the lines and how Missouri should apply these degrees to punitive damages, it is useful to see how other states have wrestled with these problems.

The only unifying theme in the law of malice is its diversity. Each state has its own nuances and terminology. Before dealing with the relationship between the degrees of malice in states other than Missouri, it is useful to examine the various terms and definitions used. In examining malice as used in other states, one finds Missouri to be unique in that only Missouri uses a three tiered system of malice. All other jurisdictions in the United States use either a single definition of malice or a two tiered system.

Outside of this general observation, one finds some common threads running through the law of malice. First, some terms are used in many jurisdictions. These terms include: actual malice, malice in fact, express malice, legal malice, implied malice, presumed malice, and malice in law. Along with these more common terms some relatively unusual terms are to be found, including technical malice and constructive malice. These terms are used

48. Id. at 333.00 (definition of knowingly).
49. Sanders, 682 S.W.2d at 810-11.
50. See infra notes 78-84 and accompanying text.
51. See infra notes 124-68 and accompanying text.
52. See infra notes 78-200 and accompanying text.
with a wide variety of definitions and in a myriad of combinations by the various states. In order to get a grasp on what each term means, one must first see what definition each state gives to these terms.

The definition of actual malice is one of the less controversial definitions in the law of malice. Of the thirty-nine states recognizing actual malice, twenty-eight define it as Missouri defines actual malice; as the presence of ill will, spite, or hatred.45 All these definitions focus on the specific intent of the defendant to do harm to the plaintiff. The seven states which depart from this view require only a generalized evil motive.

Kentucky, Nevada, Alaska, Hawaii, Indiana, North Dakota, and New Jersey depart further by defining actual malice much like Missouri defines legal malice. Nevada defines actual malice as an evil intention to do harm.46 Alaska47 and Hawaii48 both require only improper or bad motives. New Jersey requires the intentional doing of an evil minded act.49 Kentucky requires only a willful or wanton disregard of the rights of others for actual malice.50 Indiana defines express malice, which Sanders found be equivalent to actual malice, as the commission of a tort in an abusive manner.51 North Dakota


60. Consolidated Sales Co. v. Malone, 530 S.W.2d 680 (Ky. 1975).
would authorize a finding of malice if an improper motive was found or if the act was found to be unjustified.

Another variation on the theme of actual malice regards reckless or willful conduct in disregard of another’s rights as actually malicious. Fifteen states would consider this type of grossly negligent conduct actual malice. Presently, the Supreme Court of Missouri has not taken a position regarding this type of conduct’s place in Missouri’s scheme of malice. However, lower courts have indicated that even gross negligence will not be considered as actual malice.

Malice in fact and express malice seem to be universally synomnous with actual malice. Those states which use these terms generally define them according to the ill will, spite, or hatred formula.

In contrast with actual malice, the definition of legal malice is far from settled. Many states define legal malice as Missouri did in the pre-Sanders era: the intentional doing of a wrongful act without just cause or excuse. Others would use the reckless or wantonly in disregard of other’s rights formula. One state, Maine, uses a definition much like Missouri’s and looks

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68. See, e.g., Big Three Motors v. Rutherford, 432 So. 2d 483 (Ala. 1983); Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974); Maley v. Palanuk, 264 Or. 325, 505 P.2d 336 (1973).
for any improper motive. Finally, Florida, Louisiana, Nevada, Oklahoma, and Virginia regard legal malice as a mere legal fiction utilized in narrow circumstances. These definitions are similar in that they require a lesser degree of culpability, but differ as to the amount. Oregon is unusual in that it uses the recklessness and intentional wrongful act definitions in the alternative. If the defendant's actions fit either of the definitions, he has acted with legal malice.

Implied malice is an interesting term because of the wide variance in the way in which it is defined. In some states, it is merely a way actual malice is proven. In others, it approximates legal malice. Ill will, spite, and hatred are not things easily susceptible to direct proof. Many courts, therefore, use the phrase implied or inferred malice to describe the occasions when actual malice is proven by circumstantial evidence. However, implied malice can also be used to describe as malicious conduct not normally thought to be malicious.

The concept of presumed malice is roughly equivalent to legal malice. In Nevada and Virginia, presumed malice describes a purely fictional malice deemed to exist in certain circumstances. In Montana, malice is presumed when there is reckless conduct or conduct in wanton disregard of the rights of others. In North Dakota and Oklahoma, malice is presumed from the intentional doing of a wrongful act without just cause or excuse. Finally, in Utah, malice may be presumed either from reckless conduct or from the intentional doing of a wrongful act without just cause or excuse.

The single concept with absolute uniformity of definition is malice in law. Six states, Washington, Utah, Oklahoma, Nevada, Montana, and Ar-

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68. Tuttle v. Raymond, 494 A.2d 1353, 1362 (Me. 1985) ("conduct that is outrageous, because of defendant's evil motive").
72. See, e.g., Lewis v. Burdine, 240 Ark. 821, 402 S.W.2d 398 (1966); Fowler v. King, 254 Miss. 61, 179 So. 2d 800 (1965).
75. See, e.g., Dahlen v. Landis, 314 N.W.2d 63 (N.D. 1981); Thiry v. Arm-

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kansas recognize malice in law and all define it as the intentional doing of a wrongful act without just cause or excuse.\textsuperscript{77}

The definition of these terms is, of course, meaningless unless one understands the way in which they interrelate. In general, the various qualifiers and epithets attached to malice seem to differentiate it in two ways. The different names may indicate different methods of proof, or the different names can describe different levels of culpability. This Comment will first look at those jurisdictions which recognize only one level of malice and explore how the various terms relate to the different methods of proving that one level of culpability. Second, it will explore those jurisdictions which utilize more than one degree of malice. There it will be necessary to examine not only how these terms may describe different methods of proof, but also different levels of culpability.

Three of the states surveyed seemed to acknowledge but one level of malice.\textsuperscript{78} All of these jurisdictions refer to this degree of malice as actual malice, express malice, or malice in fact. These three states, New Hampshire, Arizona, and Ohio, make reference to a possible lower standard of malice but dismiss it.

The cases which mention a lower standard of malice involve the award of punitive damages in a case sounding in an intentional tort. In each case, the attorney for the plaintiff argued that the court should define malice as the intentional doing of a wrongful act without just cause or excuse. In each case, the court rejected such a standard, reasoning that its adoption would allow punitive damages in every case where compensatory damages were proven. As has been discussed earlier, the court may or may not be correct depending on what kind of intent the court required. Nevertheless, the adoption of such a standard would serve to lower the culpability required for punitive damages because, at best, this standard approximates legal malice.

The Arizona case, \textit{Huggins v. Deinhard},\textsuperscript{79} and the Ohio case, \textit{Hoskins v. Aetna Life Insurance Co.},\textsuperscript{80} involve still another problem. Both of these cases involve "bad faith" torts. \textit{Huggins} involved a wrongful assertion of ownership of property claim, and \textit{Hoskins} involved a bad faith refusal to pay an insurance claim. In \textit{Huggins}, one ex-spouse sued the other for wrong-


\textsuperscript{79}127 Ariz. 358, 621 P.2d 45 (Ct. App. 1980).

\textsuperscript{80}6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).
fully claiming ownership of marital property during the separation proceedings. In Hoskins, the plaintiff maintained that the insurance company refused to pay a claim which it was legally bound to pay. As the Huggins court recognized, an element of malice is built into that tort even if it is hidden behind a name such as bad faith. The ex-spouse incurred no liability simply by doing the acts which she did. Liability was imposed only after proof that she did these acts with a certain mental state. In these cases, one must intend to do an act which a certain mental state. In these cases, one must intend to do an act which he knows to be wrongful and for which there is no just cause or excuse before liability for compensatory damages exists. In the case of these bad faith torts, the use of the intentional doing of a wrongful act without just cause or excuse standard would serve to impose liability for punitive damages in every case were compensatory damages were established, regardless of how the definition is interpreted.

Turning to the permissible methods of proof, all of these jurisdictions which use a single degree of malice would allow that degree of malice to be proven in any way possible. That is to say, no state which recognizes only actual malice would require direct proof of that malice. Indirect proof of malice would suffice. All but one of these states would consider some level of reckless conduct as actually malicious. Some of these jurisdictions create an illusion of more than one level of malice by referring to these indirect methods of proof as legal malice or presumed malice.

Three states which address the issue of methods of proof are Alaska, Georgia, and Ohio. Alaska, in Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co., Georgia, in Tarver v. Wills, and Ohio in Hoskins v. Aetna Life Insurance Co. all speak of actual malice or the inference of actual malice. Alaska Northern Development would allow a finding of malice with an inference of malice or conduct outrageous enough to be deemed actual malice. Hoskins stated that malice may be inferred from the surrounding circumstances and Tarver would imply malice from the lack of probable cause in a malicious prosecution action. The result of allowing such a multiplicity of proof is to soften the impact of requiring actual malice. As will be discussed later, states which have a two tiered system of malice define actual malice more strictly by including

81. 127 Ariz at 360, 621 P.2d at 46.
82. 6 Ohio St. 3d at 275, 452 N.E.2d at 1318.
87. 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).
88. 666 P.2d at 41.
89. 6 Ohio St. 3d at 277, 452 N.E.2d at 1320-21.
90. 174 Ga. App. at 553, 330 S.E.2d at 900.
some of the indirect methods of proving malice in their definition of legal malice.

Three states use language which, at first glance, would lead one to believe they recognized more than one degree of malice. Alabama, in Big Three Motors, Inc. v. Rutherford,\(^91\) speaks of actual malice or its legal equivalent as the wanton disregard of the injured person's rights. Although one might be tempted to say that Alabama recognized two types of malice—legal and actual—it really only recognizes one level of culpability since the two methods of proof are said to be equivalent.\(^92\)

California cannot seem to use enough names for its degree of malice. In Schreefel v. Okuly,\(^93\) a negligence case in which the plaintiff sought punitive damages, the court stated that malice in fact was required to support an award of punitive damages.\(^94\) The court elaborated, stating that malice in fact could be express or implied depending on the method of proof. Express malice was shown by direct evidence of ill will or hatred, while implied malice was proven by evidence with which a jury could infer malice.\(^95\) The direct evidence of malice mentioned in express malice may refer to proof of malice by intentional acts, rather than truly direct evidence of malice such as statements or writings of the defendant. This possibility is buttressed by language in the opinion to the effect that if a defendant does an act so unreasonable and dangerous to the safety of others that he knows or should know that harm will result, the law will charge him with the intention of causing that harm, so as to support a finding of malice.\(^96\) Thus, implied malice may be seen as proof of malice by gross negligence, much like legal malice in Alabama.

The most complex naming scheme is found in Indiana. In First Federal Savings and Loan of Indianapolis v. Mudgett,\(^97\) the court spoke of express malice, implied malice, and constructive malice.\(^98\) While the court never explicitly defined express actual malice, it defined malice generally as an intentional wrongful act done without just cause or excuse from which the law will imply evil intent. The opinion defined implied malice as the commission of a tort in an abusive manner.\(^99\) If one takes the intentional wrongful act standard to merely state a general formula for an intentional tort, then the definition of implied malice seems merely to restate the general standard of malice. Constructive malice is defined as reckless, heedless disregard for the

\(^{91}\) 432 So. 2d 483 (Ala. 1983).
\(^{92}\) Big Three Motors, 432 So. 2d at 487.
\(^{94}\) Id. at 826, 192 Cal. Rptr. at 406.
\(^{95}\) Id., 192 Cal. Rptr. at 407.
\(^{96}\) Id.
\(^{98}\) Id. at 1008.
\(^{99}\) Id.
rights of another and is said to describe the same measure of culpability as the other forms of proof.\textsuperscript{100} Indiana's definition of malice is interesting because it seems to combine Missouri's legal malice and malice in law standards in formulating its actual malice standard.

Each of these states, except New Hampshire,\textsuperscript{101} allows proof of actual malice through reckless or grossly negligent conduct. California, in \textit{Schreefel v. Okuly},\textsuperscript{102} has offered the most eloquent defense of this position. That court stated that wanton and reckless conduct is more closely related to willful misconduct than negligent misconduct and as such the law should treat one who acts recklessly like one who acts willfully.\textsuperscript{103} The \textit{Schreeful} court noted to do otherwise would reward a person for not thinking.\textsuperscript{104} The result of allowing proof of actual malice by reckless conduct is to lessen the burden of proof. By widening the scope of conduct within the ambit of actual malice, these states lower the quantum of culpability needed to establish it.

Except for Missouri, those states using more than one degree of malice use only two degrees. While all of these systems refer to the higher level of culpability as actual malice, they differ as to the name of the lower level. Some would refer to the lower level as legal malice while others would refer to it as malice in law. Moreover, while in general agreement as to the definition of actual malice, the states differ widely as to the definition of the lower level. However, there does not seem to be a principled difference between the use of the terms legal malice and malice in law. The definitions used to define this lower level of malice, regardless of how it may be named, seem to break down into three groups. The most common definition of this lower tier is the intentional doing of a wrongful act without just cause or excuse.\textsuperscript{105} The two other definitions which receive less frequent use are an improper motives definition somewhat like Missouri's definition\textsuperscript{106} and a definition which regards legal malice as a presumption which arises only in certain instances.\textsuperscript{107}

Those states which treat legal malice as a presumption arising in certain circumstances use the term to describe the mental state required to commit the "bad faith" torts, such as malicious prosecution, wrongful garnishment, abuse of process and the like.\textsuperscript{108} These torts involve the commission of an
otherwise blameless act in a malicious way. Oklahoma, Nevada, Virginia, Louisiana, and Florida all adhere to such a definition of legal malice.

Oklahoma, in Mangrum v. Ford Motor Credit Co.,\textsuperscript{109} held that actual or presumed malice was required for punitive damages.\textsuperscript{110} Presumed malice is defined as the situation where an act is accompanied with some evil intent, done in gross negligence, or done in disregard of the rights of others.\textsuperscript{111} The case speaks of the need for actual malice or conduct deemed its equivalent to support punitive damages.\textsuperscript{112} If presumed malice will support punitive damages and punitive damages require the equivalent of actual malice, then presumed malice must be the equivalent of actual malice. Presumed malice, therefore, is but another manner of proving actual malice. Another Oklahoma case, Del State Bank v. Salmon,\textsuperscript{113} speaks of malice in law as the intentional doing of a wrongful act without justification or privilege and adds that malice in law can exist even if the act was done with good motives.\textsuperscript{114} The Del State Bank case involved the wrongful interference with an employment contract, a bad-faith tort. Oklahoma's second level of malice is merely the degree of malice needed to commit one of the bad-faith torts.

Nevada, Virginia, Louisianna, and Florida have a lower level of malice which is similar to Oklahoma. Nevada, in Sanguinetti v. Strecker,\textsuperscript{115} stated that actual malice is malice as known to the layman and as such needs no definition.\textsuperscript{116} Legal malice is a legal fiction which arises upon proof of certain facts, such as lack of probable cause in a malicious prosecution action.\textsuperscript{117} Village Development Co. v. Filice\textsuperscript{118} indicated that actual malice in Nevada encompasses grossly negligent conduct where harm is a necessary consequence of that conduct, but does not include conduct which is merely unconscionably irresponsible.\textsuperscript{119} Virginia, in Peacock Buick, Inc. v. Durkin\textsuperscript{120} announced an ill will or conscious disregard for the rights of another formula for actual malice. Peacock Buick also mentioned that legal malice is a presumption which arises in certain instances, giving one example as the malice which arises from the lack of probable cause in a malicious prosecution action.\textsuperscript{121}
Lousiana, in Leaman & Co., Inc. v. Victory Iron Works, Inc.,\textsuperscript{122} follows Virginia's pattern, as does Florida in Adams v. Whitfield.\textsuperscript{123} With the exception of Nevada, these states follow the pattern of the states which only recognize one level of malice. They recognize a broad definition of actual malice, but add to it a narrow lower level.

The other two definitions of this second level of malice are "true" levels in that they represent a degree of culpability separate from both actual malice and the wrongfulness required for the bad-faith torts. Generally, the adoption of these second levels of malice represent an attempt to award punitive damages with a lesser showing of misconduct or with fewer problems of proof than if actual malice were required.

The most common definition of legal malice or malice in law is that of an intentional, wrongful act done without just cause or excuse. Some jurisdictions include reckless disregard of the rights of others in that definition. To get an idea of what conduct is required to establish this level of malice and to compare it to the remaining standard of legal malice, it is useful to examine the facts of some of the cases applying this standard.

Maley v. Palanuk,\textsuperscript{124} an Oregon case examining legal malice, involved fraud in the sale of a house. The seller represented that a septic tank could be put on the property, knowing that the city had already denied permission to install a septic tank because the lot was too small.\textsuperscript{125} The Oregon court applied the wrongful act done intentionally without just cause or excuse and the intentional disregard of the interest of another definitions of legal malice in the alternative.\textsuperscript{126} Using these definitions, the court found legal malice and upheld an award of legal malice.\textsuperscript{127} The application of the standard in this case exacts a high price for fraud. The plaintiff proved no more misconduct than would have been necessary for the fraud claim, yet was allowed to recover both compensatory and punitive damages. Therefore, under Oregon's view, a successful showing of fraud entitles one to punitive damages.

In Sears v. Summit, Inc.,\textsuperscript{128} a Wyoming case, the plaintiff sued for trespass to chattels and the defendant counterclaimed for trespass. Using a definition of malice calling for wrongful or illegal conduct committed or continued with willful or reckless disregard for the rights of another, the court found the presence of malice\textsuperscript{129} and awarded the defendant punitive damages on his counterclaim for trespass.\textsuperscript{130} The court held that by passing

\begin{itemize}
  \item \textsuperscript{122} 411 So. 2d 666 (La. Ct. App. 1982).
  \item \textsuperscript{123} 290 So. 2d 49 (Fla. 1974).
  \item \textsuperscript{124} 264 Or. 325, 505 P.2d 336 (1973).
  \item \textsuperscript{125} \textit{Id.} at 326, 505 P.2d at 336.
  \item \textsuperscript{126} \textit{Id.} at 328, 505 P.2d at 337.
  \item \textsuperscript{127} \textit{Id.}
  \item \textsuperscript{128} 616 P.2d 765 (Wyo. 1980).
  \item \textsuperscript{129} \textit{Id.} at 770.
  \item \textsuperscript{130} \textit{Id.} at 772.
\end{itemize}
three “no trespassing” signs and going through a steel gate, the plaintiffs acted maliciously. The court focused on the fact that the plaintiffs knew that what they were doing was wrong and nevertheless continued.131

Minnesota dealt with legal malice in Haukison v. Geyer.132 In Haukison, a group of young men in a car ran into a house and severely injured an elderly couple. The evidence showed that the young men had been drinking for approximately twelve hours prior to the accident and that the driver had a blood alcohol level approximately three times the legal limit. The couple sued in negligence and ask for punitive damages.133 The court sustained an award of punitive damages using as its definition of legal malice “willful indifference to the rights of others.”134 Minnesota, in Johnson v. Radde,135 had announced another definition of malice: the doing of a harmful act without legal justification, the willful violation of a known right.136 Johnson involved the sale of a single piece of land to two buyers by a broker and the owner. In Johnson, the court found no malice, but mere negligence.137

Maryland defined legal malice in Natural Design, Inc. v. The Rouse Co.138 as a wrongful act done without just excuse, or an illegal and thus improper act.139 Natural Design involved a ruling on a motion for summary judgment. The court expressed no opinion as to the existence of malice except that the facts created a jury question. Wedeman v. City Chevrolet140 defined legal malice as “conduct of an extraordinary nature characterized by wanton or reckless disregard for the rights of others” in a case involving fraud in the sale of a car.141 The car dealer represented that the car had not been in an accident; a fact which he knew to be untrue.142 The plaintiff, who noticed the prior damage after another accident, introduced testimony of an experienced body repairman that the car had been repaired before.143 The court found the presence of malice not in the untruth itself, but in the actions of the dealer when confronted with proof that his words were untrue. The dealer’s malice came from persisting that the car had never been in an accident and demanding that the plaintiff withdraw his allegations that the dealer had lied.144

131. Id.
133. Id. at 786.
134. Id. at 788.
135. 293 Minn. 409, 196 N.W.2d 478 (1972).
136. Id. at 410., 196 N.W.2d at 480.
137. Id. at 411, 196 N.W.2d at 480.
139. Id. at 71, 485 A.2d at 675.
140. 278 Md. 524, 366 A.2d 7 (1976).
141. Id. at 530, 366 A.2d at 13.
142. Id. at 525, 366 A.2d at 9.
143. Id. at 526, 366 A.2d at 9.
144. Id. at 529, 366 A.2d at 13.
Illinois recognized legal malice as the intentional doing of a wrongful act without just cause or excuse in Bank Computer Network Corp. v. Continental Illinois National Bank and Trust Co. of Chicago. In Bank Computer, a customer sued its bank for improperly setting-off its bank account against certain promissory notes held by the defendant. The court held that there was no malice in the bank's procedures and therefore no cause of action for wrongful set-off. The court held that although the procedures used were improper, there was no intent to harm present and therefore no malice. Illinois, in Carter v. Mueller, recognized that willful and wanton disregard of the rights of others was the equivalent of the wrongful, intentional act definition set forth in Bank Computer.

A Mississippi case, Cranford v. Shelton, involving a statutory equivalent to tortious interference with contract, held that the malice needed to sustain that action was the intentional doing of a wrongful act without just cause or excuse. Fowler v. King, a malicious prosecution case based on a bad check prosecution, held that wanton acts in reckless disregard of the rights of the person wronged could satisfy either a malice in fact or a malice in law standard.

Branch v. Western Petroleum, Inc., a Utah water pollution case involving punitive damages, held that presumed malice or malice in law was that conduct which was reckless of law and the legal rights of the person wronged. Branch equated this standard with unjustifiable conduct and a wrongful act intentionally done without just cause or excuse. This sweeping definition of malice in law stands in stark contrast to the definition of actual malice in the opinion: personal hatred or ill will.

In the Texas case of State National Bank of El Paso v. Farah Manufacturing Co., the officers of a bank that held the principle indebtedness of a manufacturing company conspired using fraud, duress, and tortious interference to keep an individual off the board of directors of the defendant company. The court held that in order to prove punitive damages, legal

146. Id. at 494, 442 N.E.2d at 588.
147. Id. at 501, 442 N.E.2d at 588.
149. 378 So. 2d 652 (Miss. 1980).
151. 378 So. 2d at 655.
152. 254 Miss. 61, 179 So. 2d 800 (1965).
153. Id. at 69, 179 So. 2d at 805.
154. 657 P.2d 267 (Utah 1982).
155. Id. at 277.
156. Id. at 278.
157. Id. at 277.
159. Id. at 667.
malice, characterized as an unlawful act intentionally done without just cause or excuse, had to be shown.160

A Hawaiian case, Chow v. Alston,161 involved tortious interference with contract. In Chow, an employee alleged that his supervisor had tortiously interfered with his employment contract by writing a memo to the division director criticizing the employee's work.162 The court held that the tort required legal malice, the intentional doing of a harmful act without legal or social justification, a willful violation of a known right.163 The court found no malice in this case since the supervisor was simply doing his job.164

In Mingachos v. CBS, Inc.,165 a widow sued her husband's employer for his wrongful death. She alleged that his death was from a malicious injury in order to escape the wrongful death statute.166 The court found that a malicious injury need be intentionally inflicted without just cause or excuse, but need not be actuated by express malice, ill will, or malevolence.167 The court held the explosion which had killed the plaintiff's decedent had been negligent and denied recovery.168

The final group of states which use a second tier of malice choose to instruct their juries with a slightly different formula. Those courts speak in terms of improper motive, evil intent, and unjustifiable conduct.

Gee v. Egbert,169 a Montana case involving negligence, products liability, warranty claims, and punitive damages, held that punitive damages required a showing of actual or presumed malice and that a showing of malice in law was insufficient.170 Actual malice is defined as ill will, spite, and hatred and presumed malice is defined as reckless and wanton conduct.171 The court states that the wanton and reckless actor is presumed to have intended the result of his actions and is made to bear responsibility for them.172 This analysis is much like that used in Schreefel v. Okuly,173 discussed earlier. The court in Gee defines the lesser standard of malice in law as unjustifiable conduct.174 In this case, the plaintiff got his jacket caught in a dumbwaiter

160. Id. at 668.
162. Id. at ____, 634 P.2d at 432.
163. Id. at ____, 634 P.2d at 434.
164. Id. at ____, 643 P.2d at 434.
165. 196 Conn. 91, 491 A.2d 368 (1985).
166. Id. at ____, 491 A.2d at 371.
167. Id. at ____, 491 A.2d at 375.
168. Id. at ____, 491 A.2d at 378.
170. Id. at ____, 679 P.2d at 1202.
171. Id. at ____, 679 P.2d at 1202.
172. Id. at ____, 679 P.2d at 1202.
174. ____ Mont. at ____, 679 P.2d at 1202.
and was injured. The court found that the actions of the manufacturer were not so grossly negligent to amount to actual or presumed malice and denied punitive damages.

A North Dakota case, *Dahlen v. Landis*, illustrates how difficult it may be to differentiate between the degrees of malice. North Dakota required presumed malice or malice in law to support an award of punitive damages. Presumed malice or malice in law is defined as being reckless with the law and with the legal rights of a citizen towards that citizen or having improper motives. North Dakota also allows proof of actual malice by circumstantial evidence. Much of the evidence which would be presented to establish actual malice by circumstantial evidence would actually be proof of presumed malice or malice in law. Thus, by setting the standards in this way the degrees of malice may overlap considerably.

Tennessee, in *Lawson v. Wilkerson*, a bad check malicious prosecution case, stated that legal malice is any improper motive and requires a lesser amount of culpability than actual malice, which is defined as personal hatred or ill will. In *Lawson*, the plaintiff bought a horse from the defendant with an understanding that he could return the horse if he was not satisfied with it. When the defendant refused to take back the horse, the plaintiff stopped payment on his check. The defendant then sued the plaintiff for passing a bad check, but did not prevail. The plaintiff then sued the defendant for malicious prosecution. Holding that legal malice could be inferred from the lack of probable cause, the court upheld the malicious prosecution award.

The interesting aspect of the *Lawson* case is that the court held that the definition of legal malice was any improper motive, a definition much like Missouri's. Missouri, however, does not allow a jury to infer legal malice from the lack of probable cause.

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175. *Id.* at ____, 679 P.2d at 1197.
176. *Id.* at ____, 679 P.2d at 1203.
177. 314 N.W.2d 63 (N.D. 1981).
178. *Id.* at 69.
179. *Id.*
180. *Id.*
182. *Id.* at 413–14, 447 S.W.2d at 374.
183. *Id.* at 409, 447 S.W.2d at 371.
184. *Id.* at 411, 447 S.W.2d at 374.
185. *Id.* at 413, 447 S.W.2d at 373.
186. *Id.* at 416, 447 S.W.2d at 373.
187. Sanders v. Daniel Int'l Corp., 682 S.W.2d 803, 812 n.3 (Mo. 1984) (en banc). The Sanders opinion stated that facts which support a finding of lack of probable cause may also support a finding of malice, but made it clear that Missouri would not infer malice in every case in which lack of probable cause was found. *Id.* The rationale behind this stance is that mere negligence may support a finding of lack of probable cause, while negligence would not support a finding of legal malice. *Id.*
Maine gave an interesting definition of legal malice in Raymond v. Tuttle. In Raymond, a negligence action, the court stated that legal malice is needed for an award of punitive damages. The court stated that legal malice requires less culpability than actual malice, but more than recklessness. For legal malice to exist the court must find the presence of deliberate, outrageous conduct.

Iowa, in Cedar Falls Building Center, Inc. v. Vietor, gives one of the broadest definitions of legal malice. Legal malice is defined as the result of any improper or sinister motive or evidencing the disregard of the rights of others. The court equated that with an actual wrong done without just cause or excuse. This combination of the two standards would seem improper if analyzed under Missouri law since the latter would encompass the former. In Cedar Falls, it was alleged that a bank officer negligently misrepresented the presence of lien waivers in a contract to build a house. The court found that although his statement was misleading, it was not malicious.

In Lewis v. Burdine, Arkansas recognized improper motive as a definition for malice in law. In Burdine, a collection agency garnished a debtor’s wife’s wages for a debt upon which she had no liability. The court concluded that malice in law could be found from these facts.

One area of the law in which malice plays a major role is that of punitive damages. Missouri allows either proof of legal malice or actual malice to

188. 494 A.2d 1353 (Me. 1985).
189. Id. at 1361.
190. Id.
191. Id.
192. 365 N.W.2d 635 (Iowa Ct. App. 1985).
193. Id. at 640.
194. Id.
195. Id. at 637.
196. Id. at 640.
198. Id. at 823, 402 S.W.2d at 398.
199. Id. at 822, 402 S.W.2d at 398.
200. Id. at 825, 402 S.W.2d at 400.
201. Big Three Motors v. Rutherford, 432 So. 2d 483 (Ala. 1983) (punitive damages available with a showing of actual malice or its legal equivalent); Alaska N. Dev. v. Alyeska Pipeline Serv. Co., 666 P.2d 33 (Alaska 1983) (punitive damages available upon a showing of actual malice or the inference of actual malice); Huggins v. Deinhard, 127 Ariz. 358, 621 P.2d 45 (App. 1980) (punitive damages available with a showing of actual malice); Porter v. Lincoln, 282 Ark. 258, 668 S.W.2d 11 (1984) (punitive damages available with a showing of actual malice); Schreelf v. Okuly, 143 Cal. App. 3d. 818, 192 Cal. Rptr. 402 (1983) (punitive damages available with a showing of express or implied malice); Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974) (punitive damages available with a showing of legal malice); Carter v. Mueller, 120 Ill. App. 3d 314, 457 N.E.2d 1335 (1983) (punitive damages available...
support an award of punitive damages. The question which presently faces the Missouri bar is what definition of malice will be needed for punitive damages.

Oster v. Kribs Ford, Inc. is the most recent Missouri case reciting both the degree of malice for punitive damages and defining that degree of malice. Oster stated that punitive damages are available with a showing of legal or actual malice, and that legal malice is the intentional doing of a wrongful act without just cause or excuse. Oster was decided before the Sanders decision. The question now facing the bar is this: will Missouri change the name of the degree of malice required for punitive damages, keeping the definition unchanged or change the definition of malice required and retain the same terminology? The first option is really no change at all, while the


203. 660 S.W.2d 348 (Mo. Ct. App. 1983).

204. Id. at 355.
second would be a drastic change in Missouri's law of punitive damages. If the new definition of legal malice is required for punitive damages, plaintiff will have to prove improper motives, a higher standard of malice, in order to establish punitive damages.

Of the three cases which have dealt squarely with punitive damages and malice after Sanders, only one gives us any insight into the future of malice and punitive damages in Missouri. The two other cases which have had to deal with the issue have sidestepped it. Herron v. Wyrick205 involved a motion to dismiss a claim for punitive damages. While the court seemed to say that the allegation of the wrongful taking of property without justification was enough to satisfy the pleading requirements for punitives, it second guessed itself by saying that the petition also alleged improper motives on the part of the defendants.206 The second case to deal with the concept, Shearin v. Fletcher/Mayo/Associates, Inc., stated that a showing of legal malice was required to support an award of punitive damages, but failed to define legal malice.207 Although one can make arguments for either of the two options previously discussed based on what little these cases say or the large amount which they omit, these arguments lack credibility.

The third case, Hoover's Dairy v. Mid-America Dairymen.208 discussed punitive damages in a case based in negligence. In Hoover's Dairy, the court announced that in order to prove punitive damages in a negligence case a plaintiff must show that the defendant knew or should have known that his actions created an unreasonable risk which created a high probability of substantial injury.209 The court failed to use any of the three degrees of malice recognized in the Sanders opinion, in spite of the fact that Missouri law requires a finding of malice to support punitive damages.210 What makes this omission more puzzling is the fact that other states have used similar standards and similar rationales in awarding punitive damages and discussed them in terms of malice.211

If one assumes, however, that the Hoover's Dairy standard represents some form of malice as required by prior case law, then it seems more like the Sanders definition of legal malice212 than that of malice in law.213 Before

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205. 686 S.W.2d 56 (Mo. Ct. App. 1985).
206. Id. at 57.
207. 687 S.W.2d 198 (Mo. Ct. App. 1984).
208. 700 S.W.2d 426 (Mo. 1985) (en banc).
209. Id. at 436.
211. See supra notes 102-04 and accompanying text (discussion of Schreefel v. Okuly, 143 Cal. App. 3d 818, 192 Cal. Rptr. 402 (1983)).
212. Sanders defined legal malice as an act motivated by any improper or
Hoover's Dairy, a plaintiff was required to show that the defendant acted with complete indifference to or in conscious disregard for the safety of others.214

A simple solution would be to assume that the Sanders court did not mean to change the law of malice as it affects punitive damages. Given the depth and complexity of the Sanders and Hoover's Dairy opinions, however, such an argument is untenable. The result of the Sanders opinion is that the Missouri courts are presented with a unique opportunity to re-examine the law of punitive damages in Missouri. This re-examination is needed not only because of Sanders, but also because of the hodgepodge manner in which the law of punitive damages has developed in Missouri. Previously, when setting a standard for punitives, Missouri courts have looked to the underlying cause of action only, ignoring the way in which punitive damages were set in other causes of action. Never has Missouri put forth a unified theory of punitive damages.

Before attempting to select the definitions of malice to be used in a unified theory of punitive damages, a overview of the Missouri law of punitive damages is useful. Punitive damages are awarded in Missouri to punish the defendant and to deter the defendant and others like him from such conduct.215 For punitive damages to be awarded there must be at least nominal compensatory damages.216 The general level of culpability was the intentional doing of a wrongful act without just cause or excuse.217 For punitives to be available in a breach of contract case, facts must be established that would establish an independent tort.218 For punitives in a negligence action, conscious indifference or reckless disregard for the rights of others must be shown.219 In malicious prosecution, actual malice must be shown to establish punitive damages.220 Finally, the general rule for punitives is that a higher

wrongful motive-malo animo. Sanders v. Daniels Int'l Corp., 682 S.W.2d 803, 807 (Mo. 1984) (en banc).
213. Sanders defined malice in law as legal malice which had previously been defined as the intentional doing of a wrongful act without just cause or excuse. 682 S.W.2d at 808.
220. Sanders v. Daniels Int'l Corp., 682 S.W.2d 803, 816 (Mo. 1984) (en banc).
level of culpability or fault is required for punitives than would be required for compensatory damages.221

This last statement that a higher degree of culpability is required for punitive damages than for compensatory damages is the key to developing a uniform system of punitive damages. One must first determine the degree of culpability required for the underlying cause of action and then set the degree of malice required for punitive damages for that cause of action as a higher level. If one first groups the various causes of action by the level of culpable conduct required to recover compensatory damages before assigning the degrees of malice required for punitive damages, a uniform system can be established.

Causes of action seem to fit into three categories of culpability: those requiring no fault or culpability, those requiring negligence, and those requiring intentional action. Furthermore, the third category may be split into sub-groups: strict liability intentional torts and intentional torts which require some form of malice. The causes of action falling under the first category, those of strict liability, include products liability and breach of contract. The second category, negligence, is self explanatory. The first sub-group of the third category includes torts such as assault, battery, trespass, and false imprisonment. These torts can be said to be “strict liability torts,” because no more intent than to do the act which creates the tort is needed. The second subgroup of the third group are torts such as malicious prosecution, tortious interference with contract, and injurious falsehood. These torts go one step beyond the strict liability torts because the mere intentional doing of the act which gives rise to the cause of action is not enough. In order to establish liability, one must prove a malicious mental state.

Having sorted out the underlying causes of action, two possible systems exist for uniformly awarding punitive damages. First, a sliding scale could be established. Under such a system, punitive damages would be available if a certain quantum of culpability above that required for compensatory damages was proven. This quantum of culpability could be presented to the jury in terms of jury instructions embodying the varying degrees of malice. For strict liability causes of action, a showing of malice in law would be sufficient. For negligence, the conscious disregard of others’ rights definition would be appropriate. For the strict liability intentional torts, the legal malice definition would be proper, and for the malicious torts, actual malice would be required.222


222. Missouri may have already de facto adopted this theory. To establish punitive damages for breach of contract, a strict liability action, one must prove the commission of an intentional tort. Greening v. Klamen, 652 S.W.2d 730 (Mo. 1983). Previously, for punitive damages in a negligence action, one needed to prove reck-
The second possibility is to establish a minimum level of culpability below which punitive damages would not be allowed. If one is to include all causes of action, however, this line must be drawn at actual malice. An alternative to this seemingly harsh result might be to draw the line at legal malice and make an exception for the malicious torts or to always allow punitives in those actions.

Most jurisdictions have, like Missouri, not set out a unified theory of punitive damages. Many states, however, tend toward the single degree of malice concept.\textsuperscript{223} Other states, by recognizing more than one degree of malice, have created variations of the sliding scale theory.\textsuperscript{224} None, however, have developed a system as reticulated as that conceived by this comment. Missouri could choose such a multi-layered theory because of its recognition of three distinct degrees of malice.\textsuperscript{225}

Each of these systems has its drawbacks. With the sliding scale, a defendant in a products liability action might be liable for punitive damages with a far less culpable mental state than a defendant in a malicious prosecution case. With the set level system, a defendant in a products liability case might grossly violate the standard of conduct for the underlying action, but still not be liable for punitive damages.

From this limited study of the cases attempting to make sense out of the law of malice, one can see that there is little agreement. Malice is in one way a simple subject; a person knows it when he sees it. Malice is also a very confusing subject; it is very difficult to put that visceral feeling into words. Despite this difficulty, as long as malice plays a part in American jurisprudence, it will creep into jury instructions and when it does it will have to be put in words.

A single degree of malice presents the least problems both intellectually and practically. A single definition of malice could be drafted broadly enough to cover all methods of proof, including grossly negligent conduct. Intellectually a single degree of malice is satisfying because it reflects reality. While people may be affected by the mental state of malice in differing intensities, the mental state of malice is unitary. That is to say, one is malicious or one is not, there is no logical intermediate. Practically, a single degree of malice is convenient in that the chance of a jury becoming confused is greatly reduced when they are not asked to comprehend foreign concepts of degrees

\textsuperscript{223} See supra notes 78-123 and accompanying text.
\textsuperscript{224} See supra text following note 123 and text accompanying notes 124-200.
\textsuperscript{225} See supra notes 12-46 and accompanying text.
of malice. Additionally, a single degree of malice would eliminate frivolous appeals and relieve the courts of appeal from the job of second guessing juries. Complex, multilevel systems of malice encourage losing parties to appeal by holding out the hope that the highly technical requirements of the mandated degree of malice have not been met. A single degree of malice will not eliminate appeals, but would force those appealing to attempt to impeach a jury verdict, rather than simply arguing an error in the law.

Thus, in assessing punitive damages a jury should be instructed that it must find the presence of "malice." Malice would be defined as ill will, hatred, spite, or vengeful motive or circumstantial evidence from which ill will, spite, hatred, or vengeful motive could be implied. Circumstantial evidence of ill will, spite, hatred, or vengeful motive could consist of, but would not be limited to, evidence of gross negligence or conscious disregard for the rights of the person injured.

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