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The Politics of the Law-Politics Dichotomy

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PUNITIVE DAMAGES: THEIR HISTORY AND THEIR APPLICABILITY TO DRUNK-DRIVING CASES.

Considering the epidemic nature of drunk driving today, it is not surprising that punitive damages are becoming an important issue in accident litigation. Much of the difficulty in this area stems from the particular standard of care the court decides to apply in its determination of whether punitive damages should be awarded. Generally, there are two standards to justify an award of punitive damages. The first standard, the more conservative view, requires actual malice. Courts which follow this standard, although acknowledging the fact that drinking to a point of intoxication and then driving is negligent, and even reckless, hold that such conduct will not support an award of punitive damages without proof of actual malice on the part of the driver.¹ The second view is much more liberal² and merely requires a showing that the defendant was so wanton and reckless as to indicate a conscious disregard for the rights of others.³ This standard was used as early as

¹See *Smith v. Sayles*, 637 S.W.2d 714 (Mo. 1982); *Baker v. Marcus*, 201 Va. 905, 114 S.E.2d 617 (1960).

²See *Taylor v. Superior Court*, 24 Ca.3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (driving while intoxicated is in itself sufficiently reckless or wanton to warrant punitive damages). *Accord Allers v. Willis*, 199 Mont. 499, 643 P.2d 592 (Mont. 1982); *Nales v. State Farm Mut. Auto. Ins. Co.*, 398 So. 2d 455 (Fla. Dist. Ct. App. 1981); *Svejcar v. Whitman*, 82 N.M. 739, 487 P.2d 167 (1979); *Harrell v. Ames*, 265 Or. 83, 508 P.2d 211 (1973); *Focht v. Rababa*, 217 Pa. Super. 25, 268 A.2d 157 (1970); *Infeld v. Sullivan*, 151 Conn. 506, 199 A.2d 693 (1964); *Busser v. Sabatasso*, 143 So. 2d 532 (Fla. 1962); *Holmes v. Hollingsworth*, 234 Ark. 347, 352 S.W.2d 96 (1958); *Sebastian v. Wood*, 246 Iowa 94, 66 N.W. 2d 841 (1954); *Southland Broadcasting Co. v. Tracy*, 210 Miss. 836, 50 So. 2d 572 (1951); *Pratt v. Duck*, 28 Tenn. App. 502, 191 S.W.2d 562 (1945); *Ross v. Clark*, 35 Ariz. 60, 274 P. 639 (1929).

³The Restatement (Second) of Torts recognizes a mere showing of a reckless indifference to the rights of others as conduct so outrageous as to allow an award of punitive damages. The RESTATEMENT (SECOND) OF TORTS § 908 (1954) states: 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.

1929 in Arizona⁴ and is now the trend in automobile accident litigation involving drunk drivers.⁵ Despite the national trend toward liberalization, Utah District Courts maintain the conservative view requiring actual malice.⁶

I. [§ 1] INTRODUCTION

In view of the continuing American problem of the motor vehicle operator who insists on driving after drinking and the continual increase, both in dollar awards and cases in general, of punitive damages in recent years,⁷ it is somewhat surprising that the Utah Supreme Court has not entertained a single case presenting the question of whether evidence of a motor vehicle operator's intoxication will justify the recovery of punitive damages after injury occurs in a vehicle accident. In light of district court opinions on appeal before the Utah Supreme Court dealing with punitive damages in drunk-driving cases,⁸ this article addresses the following issue: Should Utah adopt a rule allowing for punitive damages against an intoxicated driver for injury he causes to another by reason of his diminished ability to operate his car?

A brief review of the history of punitive damages and their development in Utah case and statutory law is necessary before addressing this

⁴Ross v. Clark, 35 Ariz. 60, 274 P. 639 (1929). The court held that the jury was justified in awarding punitive damages of \$3,000.00 against a drunk driver, where evidence showed that he was driving at a reckless rate of speed in traffic that demanded careful driving.

⁵See *supra* note 2.

⁶See Biswell v. Duncan, No. C-83-6505 (3rd Dist. Ct. Utah Aug. 7, 1984) (notice of intent to appeal filed May 16, 1985); Miskin v. Carter, No. C-82-10175 (3rd Dist. Ct. Utah Dec. 9, 1983); Bell v. Crawford, No. C-81-7050 (3rd Dist. Ct. Utah Nov. 1, 1983) (notice of intent to appeal filed Nov. 10, 1983); Neilson v. Beers, No. C-82-4515 (3rd Dist. Ct. Utah Oct. 4, 1983).

⁷Mann v. Alabama-Kraft, No. 77-71-COL (M.D. Ga. March 15, 1979) (\$1,000,000. in punitive damages for wrongful death as a result of a negligent repair by machine's owner; machine put back into use violated written safety regulations); Daniel v. Magna Copper Co., No. 164920 (Ariz. Pima County Super. Ct. Apr. 19, 1979) (\$176,000. compensatory, \$500,000. Punitive damages for wrongful termination of plaintiff's employment and the intentional infliction of emotional distress as a result of plaintiff's suggestion that he was going to file a medical malpractice claim against the company hospital for a severe injury to his anal sphincter muscle which resulted in embarrassing bowel accidents); Ingram v. Commercial Bankers Life Ins. Co., No. 117117 (Cal. Riverside County Super. Ct. May 23, 1979) (\$128,000. compensatory, \$872,001. punitive for bad faith termination of benefits under a credit disability policy); Grimshaw v. Ford Motor Co., (Cal. San Bernadino County Super. Ct. 1978), *appeal docketed*, No. 4th Civ. 20095 (Cal. Ct. app. 4th Dist. Apr. 26, 1978) (\$125,000,000. punitive reduced to \$6,000,000. including compensatory; Pinto gas tank case).

⁸See *supra* note 6 and accompanying text.

issue. After exploring the historical development of punitive damages and the theories and standards Utah courts have used when awarding punitive damages, this article examines Utah District Court opinions ruling against recovery of punitive damages in drunk-driving cases. This article concludes that Utah should allow punitive damages in drunk-driving cases for the following reasons: first, the purposes of awarding punitive damages generally are not violated by allowing them in drunk-driving cases; second, the public's concern and demand for stringent laws to deter and punish the intoxicated driver, as evidenced by recent legislative action, is furthered by allowing jury assessment of punitive damages; and third, the national trend, especially seen in neighboring states, allows punitive damages in litigation involving drunk drivers.

II. [§ 2] HISTORY

Professor Morris, former professor at Harvard Law School, concisely explained the importance of a historical study of a subject when, in speaking of strict liability, he noted: "[I]ts age is something of a *prima facie* case for its usefulness."⁹ This axiom is equally applicable when one discusses the relative merits and validity of punitive damages.

A. [§ 2.1] EARLY DEVELOPMENT

The doctrine of punitive damages can be traced back to the earliest collection of laws known to man. The Code of Hammurabi, dated circa 2000 B.C.; the bible, which contains the Mosaic Law; and the Roman Law are three examples of ancient codes and writings that have provisions for increased awards designed to punish wrongdoers.¹⁰ Section eight of the Code of Hammurabi, for example, required that if a man stole an ox, sheep, ass, pig or goat from a temple or palace, he must pay thirty-fold; were he to steal it from a freeman, then he was to pay ten-fold.¹¹ The range of recoveries under Babylonian laws of restitution in theft cases ranged from two to thirty times the value of the stolen property.¹²

B. [§ 2.2] ENGLISH COMMON LAW

Early English courts never had to face the prospect of assessing damages; most suits that were brought were for the recovery of specific

⁹Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1206 (1931).

¹⁰Moses said:

For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the case of both parties shall come before the judges, and whom the judges shall condemn, he shall pay double unto his neighbor. If a man steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep. *Exodus* 22:1,4.

¹¹A. KOCUREK & J. WIGMORE, *SOURCES OF ANCIENT AND PUNITIVE LAW* 391 (1915).

¹²*Id.*

property of which the plaintiff had been deprived. However, in the thirteenth century, juries, having limited experience and few examples to follow, began making occasional pecuniary awards.¹³

By the sixteenth century, punitive damages appeared discreetly, their importance overshadowed by the legal and moral issues of the cases of which they were a part.¹⁴ The first case specifically to award punitive damages was the 1763 case of *Wilkes v. Wood*.¹⁵ In *Wilkes*, a case arising when Woods ransacked Wilkes' house because of a "libelous" pamphlet which Wilkes had published, the court stated:

[T]hat a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, as a proof of the detestation of the jury to the action itself.¹⁶

English courts have criticized punitive damages since *Wilkes*. In fact, in 1964 the House of Lords nearly abolished punitive damages because of the Lords' inability to agree on the purpose of punitive damages and the standard that should be used in allowing punitive damages.¹⁷

C. [§ 2.3] AMERICAN COMMON LAW

Due to America's historical association with England, it comes as no surprise that twenty-eight years after English courts allowed punitive damages, American courts did also. In 1791 punitive damages were, for the first time, awarded "for example's sake" in a case involving the breach of a promise to marry.¹⁸ The theory of punitive damages, however, has continuously been attacked and generally is not favored,¹⁹ despite the fact that the law upholds it. Therefore, in order to justify an imposition of such damages, there usually must be a showing that the defendant's conduct was malicious, intentional, or demonstrated "such a conscious and deliberate disregard of the interests of others that his conduct may be called

¹³T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed. 1956).

¹⁴Belli, *Punitive Damages: Their History, Their Use and their Worth in Present-Day Society*, 49 UMKC L. REV. 1 (1980).

¹⁵Lofft 1, 98 Eng. Rep. 489 (C.P. 1763).

¹⁶*Id.* at 498-99.

¹⁷*See Rookes v. Barnard*, 1 All E.R. 367 (1964).

¹⁸*See Coryell v. Colbaugh*, 1 N.J.L. 90 (1791).

¹⁹*See Hatfield v. Max Rouse & Son N.W.*, 100 Idaho 840, 854, 606 P.2d 944, 955 (1980) ("[P]unitive damages 'are not a favorite of the law, and the power to give such damages should be exercised with caution and within the narrowest limits.'") (quoting *Williams v. Bone*, 74 Idaho 185, 189, 259 P.2d 810, 812 (1953)).

willful or wanton.”²⁰ A showing of “mere negligence,” even if characterized as “gross,” is not judged sufficiently culpable for civil punishment and courts universally hold that such conduct does not justify an award of punitive damages.²¹

D. [§ 2.4] UTAH HISTORY

With the development of American common law, Utah, since 1928, has held that punitive damages are allowed by law;²² however, a review of Utah case law reveals that the application of punitive damages is far from consistent. Not only have the underlying theories of punitive damages changed, but the standards to determine the applicability of punitive damages have also varied. The operative point, in spite of changing theories and standards, is that Utah has allowed punitive damages in a gamut of cases.²³ A review of the theories and the standards of punitive damages indicates that drunk-driving cases should not be an exception to those many cases allowing punitive damages.

1. [§ 2.4.1] Underlying Theories

In the 1969 case *Palombi v. D. & C. Builders*,²⁴ the Utah Supreme Court held that punitive damages “serve a dual purpose: as an entitlement of the plaintiff for being subjected to a particularly grievous injury, and as a punishment to the defendant, and a warning to him and others, not to engage in similar evil conduct.”²⁵ Six years after *Palombi*, the Utah Supreme Court, in *Prince v. Peterson*,²⁶ held that punitive damages are “awarded not so much to reward plaintiff for loss as to punish the defendant . . . and to serve as a wholesome warning to others not to engage in similar wrongful conduct.”²⁷ Shortly after the *Prince* decision, the court, in *Kesler v. Rogers*,²⁸ leaned toward the *Palombi* rationale for punitive damages arguing that punitive damages should be awarded when it seems to one’s sense of justice that mere recompense for actual loss is inadequate

²⁰W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971).

²¹Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HAST. L.J. 639 (1980).

²²See *Falkenberg v. Neff*, 72 Utah 258, 269 P. 1009 (1928).

²³See *Leigh Furniture & Carpet v. Isom*, 657 P.2d 293 (Utah 1982); *Nash v. Craigco, Inc.*, 585 P.2d 775 (Utah 1978); *Prince v. Peterson*, 538 P.2d 1325 (Utah 1975); See *infra* notes 23-44 and accompanying text.

²⁴22 Utah 2d 297, 452 P.2d 325 (1969).

²⁵*Id.* at 301, 452 P.2d at 328.

²⁶538 P.2d 1325 (Utah 1975).

²⁷*Id.* at 1329.

²⁸542 P.2d 354 (Utah 1975).

and that the plaintiff should have added compensation. In *Behrens v. Raleigh Hills Hospital, Inc.*,²⁹ the court vacillated again; however, this time the court held that “[s]ince punitive damages are not intended as additional compensation to a plaintiff, they must, if awarded, serve a societal interest of punishing and deterring outrageous and malicious conduct which is not likely to be deterred by other means.”³⁰

As shown, the court has not been consistent in regard to whether additional compensation to the plaintiff is a recognized purpose of punitive damages. If it is, it appears to be a purpose secondary to punishment and deterrence. Whether the purpose of punitive damages is to compensate the plaintiff, punish the defendant, or both, punitive damages should not be precluded in drunk-driving cases. In fact, both theories support the awarding of punitive damages in drunk-driving cases.

2. [§ 2.4.2] Standard

Whether punitive damages may be granted in a drunk-driving case in Utah depends on the standard used in determining if the defendant's conduct is sufficiently grievous to merit punitive damages. Since the Utah Supreme Court has yet to rule on the issue in a drunk-driving case, the standard to be used to determine whether punitive damages should be granted is unclear. However, various Utah District Courts have ruled on the issue.³¹ Before analyzing the district court opinions and the standard they used, a review is necessary of Utah Supreme Court cases dealing with the standard that must be attained before the fact finder may impose punitive damages in non-intoxication cases.

Prior to *Terry v. Zions Co-op Mercantile Institution*,³² the general standard required for the imposition of punitive damages in tort cases was actual malice.³³ Actual malice or malice-in-fact is defined as willful and malicious conduct.³⁴ Therefore, before *Terry*, a jury could award punitive or exemplary damages only if the party against whom the damages were to be awarded acted willfully and maliciously.³⁵ Under this standard courts could hold that one who became intoxicated with full knowledge that she intended to drive immediately afterwards was, at most, grossly negligent. Since her activity lacked the requisite “malice,” a claim for punitive damages was not permitted.

²⁹675 P.2d 1179 (Utah 1983).

³⁰*Id.* at 1186.

³¹See *supra* note 6 and accompanying text.

³²603 P.2d 314 (Utah 1979).

³³See *Prince v. Peterson*, 538 P.2d 1325 (Utah 1975).

³⁴*Terry*, 605 P.2d at 327.

³⁵*Prince*, 538 P.2d 1325 (Utah 1975).

In *Terry*, which dealt with detention of the plaintiff by the defendant for alleged shoplifting, the Utah Supreme Court introduced a new standard that expanded the old malice-in-fact rule to include malice in law. Malice in law was defined by the *Terry* court as follows:

[M]alice in law does not consist of personal hate or ill will of one person towards another but rather refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen. . . . In such cases malice in law will be implied from unjustifiable conduct which causes the injury complained of or from a wrongful act intentionally done without cause or excuse.³⁶

The new malice-in-law standard, if applicable to drunk-driving cases, would allow punitive damages in those cases where one willfully consumes alcoholic beverages to the point of intoxication, knowing that he must thereafter operate a motor vehicle. Driving while intoxicated would be "sufficiently reckless or wanton conduct in itself to justify an award" of such damages.³⁷

In *Behrens v. Raleigh Hills Hospital, Inc.*,³⁸ the court again applied the malice-in-law standard in determining whether punitive damages were allowable. In *Behrens* a patient with known suicidal tendencies was given a razor to shave; however, the patient used the razor to commit suicide. The hospital's conduct manifested a knowing and reckless indifference toward, and disregard of, the rights of the patient. Therefore, punitive damages were awarded because the defendant either knew or should have known "that such conduct would, in a high degree of probability, result in substantial harm to another" and the conduct was "highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent."³⁹ As in *Terry*, the *Behrens* malice-in-law standard is sufficient to justify submission of the question of punitive damages in drunk-driving cases to a finder of fact because, at a minimum, a person who willfully consumes alcoholic beverages to the point of intoxication, knowing that he must thereafter operate a motor vehicle, manifests a knowing and reckless indifference toward and disregard of the rights of others.

In 1984, one year after *Behrens* and five years after *Terry*, the Utah

³⁶*Terry*, 605 P.2d at 327.

³⁷Annot., 65 A.L.R. 3rd 656, 660 (1975).

³⁸675 P.2d 1179 (Utah 1983).

³⁹*Id.* at 1187 (cit. omitted). See also *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 277-78 (Utah 1982) for another decision that allows punitive damages on proof of conduct that manifests a knowing and reckless indifference toward, and disregard of, the rights of others—the standard set forth in *Terry*, 605 P.2d 314 (Utah 1979).

*Terry and McFarland decisions, felt that the standard of malice in law was applicable in other areas, and in other types of claims beyond false imprisonment.*⁵²

In spite of such recognition, the court stated that the imposition of punitive damages must be considered as if 'the *Terry* decision never existed.'⁵³ Unfortunately, the court gave no explanation as to why it had to disregard the *Terry* decision.

In the 1983 case of *Bell v. Crawford*,⁵⁴ the Third District Court dismissed with prejudice the plaintiff's prayer for punitive damages. The facts are simple: the plaintiff had stopped for a red light when the intoxicated defendant drove his vehicle into the rear of the plaintiff's vehicle.⁵⁵ The court did not give any reason for ordering the dismissal.

As with *Bell* and *Biswell*, the court in *Neilson v. Beers*,⁵⁶ held that the "gross negligence and recklessness" of an intoxicated driver does not "rise to a level as to allow the fact finder to award punitive damages."⁵⁷ The court stated that the plaintiff had incorrectly interpreted two cases he cited for the proposition that punitive damages may be awarded where the defendant's conduct is proven to be with reckless indifference and disregard of the rights of others. The first case cited by the plaintiff was the *Terry* case.⁵⁸ The second case, which is discussed later, was *Leigh Furniture & Carpet v. Isom*.⁵⁹ In *Terry*, a false imprisonment case, the Utah Supreme Court applied the "reckless indifference and disregard" standard for allowing punitive damages. The district court in *Neilson*, nevertheless, held that such a standard is clearly an exception to the "willful and malicious" standard and applies only to "false imprisonment cases."⁶⁰

Juxtaposing *Neilson* to *Biswell* reveals two inconsistencies, only one of which is explainable. First, *Biswell* stated that malice-in-fact, that is willful and malicious conduct, was the standard to be used in determining whether punitive damages were allowable in false imprisonment cases.⁶¹

⁵²*Id.* at 4. (*emphasis added*).

⁵³*Id.*

⁵⁴No. C-81-7050 (3rd Dist. Ct. Utah Nov. 1, 1983).

⁵⁵*Id.* (Memorandum in Support of Defendant's Motion for Partial Summary Judgment).

⁵⁶No. C-82-4515 (3rd Dist. Ct. Utah Oct. 4, 1983).

⁵⁷*Id.* at 1.

⁵⁸See *supra* notes 32-37 and accompanying text.

⁵⁹657 P.2d 293 (Utah 1982).

⁶⁰*Neilson*, No. C-82-4515 at 2.

⁶¹*Biswell*, No. C-83-6505.

Neilson, on the other hand, stated that malice-in-law was the standard to be used in determining whether punitive damages were allowable in false imprisonment cases.⁶² This inconsistency is because the district court in *Neilson* based its outcome on *Terry*, whereas the district court in *Biswell* based its decision on *McFarland*. *McFarland*, which overruled *Terry*, came after the *Neilson* case.

The second and unexplainable inconsistency deals with whether the malice-in-law standard, that is the reckless indifference and disregard standard applies only to false imprisonment cases. Dictum in *Biswell* correctly states that the "malice-in-law standard was applicable in other areas, and in other types of claims beyond false imprisonment."⁶³ The district court in *Neilson*, on the other hand, said the malice-in-law standard applies only to false imprisonment cases.⁶⁴ For no apparent reason, the district court in *Neilson* failed to comment on the pre-*Neilson* case of *Branch v. Western Petroleum, Inc.*⁶⁵ *Branch* clearly indicates that the Utah Supreme Court did not intend to limit the standard of "reckless indifference and disregard" to the tort of false imprisonment for recovery of punitive damages.

In *Branch* the court affirmed the jury award of punitive damages where defendant polluted an adjoining landowner's culinary water well by discharging waste and allowing it to percolate through the soil.⁶⁶ The court expressly rejected defendant's argument that plaintiff must prove willful and malicious conduct in order to recover punitive damages stating:

[T]his Court held (in *Terry*) that punitive damages may be awarded when one acts with reckless indifference and disregard of the law and his fellow citizens: "This presumed malice or malice-in-law does not consist of personal hate or ill will of one person toward another but rather refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen. . . . In such cases, malice in law will be implied from unjustifiable conduct which causes the injury complained of or from a wrongful act intentionally done without cause or excuse."⁶⁷

By allowing punitive damages in drunk-driving cases, the Utah Supreme Court could resolve the confusion that presently exists among lower courts.

⁶²*Neilson*, No. C-82-4515.

⁶³*Biswell*, No. C-83-6505 at 4.

⁶⁴*Neilson*, No. C-82-4515 at 2.

⁶⁵657 P.2d 267 (Utah 1982).

⁶⁶*Id.* at 278.

⁶⁷*Id.* at 277-78 (quoting *Terry*, 605 P.2d 314 (Utah 1979)).

The Utah Supreme Court's reasoning in *Leigh Furniture & Carpet v. Isom*,⁶⁸ the second case cited by the plaintiff in *Neilson* as holding that the fact finder should determine whether punitive damages are allowed when the defendant's conduct is with reckless indifference and disregard of the rights of others, was too readily brushed aside by the district court. The court simply, though inadequately, stated that the reckless indifference standard was dictum.⁶⁹ Once again the district courts in Utah failed to accept the fact that the Utah Supreme Court has set forth and adopted two standards for awarding punitive damages in tort cases. Simply stated, defendant's conduct in a false imprisonment case must be willful and malicious, whereas defendant's conduct in a case other than a false imprisonment case can be with reckless indifference and disregard of the rights of others.

IV. [§ 4] PUNITIVE DAMAGES IN DRUNK-DRIVING CASES

Support for the proposition that punitive damages should be awarded in drunk-driving cases lay in three areas: first, the purposes of awarding punitive damages generally are not violated by allowing them in drunk-driving cases; second, the public's concern and demand for stringent laws to deter and punish the intoxicated driver, as evidenced by recent legislative amendments of the automobile homicide statute, is furthered by allowing them; and third, the national trend, especially seen in neighboring states, in allowing punitive damages in litigation involving drunk drivers.

A. [§ 4.1] PURPOSE

The previously mentioned decisions relating to the underlying theories of punitive damages indicated that courts have vacillated between using punitive damages to punish the defendant and to deter others from similar conduct and to compensate the plaintiff. As this area of tort law has evolved over the past fifteen years it has become generally accepted that the primary purpose of awarding punitive damages is to punish the defendant for his conduct and to deter others from similar conduct.⁷⁰ Allowing punitive damages in drunk-driving cases is appropriate because such damages deter similar future conduct, the incalculable cost of which is well documented.⁷¹ The deterrent effect punitive dam-

⁶⁸657 P.2d 293 (Utah 1982).

⁶⁹*Neilson*, No. C-42-4515 at 3.

⁷⁰See *supra* notes 24-30 and accompanying text.

⁷¹Although problem drinkers constitute a small portion of the nation's driving population, alcohol is the largest single factor involved in fatal highway accidents. See Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660 (1981); Note, *ASAP: A*

ages afford is directly in accord with the reasoning of the Supreme Court of Oregon, which in *Harrell v. Ames*,⁷² stated:

Indeed, the fact of common knowledge that the drinking driver is the cause of so many of the more serious automobile accidents is strong evidence in itself to support the *need for all possible means of deterring persons from driving automobiles after drinking, including exposure to awards of punitive damages* in the event of accidents. (*emphasis added*).⁷³

The Utah Supreme Court in *McFarland* stated "that punitive damages are appropriate only for aggravated torts."⁷⁴ Certainly the egregiousness of the act of driving while intoxicated and the probability of that act being repeated until life itself has been taken is far more aggravating than a false-imprisonment tort.

B. [§ 4.2] PUBLIC CONCERN

The second support for the imposition of punitive damages in drunk-driving cases comes from Utah Legislators' concern with the excessive loss of life and property caused by inebriated drivers. In light of this concern, the 1981 Utah Legislature amended the automobile homicide statute to facilitate prosecution of the intoxicated driver whose negligence causes injury or death.⁷⁵ The amendment not only established simple negligence as the standard for culpability,⁷⁶ but also signified the Legislators' dislike for the Utah Supreme Court's holding in *State v. Chavez*.⁷⁷ In

Rehabilitation Alternative to Traditional DWI Penalties, 35 WASH. & LEE L. REV. 672, 673 (1978). The Utah Supreme Court has itself decried the "excessive loss of life and property . . . caused by inebriated drivers." *Cavaness v. Cox*, 598 P.2d 349, 353 (Utah 1979) (quoting *People v. Sudduth*, 65 Cal. 2d 543, 421 P.2d 401, 403, 55 Cal. Rptr. 393 (1966)).

⁷²265 Or. 183, 508 P.2d 211 (1973).

⁷³*Id.* at 190, 508 P.2d at 214-15.

⁷⁴*McFarland*, 678 P.2d 304.

⁷⁵UTAH CODE ANN. § 76-5-207 (Supp. 1981).

⁷⁶The amended statute provides:

(1) Criminal homicide constitutes automobile homicide if the actor, while under the influence of intoxicating liquor, a controlled substance, or any drug, to a degree which renders the actor incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner. *For the purposes of this section, the standard of negligence shall be that of simple negligence, the failure to exercise that degree of care which ordinarily reasonable and prudent persons exercise under like or similar circumstances.* *Id.* (amendment emphasized)

⁷⁷605 P.2d 1226 (Utah 1979). For a discussion of the *Chavez* decision, *See* Recent Developments in Utah Law, 1981 UTAH L. REV. 190.

Chavez the Court required proof of criminal negligence in automobile homicides. The amendment itself is justified by the increasing number of fatalities attributable to drunk drivers and is indicative of Utah's unfavorable disposition toward drunk drivers. By requiring simple negligence in automobile homicides, one can infer that Legislators would approve of the malice-in-law standard espoused in *Terry* because this standard, even in a civil proceeding, would deter drunk driving more than the malice-in-fact standard. Whether awards of punitive damages or impositions of criminal penalties will effectively deter persons from driving after drinking may be debatable. However, in the absence of a showing of substantial evidence to the contrary, one cannot hold that such action does not have some deterrent effect. Furthermore, there is no reason why punitive damages should not have as much deterrent effect upon drunk driving as upon other types of conduct in which punitive damage awards are traditionally approved.⁷⁸

If the Utah courts continue to require malice in fact before allowing the fact finder the opportunity to assess punitive damages, the Legislature could, by statute, supersede the courts and their standard. An example of similar legislation action is found in Ohio. In *Detling v. Chrockley*,⁷⁹ the Ohio Supreme Court held that driving under the influence of alcohol at the time of the accident is not sufficient to raise a jury question of punitive damages since actual malice is required for questions of punitive damages. Therefore, a motorcycle passenger who was struck by an intoxicated driver was not entitled to punitive damages.⁸⁰ Ohio legislators responded by passing a statute that superseded the *Detling* holding.⁸¹ Though the statute is a criminal statute, by analogy Utah Legislators could pass a similar civil statute.

C. [§ 4.3] NEIGHBORING JURISDICTIONS

A third reason for allowing punitive damages in drunk-driving cases is founded upon existing case law. In a number of cases, neighboring courts have held that the intoxication of the defendant is itself an adequate basis for an award of punitive damages,⁸² while others have stated that the jury should decide if there was wanton disregard for another's rights.⁸³ Regardless, the national trend, now the majority, favors the malice-in-law standard.

⁷⁸See *supra* note 37, at 662.

⁷⁹70 Ohio St. 2d 134, 436 N.E. 2d 208 (1982) (superseded by statute as stated in *State v. Hennessee*, 13 Ohio App. 3d 436, 469 N.E.2d 947 (1984)).

⁸⁰*Id.*

⁸¹OHIO REV. CODE ANN. § 2903.06 (Page 1984).

⁸²See *infra* notes 84-92 and accompanying text.

⁸³See *Terry*, 605 P.2d 314.

In *Harrell v. Ames*,⁸⁴ the Oregon Supreme Court reaffirmed a ruling that an award of punitive damages is appropriate when a driver is shown to have been drinking in excess. The applicable standard was whether the tort was committed "so recklessly as to imply a disregard of social obligations. . . ."⁸⁵

In *Taylor v. Superior Court*,⁸⁶ the California Supreme Court cited *Harrell* as representative of the majority view and the most well-reasoned view in holding that punitive damages may be awarded against an intoxicated driver who causes an automobile accident since such conduct "may be held to exhibit a conscious disregard of the safety of others."⁸⁷

In support of its ruling, the Court in *Taylor*, stated:

It is crystal clear to us that courts in the formulation of rules on damage assessment and in weighing the deterrent function must recognize the severe threat to the public safety which is posed by the intoxicated driver. The lesson is self-evident and widely understood, drunken drivers are extremely dangerous people.⁸⁸

The Arizona Supreme Court, in *Smith v. Chapman*,⁸⁹ also recognized the dangerous nature of an auto, especially when a drunk driver is operating it. The court described the situation as a "time bomb waiting to explode" and refused to view the negligent conduct of a drunk driver other than as wanton misconduct.⁹⁰

The Montana Supreme Court, in *Allers v. Willis*,⁹¹ held that a person who consumes alcoholic beverages to the point of intoxication, knowing that he must operate a motor vehicle, will be subject to punitive damages. In *Allers*, a personal injury action in which the plaintiffs' car was struck from behind by an intoxicated driver, the court stated that driving while intoxicated is conduct that may be called willful or wanton.⁹²

Since the vast majority of states merely require reckless indifference to rights and safety of others when allowing fact finders to assess punitive damages in drunk-driving cases, so should Utah. There is no reason for

⁸⁴265 Or. 183, 508 P.2d 211 (1973).

⁸⁵*Id.* at 190, 508 P.2d at 213.

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

⁸⁷*Id.* at 888, 598 P.2d at 856, 157 Cal. Rptr. at 596.

⁸⁸115 Ariz. 374, 565 P.2d 880 (1976).

⁸⁹*Taylor*, 24 Cal.3d at 899, 598 P.2d at 859, 157 Cal. Rptr. at 698.

⁹⁰*Smith*, 115 Ariz. at 377, 565 P.2d at 882.

⁹¹197 Mont. 499, 643 P.2d 592 (1982).

⁹²*Id.* at 501, 643 P.2d at 596.

Utah courts to wait any longer, the soundness of allowing punitive damages in drunk-driving cases is well settled.

V. [§ 5] CONCLUSION

Drunk driving has risen to the status of a state epidemic in Utah today. Because criminal sanctions alone have not kept the problem under control, Utah's legislatures, judicial systems, and citizens groups have joined together to put an end to the drunken slaughter on the roads. The awarding of punitive damages against drunk drivers may help answer the problem.

Unfortunately, the Utah District Courts' decision to adopt an actual malice standard has lessened the effect punitive damages will have on drunk drivers on Utah's roads. It may not be long before the Utah Supreme Court considers whether punitive damages should be awarded in drunk-driving cases. When it does, it is hoped that the court will settle the malice-in-law/malice-in-fact struggle and rule that a claim for punitive damages will lie when a person consumes a sufficient amount of alcohol, becomes intoxicated, and while driving his motor vehicle causes an injury to another by reason of his diminished ability to operate his car.

JED W BECKSTEAD

VI. [§ 6] BISWELL V. DUNCAN

MEMORANDUM DECISION

CIVIL NO. C-83-6505.

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR SALT LAKE COUNTY.

AUGUST 7, 1984.

(Published As Filed)

The Motion of the defendant Diane G. Duncan for Partial Summary Judgment came before the Court on the 16th day of July, 1984 at the hour of 10:00 a.m. Counsel for the plaintiff and defendant were present, and argued their respective positions. The Court took the matter under advisement to review additional authorities cited by counsel for the respective parties, and to review in more detail the cases cited by the parties in their respective Memoranda. The Court has now reviewed the applicable case law cited by the parties, and being otherwise fully advised, enters the following Memorandum Decision.

The defendant seeks to have stricken from the plaintiff's Complaint the claim for punitive damages which is based upon the allegations in plaintiff's Complaint that the defendant was intoxicated because of the consumption of alcoholic beverages at the time of the accident complained of. The defendant takes the position and asserts to the Court that intoxication, even if it was ultimately shown that the defendant was intoxicated, is insufficient as a matter of law upon which to support a claim for punitive damages. The plaintiff takes the position that intoxication, if proven, is sufficient to defeat a Motion for Summary Judgment, and that intoxication can and in this case does create a cause of action which would allow punitive damages.

The Court has reviewed the history of the case law governing the imposition of punitive damages in tort cases. The Court has not been referred to, nor does there appear to be a decision from the Utah Supreme Court dealing directly with the issue before the Court, and that is whether intoxication, if shown, is sufficient to support a cause of action and a claim for punitive damages above and beyond compensatory damages that may result from an automobile accident.

A review of the cases dealing with the imposition of punitive damages and the standard that must be attained before those matters may be submitted to a finder of fact indicates that prior to the case of *Terry v. Zions Cooperative Mercantile Association*, 605 P.2d 314 (Utah, 1979), the standard required for the imposition of punitive damages in tort cases was actual malice. Actual malice is defined as malice in fact, and the case law prior to the *Terry* decision supports the proposition that for a defendant to be liable for punitive damages to a plaintiff, there must be a showing that

actual malice, evil will or intent was directed by the defendant towards the particular plaintiff. It does not appear that malice in law, or malice implied by the circumstances were sufficient to justify the submission of the question of punitive damages to a finder of fact prior to *Terry*.

In the *Terry* decision, which dealt with detention of the plaintiff by the defendant for alleged shoplifting, the Utah Supreme Court under the facts of that case expanded the old rule of malice in fact to include malice in law. The Supreme Court defined malice in law in the *Terry* decision as follows:

Malice in law does not consist of personal hate or ill will of one person towards another, but rather refers to that state of mind which is reckless of law, and of the rights of the citizen in a person's conduct towards that citizen.

Since the *Terry* decision, there have been a number of decisions that have used the standard set forth in *Terry*, and cases other than those dealing with shoplifting, and have applied the standard of malice in law, which includes a reckless disregard for the rights of others. See, *Behrens v. Raleigh Hills Hospital, Inc.*, 675 P.2d 1179 (Utah, 1983). In the recent case of *McFarland v. Skaggs Companies, Inc.*, 678 P.2d 298 (Utah, 1984), the Utah Supreme Court reversed the standard for imposition of punitive damages laid down in *Terry*. The *McFarland* case, as did *Terry*, dealt with detention of an alleged shoplifter. Punitive damages were awarded under the *Terry* standard. The Supreme Court determined that the *Terry* standard was improper, and should be reversed as being against the apparent weight of authority, and contrary to the pervasive scholarly reasoning in support of a position against the malice in law standard set forth in *Terry*. The Court in *McFarland*, in reversing *Terry*, adopted as the appropriate standard for determining the availability of a punitive damage award in an action for false imprisonment of that in malice in fact, or actual malice as opposed to malice in law. Obviously, it may be argued that the malice in fact requirement set forth in *McFarland* reversing the prior decision in *Terry* deals only with false imprisonment cases, and should not set the standard in cases where punitive damages are sought as a result of intoxicated driving. Apparently, the Supreme Court because it adopted the *Terry* standard in cases other than false imprisonment cases between the *Terry* and *McFarland* decisions, felt that the standard of malice in law was applicable in other area, and in other types of claims beyond false imprisonment. Inasmuch as the Supreme Court has reversed the *Terry* decision, the underpinnings for the malice in law standard have been withdrawn that sprung from the *Terry* decision, and the current appropriate standard must be considered as if the *Terry* decision never existed. Following that analysis, punitive damages can only be awarded in cases involving actual malice, or malice in fact, and malice in law is not applicable as a basis for the awarding of punitive damages in tort cases, whether it be false imprisonment or intoxicated driving.

In the present case it does not appear that there is any evidence that would support the position that the necessary requirements of actual malice were directed toward the plaintiff by the defendant as a result of the defendant's alleged intoxication or otherwise. The allegation in plaintiff's Complaint in the instant case alleges that the defendant's conduct was reckless and negligent, constituted a reckless and wanton disregard of the rights of the plaintiff in that she operated her car while intoxicated. In paragraph 4 of the plaintiff's Complaint the allegation is made that the plaintiff sustained physical injuries as a result of the negligence, or in the alternative gross negligence, of the defendant. The allegations of the Complaint while setting forth a cause of action alleging punitive damages based upon malice in law, is insufficient to support a cause of action for malice in fact, which is the standard for this Court to apply since the *McFarland* decision. If the plaintiff were in a position to allege facts sufficient to support a claim of malice in fact, Summary Judgment would be improper. On the present state of the pleadings, and there being no allegation of the plaintiff that malice in fact can be shown, this Court must grant the defendant's Motion for Summary Judgment, and hold that punitive damages cannot be recovered where the allegation and evidence only shows alleged intoxication, and does not allege or claim actual malice.

Based upon the foregoing, the defendant's Motion for Partial Summary Judgment is granted. Counsel for the defendant is to prepare an appropriate Order, and submit the same in accordance with Rule 4 (a) of the Rules of Practice in the Third Judicial District.

Dated this 7th day of August, 1984.

TIMOTHY R. HANSON
DISTRICT COURT JUDGE

VII. [§ 7] NEILSON V. BEERS

MEMORANDUM DECISION

CIVIL NO. C-82-4515.

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR SALT LAKE COUNTY.

OCTOBER 4, 1983.

(Published As Filed)

Plaintiff brings this action against the defendant for personal injuries arising out of an automobile accident. Plaintiff claims that the defendant was highly intoxicated and traveling between 70-75 MPH and on the wrong side of the road at the time of the accident. Plaintiff seeks punitive damages because of the gross negligence and recklessness of the defendant. The issue is whether or not "gross negligence and recklessness" rises to such a level as to allow the fact finder to award punitive damages. The court holds that it does not.

The standard for awarding "punitive damages" in the State of Utah is that the conduct must be "willful and malicious." (See *First Security Bank v. JBJ Feedyards*, 653 P.2d 591 at 598, and the cases cited therein; *Nelson v. Jacobsen*, 1983 Utah, 669 P.2d 1207).

Plaintiff cites two Utah cases for the proposition that punitive damages may be awarded where the conduct is proven to be with "reckless indifference and disregard of the rights of others."

The first case cited is *Terry v. Zions Merchantile Inst.*, 605 P.2d 314 (Utah 1979). This case arises out of a claimed false imprisonment. The Supreme Court states (at page 327):

Generally in personal injury cases the rule is that before the jury can award punitive or exemplary damages the party against whom the damages are to be awarded must have acted willfully and maliciously. However, it has long been the rule that in false imprisonment cases punitive damages may be awarded when a wrongful act is done recklessly or in open disregard of one's civil obligations and the rights of others.

Thus, it is obvious that the court makes a clear exception to the "willful and malicious" conduct rule in false imprisonment cases.

The second case cited is *Leigh Furniture and Carpet v. Isom*, 657 P.2d 293 (Utah 1982). In this case there was an alleged breach of contract and an intentional interference with prospective economic relations. It is also plead that the defendant was "intentionally and maliciously" (see page 296 of the case) forced out of business. The court held:

The purposes of punitive damages are well stated in *Kesler v. Rogers*, *supra*: These are: a punishment of the defendant for

particularly grievous injury caused by conduct which is not only wrongful, but which is wilful and malicious so that it seems to one's sense of justice that mere recompense for actual loss is inadequate and that the plaintiff should have added compensation; and that the defendant should suffer some additional penalty for that character of wrongful conduct; and also that such a verdict should serve as a wholesome warning to others not to engage in similar misdoings. 542 P.2d at 359. *Accord Branch Western Petroleum, Inc.*, Utah, 657 P.2d 267 (1982). As reflected in this statement of purpose and in numerous other authorities, punitive damages are awarded 'where the nature of the wrong complained of . . . goes beyond merely violating the rights of another in that it is found to be willful and malicious, *Eklington v. Foust*, Utah, 619 P.2d 37, 41 (1980) (emphasis added), or as a result of 'reckless indifference toward, and disregard of' the rights of others. *Branch v. Western Petroleum, Inc.*, *supra*.

It should be noted that at most the very last statement of "reckless indifference toward, and disregard of the rights of others" is dictum but is further limited by the footnote shown in the case which states: "We do not address the question of whether the theory of punitive damages would permit their award for an intentional tort, one of whose elements is malice (improper purpose). That circumstance is not before us." (Whatever that means?)

The motion to strike the claim for punitive damages is granted.

Dated this 4th day of October, 1983.

DEAN E. CONDER,
DISTRICT JUDGE