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Punitive Damages As a Solution to Drunken Driving

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PUNITIVE DAMAGES AS A SOLUTION TO DRUNKEN DRIVING

Wheeler v. Evans[1]

The number one cause of highway fatalities and accidents in the United States today is drunk driving.[2] Public outrage over the death, destruction and anguish caused by drunk driving has led to a search for new methods of combatting this problem. In the past, society has relied on criminal sanctions. However, these criminal sanctions have not been effective in controlling the problems presented by intoxicated drivers. In response, state legislatures have begun to pass legislation toughening drunk driving laws by increasing fines and revoking driver's licenses. Another response to the drunk driving problem has been the institution of rehabilitative programs for the drunk driver. Organizations such as Mothers Against Drunk Driving (MADD), Remove Intoxicated Drivers—U.S.A. (RID), and Students Against Drunk Driving (SADD) have started extensive campaigns to create an awareness of this problem and to promote programs designed to prevent drinking and driving.[3] Finally, courts are beginning to impose punitive damages against those found guilty of driving while intoxicated.

This Note will focus on the imposition of punitive damages against the drunk driver as a response to the drunk driving problem. The court in *Wheeler v. Evans*,[4] decided to allow the imposition of punitive damages against drunk drivers who injure another person in an automobile accident. This Note will examine the policy reasons behind the court's holding and the effect of that decision. Within the analysis, decisions of other jurisdictions will be evaluated and compared to the Missouri decision, and the advantages and disadvantages of the differing views will be discussed.

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1. 708 S.W.2d 677 (Mo. Ct. App. 1986).

2. Drunken driving is the cause of over half the United States' highway fatalities (approximately 25,000 deaths per year). Drunk driving is the primary cause of death for people between the ages of fifteen and twenty-four. Further, there is a fifty percent chance that a person of the general population will be involved in an alcohol-related accident in his or her lifetime. Note, *Punitive Damages in Drunk-Driving Cases: A Call For a Strict Standard and Legislative Action*, 19 SUFFOLK U.L. REV. 607, 608 (1985).

3. *Meeting the Drunk Driver Head-On,* CONSUMERS' RESEARCH MAG., Aug. 1983, at 26. The primary stimuli for the formation of these groups have been personal tragedy and a concern for family and friends. The goal of these groups is to create nationwide animosity towards driving while intoxicated. *Id.* at 28.

4. 708 S.W.2d 677 (Mo. Ct. App. 1986).

On the evening of March 2, 1981, the plaintiff, Sue Wheeler, was struck from behind by a vehicle driven by defendant Ralph Evans. The defendant claimed the plaintiff's car was not "obediently" situated on the road because it extended into his lane on a four lane highway.[5] After the accident, the defendant was given a breathalyzer test in which he registered a blood alcohol content of .12 percent. Under Missouri law, that level of intoxication was sufficient to render the defendant legally intoxicated.[6] The plaintiff brought suit against Evans for medical expenses, lost wages and punitive damages as a result of injuries she suffered in the accident.[7] Although the circuit court entered a judgment on a jury verdict for the plaintiff for medical expenses and lost wages,[8] she appealed the court's judgment, claiming the court erred in refusing to submit to the jury a punitive damage instruction. The plaintiff asserted that the defendant's driving while legally intoxicated constituted a "conscious disregard for the safety of others" that warranted a punitive damages instruction.[9] The Missouri appellate court upheld the circuit court's finding that a punitive damage instruction was not warranted in this particular situation. However, the court stated that a punitive damage instruction could be submitted to the jury under the right circumstances. If a plaintiff could prove: 1) reckless conduct by the defendant (driving while intoxicated), and 2) causation (that the defendant's intoxication caused him to collide with the plaintiff's car), then a punitive damage instruction could be submitted to the jury.[10] While the plaintiff in *Wheeler* presented evidence that the defendant was legally intoxicated (proof of reckless conduct), she did not present additional evidence that the defendant's reckless conduct in driving while intoxicated caused the accident.[11]

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5. While proceeding west on the highway, the plaintiff prepared to make a left-hand turn into the entrance of a Wal-Mart parking lot and was struck from behind by the defendant's vehicle. At this particular point on the highway, there were five separate lanes: two eastbound, two westbound and a center left-turn lane. The plaintiff claimed she was in the center lane, but the defendant testified that he rear-ended the plaintiff's car while he was still in the second westbound lane of traffic. *Id.* at 678. The evidence in the case revealed that the plaintiff was not "obediently positioned" on the highway. *Id.* at 681.

6. A blood alcohol content (BAC) of .10 percent or more leads to a presumption of legal intoxication in Missouri. MO. REV. STAT. § 577.037 (1986). Most other states also consider drivers to be intoxicated when their BAC is .10 percent or greater. Note, *supra* note 2, at 607 n.3.

7. *Wheeler*, 708 S.W.2d at 679. The plaintiff testified that she suffered headaches, pain in her neck, back, shoulders, arms, right leg and hip and experienced numbness in her arms, fingers and toes. Because of these injuries, plaintiff claimed her work as a waitress, her housework and her recreational activities were impeded. *Id.*

8. *Id.* at 682. The jury returned a verdict of $8,572 for medical expenses and lost wages. *Id.*

9. *Id.* at 679.

10. *Id.*

11. *Id.*

Punitive damages, also known as exemplary damages, have been defined as damages, other than compensatory or nominal damages, awarded against a person to punish him for outrageous conduct arising from his evil motive or reckless indifference to others.[12] Punitive damages essentially are a windfall to the plaintiff, and thus the award is not a "matter of right."[13] If the court determines that the evidence is sufficient to submit the question of punitive damages to the jury, the jury has discretion to either grant or deny the damages and to determine the particular amount of the award.[14] All jurisdictions agree that something more than the mere commission of a tort is necessary to allow awarding punitive damages to the plaintiff. There must be circumstances involving aggravation, outrage or spite on the part of the defendant.[15] Most jurisdictions require that the defendant have acted with malice or with a fraudulent motive to justify a punitive damages award, or with such conscious disregard for the interests of others that he could be said to have acted willfully and wantonly.[16] A few jurisdictions, while not imposing punitive damages for mere negligence, have expanded "conscious disregard for the interests of others" to include extreme or gross negligence.[17]

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12. RESTATEMENT (SECOND) OF TORTS § 908 (1977). Section 908 defines punitive damages:

> (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.

13. W. PROSSER & W. KEETON, THE LAW OF TORTS § 2, at 14 (5th ed. 1984).

14. *Id.*; *see* Wedeman v. City Chevrolet Co., 278 Md. 524, 366 A.2d 7 (1976) (trier of fact has discretion to grant or deny punitive damages once legal basis exists); Malco, Inc. v. Midwest Aluminum Sales, Inc., 14 Wis. 2d 57, 109 N.W.2d 516 (1961) (jury had discretion to determine whether to allow punitive damages).

15. W. PROSSER & W. KEETON, *supra* note 13, at 9-10.

16. W. PROSSER & W. KEETON, *supra* note 13, at 10; *see, e.g.*, Brooks v. Wootton, 355 F.2d 177 (2d Cir. 1966) (willful or wanton conduct is the standard for punitive damages); Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954) (driving in wanton and reckless manner was sufficient to support an award of punitive damages); Dorn v. Wilmarth, 254 Or. 236, 458 P.2d 942 (1969) (driving after voluntarily consuming alcohol to excess was wanton and reckless and supported an award of punitive damages).

17. W. PROSSER & W. KEETON, *supra* note 13, at 10-11; *see, e.g.*, Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954) (punitive damages were allowed upon finding of gross negligence); Texas Pac. Coal & Oil Co. v. Robertson, 125 Tex. 4, 79 S.W.2d 830 (1935) (gross negligence, when defined as "conscious indifference," could be adequate grounds for a punitive damages award).

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The theory behind punitive damages has been continually attacked and disfavored by courts in many jurisdictions. Some courts argue that awarding punitive damages provides an undeserved windfall for the plaintiff because he has already been compensated for his loss through compensatory damages.[18] Proponents of punitive damages argue that attorney's fees may consume a large portion of the compensatory award and punitive damages are therefore needed to fully compensate the plaintiff for his losses.[19]

Other critics maintain that juries are given too much unguided discretion in determining the amount of a punitive damage award.[20] Because punitive damages are parasitic in nature, they are only to be awarded if compensatory damages are also awarded.[21] However, juries sometimes blur the two, particularly when the damages are vague, and as a result award only nominal compensatory damages with large punitive awards.[22] This problem can be remedied by stricter judicial supervision of the jury.

Finally, critics of punitive damages contend that the Constitution prohibits punishing a civil defendant who is also accused of a crime. These critics assert that the possibility of both criminal and civil sanctions against an offender violates the Constitution's protection against double jeopardy.[23] However, courts have generally dismissed this argument, noting that the double jeopardy argument only applies to subsequent criminal prosecutions, not to a prosecution followed by a civil proceeding.[24]

Many jurisdictions, including Missouri, feel that the policy reasons in favor of awarding punitive damages outweigh the criticisms. One common justification for punitive damages is to punish the wrongdoer for his outrageous conduct when criminal laws fail to adequately punish him. Most drunk driving accidents involving death or serious bodily injury are criminally prosecuted. However, many drunk driving accidents cause only minor personal injuries which do not warrant criminal punishment. Further, a district attorney may exercise his discretion so as to decide that even though the offense is a crime, it is not serious enough to warrant a criminal prosecution.[25] Punitive damages help to punish the offender in these instances when he would otherwise not be criminally punished.[26] Those opposed to awarding

18. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 219 (1973).
19. *Id.* at 220.
20. *Id.* at 219.
21. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 83, at 293 (1935).
22. D. DOBBS, *supra* note 18, at 209.
23. C. MCCORMICK, *supra* note 21, § 77, at 276-77. The fifth amendment of the United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V.
24. Note, *supra* note 2, at 613 n.32.
25. J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW & PRACTICE § 2.02, at 6 (1985).
26. Note, *Insurance Against Punitive Damages in Drunk Driving Cases*, 69 MARQ. L. REV. 308 (1986).

punitive damages in civil cases argue that if the actions of a person do not justify a criminal prosecution he should not suffer punishment.[27]

An additional justification for the imposition of punitive damages is to deter the offender and others from engaging in similar conduct.[28] Although the deterrent effect of awarding punitive damages has not been proven conclusively, it does serve as a signal to the defendant and others that driving while intoxicated may warrant severe civil penalties.[29] The effectiveness of punitive damages as a deterrent may depend on the public's knowledge of the possible consequences. Proponents argue that the public is knowledgeable about punitive damages.[30] Opponents argue that the deterrent effect is minimal for two reasons: first, because society is ignorant about the nature of punitive damages; and second, because once the drunk driver is intoxicated he is unable to rationally choose whether or not to drive.[31]

A third justification offered for imposing punitive damage awards against an offender is to reimburse the plaintiff for actual expenses not covered by compensatory damages, such as attorney's fees and court costs.[32] The availability of punitive damages allows and induces plaintiffs to bring actions which they might not otherwise pursue due to litigation expenses.[33] Critics maintain that this is a weak justification, and argue that those who find fault with the present system of civil litigation and its allocation of expenses should attack the problem directly, not indirectly through punitive damage awards.[34]

After evaluating the arguments for and against imposing punitive damages, an overwhelming majority of states today accept the use of punitive damages and deem it to be a necessary part of the civil litigation system.[35]

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27. J. GHIARDI & J. KIRCHER, *supra* note 25, at 6.
28. W. PROSSER & W. KEETON, *supra* note 11, at 9.
29. *See* Note, *supra* note 26, at 308.
30. Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 226 (1960).
31. J. GHIARDI & J. KIRCHER, *supra* note 25, § 2.09, at 22-23.
32. D. DOBBS, *supra* note 18, § 3.9, at 205.
33. J. GHIARDI & J. KIRCHER, *supra* note 25, § 2.11, at 25.
34. J. GHIARDI & J. KIRCHER, *supra* note 25, § 2.11, at 26.
35. Some courts, however, limit the imposition of punitive damages, permiting punitive damages only as an enhanced form of compensation to the plaintiff. *See e.g.*, Tedesco v. Maryland Casualty Co., 127 Conn. 533, 18 A.2d 357 (1941) (compensation was the purpose of imposing punitive damages and the award could not exceed litigation expenses less taxable costs); Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922) (punitive damages were allowed to enlarge compensatory damages, but they were not in a separate category); Bixby v. Dunlap, 56 N.H. 456 (1876) (enhanced compensatory damages were allowed as opposed to punitive damages).

In Louisiana, Massachusetts, Nebraska and Washington, the courts have completely rejected the awarding of punitive damages. *See* McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383, *cert. denied,* 287 U.S. 661 (1932) (punitive damages allowed only if a statute expressly authorized the imposition for a particular wrong); City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 47 N.E.2d 265

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A very important issue in the area of punitive damages is the role of insurance and whether the offenders or their insurance companies will pay punitive damages. While most courts recognize that a party may insure itself against punitive damages,[36] some courts prohibit an insurance company from providing coverage for punitive damages.[37] In determining whether to allow coverage for punitive damages, courts confront two questions: 1) whether the language of the insurance contract is sufficiently broad to cover punitive damages; and 2) whether public policy should permit recovery for punitive damages.[38]

An analysis of the insurability of punitive damages must begin with the language of the insurance policy. While most policies do not employ the terms "punitive damages" or "exemplary damages," some policies do suggest that coverage does include punitive damages by providing coverage on "all sums" or "all damages" for which the insured shall become liable.[39] Although this language may seem too broad or ambiguous, most courts interpret this general language in the insured's favor and allow for coverage.[40] In *Crull v. Gleb*,[41] a Missouri appellate court followed the minority view and held that a general public liability insurance policy does not include coverage for punitive damages. Assuming the insurance contract between the offender and the insurer contemplates coverage of punitive damages, public policy issues must also be addressed. In *Northwestern National Casualty Co. v. McNulty*[42] (the leading case against insurance covering punitive damages), a Florida appellate court stated that allowing coverage for punitive damages would greatly undermine the punishment and deterrent objectives of punitive damages.[43] The court also stated that "where a person is able to insure himself

(1943) (exemplary damages allowed only if authorized by statute); Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960) (compensation is the basis for recovery of damages in civil cases, so punitive damages are not allowed); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891) (punitive damages found to be unsound, unfair and dangerous in practice).

In the state of Indiana, courts allow the imposition of punitive damages, but not if the defendant in the civil action is also subject to criminal prosecution for the same act. *See* Nicholson's Mobile Home Sales, Inc. v. Schramn, 164 Ind. App. 598, 330 N.E.2d 785 (1975).

36. Note, *supra* note 2, at 624; *see* Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964).

37. *See* Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).

38. Note, *supra* note 26, at 320.

39. *See, e.g., Lazenby*, 214 Tenn. at 648, 383 S.W.2d at 5.

40. K. REDDEN, PUNITIVE DAMAGES § 9.3, at 685 (1980).

41. 382 S.W.2d 17 (Mo. Ct. App. 1964).

42. 307 F.2d 432 (5th Cir. 1962). Defendant, who was insured, lost control of his car while intoxicated and severely injured the plaintiff. The plaintiff was awarded punitive damages and the insurance company protested its liability for the punitive damages. *Id.* at 433.

43. *Id.*

against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct."[44]

A leading case supporting insurance against punitive damage awards is *Brown v. Maxey*.[45] The court in *Brown* emphasized the importance as a major public policy objective of maintaining freedom to contract. "Public policy favors the enforcement of insurance contracts according to their terms, where the insurance company accepts the premium and reasonably represents or implies that coverage is implied."[46] The *Brown* court also stated that insurance coverage for punitive damages could be a successful deterrent in that insurance premiums might rise after punitive damages have been imposed, insurance may become unavailable after the imposition of a punitive award, or the award may exceed the policy coverage.[47]

Because of the increase in civil litigation involving drunk driving incidents, most jurisdictions have addressed the issue of whether or not a drunk driver may be held liable for punitive damages.[48] Three different approaches have evolved from the jurisdictions that have ruled on this issue. Critical considerations in these three theories are the plaintiff's burden of proof concerning the defendant's standard of care and the defendant's state of mind at the time the tort was committed.

Jurisdictions that have responded negatively to the assessment of punitive damages against drunk drivers have adopted the more conservative view requiring proof that the defendant acted with ill will, malice, evil motive or fraudulent purposes.[49] Jurisdictions applying this standard require that the defendant's state of mind be established independently from his conduct.[50] The fact that the defendant acted in a certain manner does not by itself establish his state of mind. Because the defendant's conduct cannot be used to establish a malicious state of mind, independent evidence of malice must

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44. *Id.* at 440.

45. 124 Wis. 2d 426, 369 N.W.2d 677 (1985). In considering the insurability of punitive damages assessed against a landlord for failure to maintain his apartment complex reasonably safe from fire, the Wisconsin Supreme Court concluded that the policy language was sufficiently broad that the insured could reasonably have expected to be covered for punitive damages. *Id.* at 445, 369 N.W.2d at 686.

46. *Id.* at 446, 369 N.W.2d at 687.

47. *Id.* at 447, 369 N.W.2d at 688.

48. Note, *supra* note 2, at 615-16 n.47.

49. The following jurisdictions follow the conservative view: American Sur. Co. v. Gold, 375 F.2d 523 (10th Cir. 1966); Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); Arnold v. State *ex rel.* Burton, 220 Ark. 25, 245 S.W.2d 818 (1952); Tedesco v. Maryland Casualty Co., 127 Conn. 533, 18 A.2d 357 (1941); Yesel v. Watson, 58 N.D. 524, 226 N.W. 624 (1929); Teska v. Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 300 N.Y.S.2d 375 (1969); Detling v. Chockley, 70 Ohio St. 2d 134, 436 N.E.2d 208 (1982); Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1966).

50. *Chockley*, 70 Ohio St. 2d at 136, 436 N.E.2d at 210.

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be introduced. This concept is known as *actual malice* and requires the defendant to have had intent and deliberation in order to establish the requisite state of mind. From a practical standpoint, under this test punitive damages are effectively precluded because proving malice outside the context of specific conduct is extremely difficult in drunk driving cases.[51]

In *Detling v. Chockley*,[52] an Ohio court following the conservative view stated that one who knowingly drives his automobile on the highway while legally intoxicated is in violation of the state statute prohibiting driving while intoxicated and is thereby negligent. However, the court held that an act of mere negligence did not of itself demonstrate the degree of intention and deliberation necessary to justify awarding punitive damages.[53] The irony of this position is that the more the defendant drinks the more intoxicated he becomes, and he thus becomes increasingly less able to form the necessary intent and deliberation required to prove actual malice. Thus, although the defendant may be more dangerous and guilty of wrongdoing as his degree of intoxication increases, it is more difficult to assess punitive damages against him.[54] This view disregards the societal need for harsher penalties to punish the defendant and to deter others from driving while intoxicated.

Another approach followed in determining whether to award punitive damages is more liberal and determines the propriety of imposing punitive damages largely upon the conduct involved.[55] The defendant's conscious wrongdoing may be "necessarily implied" from reckless conduct,[56] and the defendant's state of mind is not viewed separately from his conduct. This standard, known as legal malice, makes it easier for the plaintiff to get the issue of punitive damages to the jury because the defendant's malicious mental state can be implied from his reckless conduct in becoming intoxicated and then driving.[57] The plaintiff does not have to provide independent evidence of the defendant's state of mind in order to recover punitive damages.

In *Taylor v. Superior Court*,[58] a California court held that one who voluntarily consumes alcoholic beverages to the point of intoxication, know-

51. Comment, *Punitive Damages and the Drunken Driver*, 8 PEPPERDINE L. REV. 117, 139 (1980).

52. *Chockley*, 70 Ohio St. 2d 134, 436 N.E.2d 208 (1982).

53. *Id.* at 137, 436 N.E.2d at 211. No ill will or malicious motive toward the plaintiff was present. *Id.*

54. *Id.*

55. *See, e.g.*, Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979); Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976); Svejcara v. Whitman, 82 N.M. 739, 487 P.2d 167 (Ct. App. 1971).

56. Asher v. Broadway-Valentine Center, 691 S.W.2d 478, 485 (Mo. Ct. App. 1985).

57. *See, e.g.*, MAI 10.01.

58. 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (in a personal injury action against an intoxicated driver, plaintiff was awarded punitive damages based on proof of defendant's voluntary intoxication).

ing from the outset that he must thereafter drive an automobile, demonstrates "such a conscious disregard of the interests of others that his conduct may be called willful and wanton."[59] Thus, the intoxication of the defendant motorist was in itself an adequate basis for an award of punitive damages and no showing of actual malice or causation was required.

While a court following the pure liberal approach would hold a defendant liable for punitive damages based solely on evidence of intoxication,[60] other jurisdictions, including the *Taylor* court, modify that approach by requiring proof that the defendant voluntarily drank to the point of intoxication and knew from the outset that he would thereafter operate a motor vehicle.[61] Under this approach the plaintiff would therefore be required to prove that the defendant possessed an awareness of the probable consequences of his conduct. This requirement affords the defendant greater protection against unwarranted punitive damages than the pure liberal approach would provide.

Although the liberal approach is the most advantageous to society in that it curbs drunk driving accidents and fatalities, it is not without drawbacks. The defendant is afforded no protection when his intoxication might not have been the cause of the accident. Also, because proof that the defendant was intoxicated is enough to sustain a punitive damage award, the plaintiff is not required to produce any evidence of a culpable mental state. This might allow the recovery of punitive damages in situations where it may not be justified. The *Taylor* court distinguished its approach from the liberal view by requiring evidence that the defendant knew that he would later be operating a motor vehicle before a punitive damage award would be allowed.

A majority of courts have adopted a moderate approach allowing the imposition of punitive damages in drunk driving cases by emphasizing the defendant's conduct in proving legal malice, but also requiring proof of causation (that the defendant's intoxication was the cause of the accident).[62] A recent decision by the Missouri Court of Appeals for the Eastern District appears to follow this moderate approach.[63]

The court in *Wheeler* upheld the circuit court's finding that a punitive damage instruction was not warranted.[64] In so holding, the court followed

59. *Id.* at 894-95, 598 P.2d at 859, 157 Cal. Rptr. at 699.

60. An example of a jurisdiction which adopted the pure liberal approach is Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976). In *Ingram*, the plaintiff's car was struck by the defendant from the rear while stopped at an intersection. Although the defendant was legally intoxicated, he was not driving at an excessive speed, nor did he swerve or veer out of his lane of traffic. *Id.* at 923. The court held that the voluntary act of driving while intoxicated was sufficient proof of malice to warrant awarding punitive damages. *Id.* at 924.

61. *Taylor*, 24 Cal. 3d at 894-95, 598 P.2d at 559, 157 Cal. Rptr. at 699.

62. *Wheeler*, 708 S.W.2d at 677.

63. *Id.*

64. *Id.* at 679.

the moderate approach allowing malice to be implied by conduct but requiring proof of causation before punitive damages could be awarded. The court, following the legal malice theory, stated that the defendant's conscious wrongdoing could be "necessarily implied" from his reckless conduct;[65] getting behind the wheel with a blood alcohol content above the legal limit is conduct which can imply conscious wrongdoing and becomes negligence per se.[66] However, the court indicated that a person could not be punished solely because he was drunk or is an alcoholic.[67] Thus, the court also required proof that the defendant's intoxication caused the accident in order to submit the issue of punitive damages to the jury.[68] The plaintiff in *Wheeler* argued that proof of causation was not required, claiming that the submission of the punitive damages instruction to the jury was a logical extension of *Smith v. Sayles*,[69] an earlier Missouri case which addressed the issue of punitive damages and drunken driving.[70] Although the *Sayles* court did not adopt a standard of care (i.e., actual or legal malice) regarding punitive damages and drunk driving, that court stated that the plaintiff must have prima facie proof of the elements of punitive damages for a punitive damage instruction to be submitted to the jury.[71] In view of the *Sayles* decision, the *Wheeler* court naturally included the element of causation as being required for punitive damages. The evidence in *Wheeler* did reveal that the defendant was legally intoxicated, thus implying reckless conduct. However, the court held that the plaintiff did not present sufficient evidence to prove that the defendant's intoxication caused him to rear-end the plaintiff's car.[72] Thus, a punitive damage instruction could not be submitted to the jury. Although the fact that the defendant was legally intoxicated does not by itself establish intoxication as the sole proximate cause of the injury to the plaintiff,[73] the *Wheeler* court recognized that the connection between the defendant's conduct and the injury may be proven through circumstantial evidence. The court stated that in most cases, injuries sustained in an automobile collision with a drunken driver may be directly attributable to the defendant's intox-

65. *Id.* at 680.
66. *Id.*; Bowman v. Heffon, 318 S.W.2d 269, 274 (Mo. 1958).
67. *Wheeler*, 708 S.W.2d at 680.
68. *Id.*
69. 637 S.W.2d 714 (Mo. Ct. App. 1982). The appellate court in *Sayles* remanded the case for retrial because the plaintiff failed to submit the issue of punitive damages to the jury in the circuit court action. *Id.*
70. *Wheeler*, 708 S.W.2d at 680 & n.1.
71. *Sayles*, 637 S.W.2d at 719. In *Sayles*, the plaintiff was not given the opportunity in the circuit court to present evidence to warrant a punitive damage award. In *Wheeler*, the plaintiff was allowed to present evidence but failed to meet the prima facie burden.
72. *Wheeler*, 708 S.W.2d at 680 & n. 2.
73. *Id.*

ication because intoxication generally causes reduced awareness and impairs the ability of a driver to react to a particular situation.[74]

However, the *Wheeler* court also stated that in cases where there is a rear-end collision,[75] it is extremely unlikely that one can recover punitive damages. Because of the particular factual situation in a rear-end collision, the causal connection between a defendant's intoxication and a plaintiff's injury is often too attenuated for a submission of punitive damages to the jury. A drunk driver could be well within the speed limit, drive a straight line and have a rear-end collision with a car stopped at an intersection because of inattention rather than intoxication.[76] Thus in a case involving a rear-end collision, the plaintiff must present additional evidence that intoxication caused the defendant to rear-end the plaintiff.

The *Wheeler* court did not expressly state what additional evidence could prove causation. However, in *Ayala v. Farmer's Mutual Automobile Insurance Company*,[77] a factually similar case, the Wisconsin Supreme Court listed several factors that could offer guidance in a future determination of whether a defendant's intoxication was the cause of a collision. Items such as speed, management and control of the car, position of the car on the road or highway, whether the defendant kept a proper lookout, or any irregular or abnormal driving might help prove causation and thus warrant the imposition of punitive damages.[78]

The rationale of the *Wheeler* court's position on drunk driving and punitive damages is fundamentally sound and achieves three laudable objectives. First, by allowing the imposition of punitive damages, it recognizes that highway travellers have the right to be free from the erratic and abnormal behavior of the drunken driver. Second, in furthering the goal of curbing the drunk driving problem, it alleviates the difficult burden of proving actual intent and deliberation of the defendant by adopting the legal malice theory.

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74. *Id.* at 680 n.2.

75. The *Wheeler* court indicated that the facts in the case fell into an exception known as the "very narrow rear-end exception." *Id.* at 681. The court distinguished the facts in *Wheeler* from a similar case, Rustin v. Cook, 143 Ariz. App. 486, 694 P.2d 316 (1984). In *Rustin*, the court found that evidence of a rear-end collision which occurred while the defendant was driving while intoxicated supports a finding of acting with reckless indifference to the rights of others. Thus the *Rustin* court allowed the imposition of punitive damages against the intoxicated driver. *Id.* at ____, 694 P.2d at 316. However, the facts of *Rustin* are distinguishable from *Wheeler*, in that the plaintiff in *Rustin* was "obediently" positioned on the road and was free from negligence. *Id.* at ____, 694 P.2d at 316. In *Wheeler*, however, the court found that the plaintiff was not "obediently" positioned to make a left turn, and thus not free from negligence. *Wheeler*, 708 S.W.2d at 678.

76. *Wheeler*, at 680-81.

77. 272 Wis. 629, 76 N.W.2d 563 (1956).

78. *Id.* at 640, 76 N.W.2d at 570.

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This provides plaintiffs with a better opportunity to recover punitive damages than plaintiffs in jurisdictions following the conservative view. Third, it forces the plaintiff to present a prima facie case including causation, which is not always easily accomplished. This serves as a protective measure for a drunk driver in those instances where his intoxication is not the cause of the injury or collision. Thus, a person would not be punished solely because he was drunk. Further, failing to require proof of causation makes the intoxicated driver an insurer, to the extent of the amount of any punitive damages, irrespective of any showing that his conduct in the operation of the automobile fell below that standard of care he owed the plaintiff.

Drunk driving has become a social problem of great proportion in the United States. To stop the destruction created by drunk drivers, society must develop responses that increase the punishment and deterrence that drunk drivers are subjected to. Perhaps the most effective method of thwarting drunk driving is through imposition of punitive damages. Intoxicated drivers should be held liable for punitive damages notwithstanding the criticisms against awarding such damages. In *Wheeler v. Evans,* a Missouri appellate court adopted a standard that struck a balance between the liberal approach of awarding punitive damages based upon proof of intoxication alone and the conservative view which makes it virtually impossible to award punitive damages. That moderate approach allowing a punitive damages award based upon the defendant's reckless conduct with proof that the defendant's intoxication "caused" the collision accomplishes the goal of getting drunk drivers off the road while affording some protection for defendants against unreasonable punitive damages.

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