

Notes

***Tuttle v. Raymond*: An Excessive Restriction upon Punitive Damages Awards in Motor Vehicle Tort Cases Involving Reckless Conduct**

I. INTRODUCTION

In *Tuttle v. Raymond*,¹ the Supreme Judicial Court of Maine set out to reexamine the justifications and proper scope of the doctrine of punitive damages. The defendant in *Tuttle* had conceded liability at trial and focused solely upon the amount of damages the jury could properly award.² On appeal, the defendant challenged only the award of punitive damages, vigorously arguing for the complete abolition of punitive damages in Maine.³ This controversial issue concerning the legal justifiability of punitive damages arose from the following, unfortunately vague,⁴ facts.

The plaintiff, Hattie Tuttle, was seriously injured when a Lincoln-Continental driven by the defendant, Ralph Raymond III, struck the Plymouth in which she was a passenger with such force that the Plymouth was sheared in half. According to the court, the jury was presented with sufficient evidence for it to have found that Raymond was driving at an excessive rate of speed in a twenty-five mile per hour zone when he struck the Plymouth, and that he had driven through a red light just before the impact.⁵

1. *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985).

2. *Id.* at 1354.

3. *Id.* The defendant also argued that punitive damages were inappropriate as a matter of law under the facts of the case, and that nonetheless, several errors in the trial court required a reversal of the punitive damages award. *Id.*

4. See Note, *Tuttle v. Raymond: Drawing The Line on Punitive Damages*, 38 Me. L. Rev. 635 (1986), arguing that the court's ambiguous treatment of the facts involved in *Tuttle* "contributes to the confusion inherent in the meaning given by the court to implied malice." *Id.* at 638 n.19. The Note just cited criticizes the *Tuttle* court largely for failing to distinguish between malice implied-in-fact and malice implied-in-law, both of which might signify a sufficiently culpable state of mind to warrant punitive damages. *Id.* at 647-50. See also *infra* note 101.

This Comment, on the other hand, embraces the concept of reckless disregard of the circumstances as a proper basis for awarding punitive damages, without any separate inquiry into varying degrees of implied malice. This Comment argues that the defendant's conduct in *Tuttle* was probably sufficiently reprehensible to support a punitive award under either a subjective definition of recklessness, see *infra* notes 164-65 and accompanying text and notes 171-74 and accompanying text, or under an objective definition of recklessness, see *infra* notes 167-69, 183-92 and accompanying text. It is, however, just as imperative under a recklessness standard as under an implied malice standard, that a court fully analyze all of the facts involved in a particular case in order to determine the precise state of mind of the defendant. The court's failure to fully evaluate the facts in *Tuttle* precludes a definitive analysis as to whether the defendant's conduct would satisfy a subjective definition of recklessness. Nonetheless, this Comment argues that certain aspects of Raymond's conduct indicate that it may be considered to have satisfied a subjective definition of recklessness. See *infra* notes 171-74 and accompanying text.

5. *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985). The plaintiff in *Tuttle* also specifically alleged that Raymond had been going ninety miles per hour in a twenty-five mile per hour zone, that he had driven through two red lights, "that he had passed a car already stopped at the first light, and that he had failed to swerve or brake as he ran the second and hit the plaintiff." Note, *supra* note 4, at 638 (citing Brief of Appellee at 1, 14, *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985)). The court, however, failed to address these contentions in its opinion.

In addition, the court's opinion does not indicate whether there was any evidence presented regarding the defendant's possible intoxication at the time of the accident. The effect of evidence of driving while intoxicated upon the availability of punitive damages is discussed *infra* notes 132-45 and accompanying text.

Based upon these facts, the trial court awarded \$50,000 in compensatory and \$22,000 in punitive damages.⁶ On appeal, the Supreme Judicial Court of Maine refused to abolish the doctrine of punitive damages, but did vacate the punitive award in this particular case.⁷ In doing so, the court announced a new standard which severely restricts the availability of punitive damages in motor vehicle tort cases.⁸ The new standard permits the imposition of punitive damages based upon tortious conduct only when the defendant acted with malice.⁹

The malice requirement can be satisfied by a showing of "express" or "actual" malice in which the defendant's conduct is motivated by ill will towards the plaintiff, or alternatively, when the defendant's conduct is "so outrageous that malice can be implied."¹⁰ Significantly, the court emphasized that the latter implied or legal malice "will not be established by the defendant's mere reckless disregard of the circumstances."¹¹

Before addressing the propriety of this restrictive punitive damages standard, this Comment will briefly examine the historical origins of punitive damages.¹² Since punitive damages have been subjected to scathing criticisms from the time of their inception, a discussion of the continuing policy debate regarding their justifiability also will be presented.¹³ Then, the Comment will shift to a discussion of the different legal standards which have been utilized to support punitive awards,¹⁴ and of particular types of conduct in operating motor vehicles which courts often have held to be sufficiently culpable to justify the imposition of punitive damages.¹⁵ The primary focus of the Comment, however, is to evaluate the express holding in *Tuttle* that implied malice "will not be established by the defendant's mere reckless disregard of the circumstances,"¹⁶ and thus, that a punitive damages award will not be supported under a reckless disregard of safety standard. Rather than focusing upon Maine law, under

6. *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985).

7. *Id.*

8. *Id.* at 1361.

9. *Id.*

10. *Id.*

11. *Id.* In addition, the court held that future plaintiffs must prove malice by clear and convincing evidence in order to recover punitive damages. *Id.* at 1354 & n.2, 1362-63. This heightened standard of proof has been adopted by other courts as well. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 850-51 (2d Cir. 1967); *Traveler's Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 360-63 (Ind. 1982); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 298-300, 294 N.W.2d 437, 457-58 (1980). For a discussion of the propriety of the court's raising the standard of proof in *Tuttle*, see Note, *supra* note 4, at 653-57.

12. See *infra* notes 18-31 and accompanying text.

13. See *infra* notes 32-96 and accompanying text.

14. See *infra* notes 97-109 and accompanying text.

15. See *infra* notes 110-45 and accompanying text.

16. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). Several issues concerning the availability of punitive damages, including whether one can insure against the assessment of punitive damages, were not raised in the *Tuttle* case, and thus were reserved for future consideration. *Id.* at 1360 n.20.

For a thorough treatment of the insurability issue, see I J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES L. & PRAC. § 6.11 (1985 & Supp. 1986); Schumaier & McKinsey, *The Insurability of Punitive Damages*, 72 A.B.A. J. 68(4) (March 1, 1986); Note, *The Publicly Held Corporation and the Insurability of Punitive Damages*, 53 FORDHAM L. REV. 1383 (1985); Note, *Corporate Insurability of Punitive Damages Arising from Employee Acts*, 11 J. CORP. LAW 99 (1985); Comment, *Insurance Against Punitive Damages in Drunk Driving Cases*, 69 MARQ. L. REV. 306 (1986); Case Comment, *Punitive Damages Insurance: Why Some Courts Take the Smart Out of Smart Money*, 40 U. MIAMI L. REV. 979 (1986); Annot., 16 A.L.R.4th 11 (1982).

which *Tuttle* arose, this Comment will address the more general question of whether reckless operation of an automobile is a type of conduct for which the law should impose punitive damages.¹⁷

II. THE CONTROVERSIAL HISTORY OF PUNITIVE DAMAGES

A. Historical Origins

Two major theories have been advanced to explain the origin of punitive damages in the common law system. The first theory asserts that the doctrine arose from judicial reluctance to set aside jury verdicts awarding excessive damages.¹⁸ This reluctance was predicated upon the jury's original position as both investigator and adjudicator of disputes.¹⁹ Under this scheme, jurors were chosen because of their familiarity with the litigants and the facts in dispute.²⁰ Thus, courts generally deferred to the more knowledgeable juries and declined to review jury determinations of damages.²¹

By the end of the eighteenth century, however, courts had developed standards to measure damages in contract²² and tort actions involving property damage.²³ While the standard eventually adopted for personal injury cases allowed recovery only for compensatory purposes,²⁴ courts remained reluctant to set aside jury awards when the defendant's conduct had been particularly outrageous.²⁵ These courts

17. See *infra* notes 146–96 and accompanying text.

18. DUFFY, PUNITIVE DAMAGES: A DOCTRINE WHICH SHOULD BE ABOLISHED 4 (DEF. RESEARCH INST. Monograph: The Case Against Punitive Damages, 1969); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L. J. 639, 642–43 (1980).

19. Mallor & Roberts, *supra* note 18, at 643.

20. *Id.*; DUFFY, *supra* note 18, at 4.

21. See, e.g., *Townsend v. Hughes*, 2 Mod. 150, 150–51, 86 Eng. Rep. 994, 994–95 (1649) (action of *scandalum magnatum* against the defendant for saying that the plaintiff “is an unworthy man, and acts against law and reason” in which the Chief Justice affirmed an award of four thousand pounds damages stating, “that as a Judge he could not tell what value to set upon the honour of the plaintiff; the jury have given four thousand pounds, and therefore he could neither lessen the sum or grant a new trial, especially since by the law the jury are judges of the damages: and it would be very inconvenient to examine upon what account they gave their verdict”); *Russel v. Palmer*, 2 Wils. K.B. 325, 328, 95 Eng. Rep. 837, 839 (1767) (action for negligence against an attorney in which the court stated, “whereas this action [s]ounds merely in damages, and the jury ought to have been left at liberty to find what damages they thought fit.”). See also C. McCORMACK, LAW OF DAMAGES 24–25 (1935); T. SEDGWICK, MEASURE OF DAMAGES § 349 at 688 (9th ed. 1912).

22. See, e.g., *Sharpe v. Brice*, 96 Eng. Rep. 557, 557 (C.P. 1774) (stating that “[i]n contract the measure of damages is generally [a] matter of account, and the damages given may be demonstrated to be right or wrong.”).

23. See, e.g., *Pleydell v. Earl of Dorchester*, 101 Eng. Rep. 1115, 1115 (K.B. 1798) (action for property damage incurred as a result of diverting the plaintiff's water-course, in which the court set aside a verdict awarding £3000 damages because “not warranted by the evidence: it being a mere question of property as stated on the record, where there was something whereby to measure the damages, namely, the deterioration of the property itself; and therefore not like cases of personal injuries, as actions for adultery, slander, &C.”). See also DUFFY, *supra* note 18, at 5.

24. See, e.g., *Illinois Cent. R.R. Co. v. Sutton*, 53 Ill. 397, 399–400 (1870) (stating that “[t]he law is well settled, where the injury is not willful, mental suffering forms no part of the inquiry by a jury . . . the only inquiry for the jury was, the bodily injury, and such consequential damages as were the necessary result of the injury.”); *Flemington v. Smithers*, 2 C&P 292, 292–93 (K.B. 1826) (holding that plaintiff father, in action to recover for loss of son's services as driver of a stage coach, could recover damages for value of the lost services, but not for injury to his parental feelings).

25. See, e.g., *Earl v. Tupper*, 45 Vt. 275, 276, 288 (1873) (affirming award of “exemplary damages” because the defendant's series of assaults upon a pregnant woman which led to her death constituted “malice or wantonness.”); *Tullidge v. Wade*, 3 Wils. K.B. 18, 19, 95 Eng. Rep. 909 (1769) (plaintiff's daughter raped in his home; court affirmed “liberal damages” because the plaintiff “received this insult in his own house.”); *Benson v. Frederick*, 3 Burr. 1845, 97 Eng. Rep. 1130 (K.B. 1766) (recognizing the power to set aside excessive damage awards, but affirming such an

articulated the theory that these additional damages were permitted when the defendant's conduct had been motivated by malice or ill will towards the plaintiff.²⁶

The second theory asserts that punitive damages were designed to compensate the plaintiff for intangible harms²⁷ such as emotional distress and pain and suffering which were otherwise non-compensable at early common law.²⁸ During the nineteenth century, though, courts in both the United States²⁹ and England³⁰ began to expand the concept of actual damages to include intangible harm. Thus, the original compensatory function of punitive damages came to be satisfied by actual damages, and the vast majority of modern courts and legislatures have spoken of punitive damages primarily in terms of punishment and deterrence.³¹

B. *The Continuing Policy Debate Regarding the Justifiability of Punitive Damages in the United States*

Punitive damages have been the subject of many exacting criticisms³² since they were adopted as part of the common law in this country by a large majority of the

award in this case because the defendant's wrongful flogging of the plaintiff "scandalized and disgraced" him); *Huckle v. Money*, 2 Wils. K.B. 205, 207, 95 Eng. Rep. 768, 768-69 (1763) (affirming award of "exemplary damages" in case in which the plaintiff was taken from his house by virtue of a general warrant and detained for six hours in order to procure evidence against an underground newspaper).

26. See cases cited *supra* note 25. The first case in which punitive damages were expressly named as a separate category of damages was *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763). Lord Camden expressed this recognition in the following extract:

[T]he personal injury done to [the plaintiff] was very small, so that if the jury had been confined by their oath . . . , perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff . . . did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial [I] think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

Id. at 206-07, 95 Eng. Rep. at 768-69.

27. See *DUFFY*, *supra* note 18, at 5; *Mallor & Roberts*, *supra* note 18, at 643.

28. See cases cited *supra* note 24. See also *Fay v. Parker*, 53 N.H. 342 (1872), for a lengthy discussion of early cases awarding exemplary damages and the conclusion that they all may be viewed as properly considering aggravating circumstances for the sole purpose of fully compensating the plaintiff, *id.* at 353; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 587, 18 S.W. 351, 354 (1886) (discussing and rejecting the traditional view that damages were allowed only for those items of loss "as were susceptible of having attached to them an exact pecuniary value, [—] the dollars and cents lost as the result of a breach of contract or tort.").

A corollary to this theory proposes that punitive damages are a means of compensating the plaintiff for other legally non-compensable elements of damage such as attorney's fees. See, e.g., *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 127, 222 A.2d 220, 225 (1966) (stating that in Connecticut, "[r]ecovery is limited to an amount which will serve to compensate the plaintiff to the extent of his expenses of litigation less taxable costs.").

29. See, e.g., *Kennon v. Gilmer*, 131 U.S. 22, 26 (1889) ("The action is for an injury to the person of an intelligent being; and when the injury, whether caused by wilfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded."); *Canning v. Inhabitants of Williamstown*, 55 Mass. (1 Cush.) 451, 452 (1848) (where "the injury to the person is of such a character, as to be necessarily attended with mental suffering, such suffering is, within the meaning of the statute, a part of the injury to the person, and may be considered in the estimate of damages."). See also Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520 n.28 (1957).

30. See, e.g., *Andrews v. Askey*, 8 Car. & P. 7, 173 Eng. Rep. 376 (C.P. 1837) (allowing damages for mother's distress and anxiety of mind in action for seduction of daughter).

31. See *infra* note 92 and accompanying text.

32. See *infra* notes 34-37, 47-49, 61-65, and 72 and accompanying text.

states.³³ A primary criticism has been that punitive damages simply do not serve the compensatory purpose for which they were originally created.³⁴ Since actual damages now encompass items such as mental pain and suffering and wounded feelings,³⁵ it is argued that “[t]he doctrine of [punitive damages] is an anachronism and should be abolished.”³⁶ In effect, since the plaintiff is now fully compensated by compensatory damages, any amount of punitive damages constitutes an unjustified windfall to the plaintiff.³⁷

This argument, however, “fails to account for the fact that many legal doctrines serve purposes that differ from those for which they originally were developed.”³⁸ The fourteenth amendment, for example, originally was intended to protect former slaves, but its meaning has been broadened considerably to protect, for example, the rights of large public corporations.³⁹ “So long as a doctrine continues to serve a necessary policy goal, the fact that it has diverged from its original function does not provide a basis for abolishing the doctrine. The pertinent question is whether punitive damages continue to serve a rational policy.”⁴⁰ The fact remains, however, that the compensated plaintiff who is awarded punitive damages does indeed receive a windfall (and often a very large windfall). Given the overriding compensatory goal of tort law, it is quite reasonable to ask “why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished.”⁴¹

Although very compelling, this proposal is subject to the counterargument that requiring punitive damages awards to be contributed to a public fund would destroy the efficacy of punitive damages as an incentive to the plaintiff to bring a lawsuit and thereby vindicate society’s outrage at the defendant’s conduct, which might otherwise

33. Only four jurisdictions either totally or partially prohibit the imposition of punitive damages. See *McCoy v. Arkansas Natural Gas Co.*, 175 La. 487, 498, 143 So. 383, 385–86, *cert. denied*, 287 U.S. 661 (1932) (punitive damages disallowed unless specifically authorized by statute); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 269, 47 N.E.2d 265, 272 (1943) (punitive damages disallowed unless specifically authorized by statute); *Abel v. Conover*, 170 Neb. 926, 930, 104 N.W.2d 684, 688 (1960) (punitive damages never allowed); *Spokane Truck & Dray Co. v. Hooper*, 2 Wash. 45, 51–54, 25 P. 1072, 1073–74 (1891) (punitive damages never proper; “The plaintiff is made entirely whole [by liberal compensatory damages] . . . Surely the public can have no interest in exacting the pound of flesh.”). See generally 1 J. GHIARDI & J. KIRCHER, *supra* note 16, at §§ 4.09–.12 (1985 & Supp. 1986), in which the authors discuss further the limited role of punitive damages in each of these states.

In addition to these four states, one might also consider that the states of Connecticut, Georgia, Michigan, and New Hampshire do not allow punitive damages in the usual sense of the word given the compensatory approach taken towards punitive damages in those states. *Id.* at § 4.07 n.2. See *infra* notes 79–84 and accompanying text.

34. See *Murphy v. Hobbs*, 7 Colo. 541, 545–46, 5 P. 119, 122 (1872); *Fay v. Parker*, 53 N.H. 342, 349 (1872); *Bass v. Chicago & N.W. Ry. Co.*, 42 Wis. 654, 672 (1877) (Ryan, C.J., dissenting). See also DUFFY, *supra* note 18, at 8; Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411, 412–13 (1972–73).

35. See *supra* notes 29–30 and accompanying text.

36. DUFFY, *supra* note 18, at 8. See also Ghiardi, *supra* note 34, at 412–13, 423–24; Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 888 (1975–76).

37. See DUFFY, *supra* note 18, at 8; Long, *supra* note 36, at 886.

38. Mallor & Roberts, *supra* note 18, at 644.

39. See, e.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (holding that corporation’s proposed publication of views in opposition to a graduated personal income tax was “at the heart of the First Amendment’s protection,” made applicable to the states through the fourteenth amendment).

40. Mallor & Roberts, *supra* note 18, at 644. See *infra* notes 77–96 and accompanying text for a discussion of the traditionally recognized purposes of punitive damages.

41. *Bass v. Chicago & N.W. Ry. Co.*, 42 Wis. 654, 672 (1877) (Ryan, C.J., dissenting).

go unpunished.⁴² Similarly, the possibility of a punitive damages award may encourage the plaintiff to prefer legal action over violent self-help remedies.⁴³ In order to serve these goals and at the same time prevent the plaintiff from obtaining a massive windfall, it might be desirable to require that a certain percentage of a punitive damages award be contributed to a public fund, while allowing the plaintiff to retain the rest.⁴⁴

A second major attack upon punitive damages rests upon the traditionally distinct functions of the civil and the criminal law. The purpose of a criminal proceeding is to protect and vindicate the interests of society as a whole, by punishing the offender through incarceration, by rehabilitating the offender so that he will not repeat the offense, and by deterring the offender and others from engaging in similar conduct.⁴⁵ The purpose of a civil action for a tort, on the other hand, is to compensate the plaintiff for injuries sustained.⁴⁶ Some commentators argue that retribution and protection of society through deterrence are goals better left to the criminal law with its attendant procedural safeguards.⁴⁷ Punitive damages, it is argued, are primarily penal in nature and cannot constitutionally be imposed in the absence of the procedural safeguards afforded the defendant in a criminal prosecution.⁴⁸

Although this argument seems fairly compelling,⁴⁹ the "bright line that [it]

42. Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1162 (1966). See also *infra* notes 90-91 and accompanying text.

43. See *infra* notes 87-89 and accompanying text.

44. See, e.g., Note, *The Vitality of the Doctrine of Punitive Damages in Maine*, 35 ME. L. REV. 447, 458 (1983) (suggesting that the legislature could require either that plaintiff split award with state according to prescribed ratio, or that plaintiff be allowed to retain from award any amount necessary to cover expenses not fully covered by compensatory award, with any remainder to go to the state).

A recent Iowa statute requires a plaintiff to contribute any amount in excess of 25% of a punitive damages award to the state in situations in which the defendant's conduct was not directed specifically at the plaintiff or at the person from whom the plaintiff's claim is derived. IOWA CODE ANN. § 668A.1 (West Supp. 1987). Under this statute, the amounts paid to the state are paid into a civil reparations fund to be used for the purposes of "indigent civil litigation programs or insurance assistance programs." *Id.* In cases involving malice directed specifically at the person from whom the plaintiff's claim is derived, the statute does not require any contribution to the state civil reparations fund.

45. See generally J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960); W. LAFAYE & A. SCOTT, *CRIMINAL LAW* ch. 1, § 1.5, at 22-29 (2d ed. 1986); 1 WHARTON'S *CRIMINAL LAW & PROC.* 1-9 (1957); Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401 (1958).

46. See generally W. PROSSER & W. KEETON, *TORTS* § 2, at 7 (5th ed. 1984); P. WINFIELD, *THE LAW OF TORTS*, chs. 1, 3, 8 (1931); Hall, *Interrelation of Criminal Law and Torts*, 43 *COLUM. L. REV.* 753, 756-60 (1943).

47. See, e.g., FORD, *THE CONSTITUTIONALITY OF PUNITIVE DAMAGES* 15 (DEF. RESEARCH INST. MONOGRAPH: *The Case Against Punitive Damages*, 1969); Ghiardi, *supra* note 34, at 418-19; Long *supra* note 36, at 889.

48. FORD, *supra* note 47, at 17-18; Ghiardi, *supra* note 34, at 418-19; Long, *supra* note 36, at 889. These procedural safeguards include the requirement of proof of guilt beyond a reasonable doubt, the right to counsel, the privilege against self-incrimination, and the prohibition against double jeopardy. See Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 *U. CHI. L. REV.* 408 (1966-67) for an excellent refutation of these constitutional challenges against punitive damages. The author concludes that significant differences exist between criminal punishment and punitive damages which justify fewer procedural safeguards in the civil arena. The concern with double jeopardy is discussed *infra* notes 63-71 and accompanying text.

49. In fact, the United States Supreme Court once stated that a civil proceeding may operate in substance and effect as a criminal proceeding and held that the fourth and fifth amendment prohibitions against unreasonable searches and seizures and compulsory self-incrimination were applicable in a proceeding to establish a forfeiture of goods alleged to have been imported without paying duties thereon. *Boyd v. United States*, 116 U.S. 616, 633-35 (1886). In *United States v. Zucker*, 161 U.S. 475 (1896), however, the Court held that the *Boyd* principle had no bearing on the possible extension to civil proceedings of sixth amendment rights to be confronted with witnesses. And in *United States v. Regan*, 232 U.S. 37 (1914), the Court refused to raise the burden of proof to beyond a reasonable doubt in a civil action to recover a pecuniary penalty.

attempts to interpose between the civil and the criminal law is in fact artificial.”⁵⁰ In an early treatise on the law of damages, Sedgwick advocated punishment by civil courts in certain situations.⁵¹ He stated that:

Where either of these elements [fraud, malice, gross negligence, or oppression] mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender.⁵²

In addition, the United States Supreme Court, relying on more than a century of precedent, observed that, “[b]y the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of a penalty or punishment, given to the party injured.”⁵³

There are many instances in which punitive damages serve a valid purpose as either a supplement to, or a substitute for, the criminal law.⁵⁴ Punitive damages, for example, may serve as an effective supplement to the criminal law when the criminal punishment is a fine and the defendant is wealthy.⁵⁵ In such a case, punitive damages may provide greater deterrence than a fine, especially when the maximum fine is miniscule compared to the wealth of the defendant.⁵⁶ In addition, punitive damages may provide a supplemental deterrent effect in situations in which “practices such as plea bargaining . . . water down the deterrent effect of the criminal law.”⁵⁷

Moreover, when the defendant’s conduct is rarely or never prosecuted, punitive damages may constitute the only effective regulation of conduct.⁵⁸ This is particularly true in cases involving libel and slander, trespass, and technical batteries.⁵⁹ In these

50. *Tuttle v. Raymond*, 494 A.2d 1353, 1356 (Me. 1985). Similarly, Professor Morris has concluded that: [a]s long as the liability with fault rules are retained, the law of torts will have an admonitory function even though the doctrine of punitive damages is abandoned. So[,] punishment in tort actions is not anomalous (if anomalous only means unusual); and punitive damage practice is only one of many means of varying the size of money judgments in view of the admonitory function.

Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1177 (1931).

51. T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 53 (7th ed. 1880).

52. *Id.*

53. *Tuttle v. Raymond*, 494 A.2d 1353, 1356 (Me. 1985), *citing* *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851).

54. *See generally* Mallor & Roberts, *supra* note 18, at 655–58; Note, *supra* note 42, at 1173–76.

55. Note, *supra* note 42, at 1174.

56. *See, e.g.*, *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), *aff’d*, 388 U.S. 130 (1967), in which the plaintiff in a libel action, arguing that the district judge was far more lenient to the defendant in reducing the award (to \$400,000) than was justified, said:

The jury in the case at bar recognized that a 100 million dollar corporation with a circulation of between six and seven million copies and a readership of approximately 22,000,000 persons can be deterred by no less than three million dollars as a charge for its misuse of a cherished American freedom—the freedom of every man to live unthreatened by calumny.

Id. at 719 n.47. *See also* Note, *supra* note 42, at 1175.

57. Mallor & Roberts, *supra* note 18, at 657.

58. *See id.*; Morris, *supra* note 50, at 1196; Note, *supra* note 42, at 1175.

59. Punishment in these areas is usually left to the law of punitive damages. *See, e.g.*, *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), *aff’d*, 388 U.S. 130 (1967) (libel action); *Kink v. Combs*, 28 Wis. 2d 65, 135 N.W.2d 789 (1965) (assault and battery); *General Fin. Corp. v. Sexton*, 155 So. 2d 159 (Fla. Dist. Ct. App. 1963) (action for conversion).

situations, punitive damages act as a complete substitute for the criminal law rather than as a supplement.⁶⁰ The use of punitive damages to supplement, or even to supplant, the criminal law may be entirely justified when one considers the reprehensibility of much conduct that is not effectively regulated by the criminal law. We should either attempt to deter such conduct by the threat of punitive damages, or at least express societal disapproval by punishing the defendant through the imposition of punitive damages.

On the other hand, "[t]he policy attack on punitive damages is most persuasive when the conduct for which punitive damages are imposed is also punishable as a crime" and "the criminal system is adequately performing the functions of punishment and deterrence."⁶¹ The possibility of confinement and the stigma of a criminal record usually provide a far greater punishment and a more effective deterrent than the imposition of punitive damages.⁶²

Critics of punitive damages argue that to expose defendants to both criminal and civil penalties for the same conduct contravenes the spirit, though not the letter,⁶³ of the fifth amendment prohibition of double jeopardy.⁶⁴ The Indiana courts traditionally relied upon this argument and held that the mere possibility of a criminal prosecution bars an action for punitive damages based upon the same conduct.⁶⁵

60. Mallor & Roberts, *supra* note 18, at 656; Note, *supra* note 42, at 1175.

61. Mallor & Roberts, *supra* note 18, at 655.

62. Note, *supra* note 42, at 1173-74.

63. Read literally, the double jeopardy clause of the fifth amendment applies only to an "offense," which has been interpreted as referring solely to criminal offenses. See *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1874); *United States v. Bollinger*, 290 F. 395 (E.D.N.Y. 1923); *Commonwealth ex rel. Garland v. Ashe*, 344 Pa. 407, 26 A.2d 190 (1942). The United States Supreme Court, however, has more recently held that the double jeopardy prohibition applies to proceedings that are "essentially criminal." *Breed v. Jones*, 421 U.S. 519, 528 (1975). In determining that juvenile proceedings are "essentially criminal," the *Breed* Court examined the purpose of the proceeding, the potential consequences, and the extent to which the action is brought and backed by the resources of the state. *Id.* at 529. In a recent case applying the *Breed* criteria, the Fifth Circuit ruled that punitive damages awarded in a private civil action are not part of a proceeding which is "essentially criminal." *Hansen v. Johns-Manville Prod. Corp.*, 734 F.2d 1036, 1042 (5th Cir. 1984).

64. See, e.g., *Ford*, *supra* note 47, at 17-22; *Ghiardi*, *supra* note 34, at 418-19; Note, *supra* note 42, at 1181-84.

65. *Taber v. Hutson*, 5 Ind. 322 (1854). In reversing a punitive award in a civil action for assault and battery, the *Taber* court explained its rationale in the following manner:

Where the defendant is sued for the commission of a tort, such as slander, an offence not the subject of criminal punishment, the rule that gives damages 'to punish the offender,' may, with some degree of propriety, be applied, because it is the only mode in which, by public example, the various rights in community to personal security and private property can, under the sanction of law, be protected from injury and outrage. In such a case, there is wisdom in permitting a jury to 'blend together the interest of society and of the aggrieved individual.'

But there is a class of offences, the commission of which, in addition to the civil remedy allowed the injured party, subjects the offender to a state prosecution. To this class the case under consideration belongs; and if the principle of the instruction be correct, *Taber* may be twice punished for the same assault and battery. This would not accord with the spirit of our institutions. The constitution declares, that 'no person shall be twice put in jeopardy for the same offence;' and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more.

Id. at 325.

In the 1970s, long after the *Taber* decision, the Indiana courts of appeal began to disagree as to whether any exceptions to the *Taber* rule had been or should be created. In *Nicholson's Mobile Home Sales, Inc. v. Schramm*, 164 Ind. App. 598, 330 N.E.2d 785 (1975), the First District Court of Appeals noted that three exceptions to the *Taber* rule had been developed. The court stated that despite the traditional prohibition, the Indiana courts would allow punitive damages: (1) when the defendant's conduct indicated a heedless disregard of the consequences; (2) when the statute of

This argument, however, has never been very successful outside of Indiana.⁶⁶ Courts which have fully considered the double jeopardy argument have rejected it on one of two grounds.⁶⁷ The first ground is that the double jeopardy clause of the fifth amendment and similar state provisions apply only to an "offense" which refers solely to criminal offenses.⁶⁸ Under this literal approach, it is clear that an individual may be criminally prosecuted and later subjected to punitive damages in a civil action based upon the same conduct.

The second ground for rejecting the double jeopardy argument is based upon the analysis that criminal punishment is imposed as a result of a wrong done to the public, while the imposition of punitive damages in a civil action is based upon a violation of individual interests.⁶⁹ In effect, this argument asserts that the traditional Indiana rule "ignores the social judgment that one kind of conduct may be both a public and a private wrong and that a single punishment may not be sufficient to punish and deter."⁷⁰ Under this rationale, a court may allow the imposition of punitive damages

limitations on the criminal charge had run; and (3) when, in an action against a corporation, the corporation could not be criminally prosecuted for the acts of its agents. *Id.* at 606, 330 N.E.2d at 791 (citations omitted).

Subsequently, in *Glissman v. Rutt*, 175 Ind. App. 493, 372 N.E.2d 1188 (1978), the Third District Court of Appeals severely criticized *Schramm*, stating that: "An examination of the cases cited for the 'heedless disregard' exception does not support the *Schramm* conclusion. Indeed, in none does it appear that the bar arising from potential or past criminal prosecution was raised by the defendant." *Id.* at 495, 372 N.E.2d at 1190. The court in *Glissman* found itself to be bound by the *Taber* rule and affirmed the trial court's denial of punitive damages sought in connection with an automobile accident for which the defendant had already been convicted and sentenced for the offense of reckless driving. Nonetheless, the court noted that the reasons behind the *Taber* rule had not been scrutinized since 1893 and it strongly encouraged the Indiana Supreme Court or the state legislature to do so. *Id.* at 497, 372 N.E.2d at 1191.

The Indiana legislature responded with the enactment of IND. CODE ANN. § 34-4-30-2 (West Supp. 1986), effective on September 1, 1984. This statute effectively reverses the *Taber* rule by stating that "[i]t is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action" *Id.* The statute does, however, expressly prohibit the recovery of both punitive damages and treble damages for injuries to property which may be sought under IND. CODE ANN. § 34-4-30-1 (West Supp. 1986). IND. CODE ANN. § 34-4-30-2 (1) (2) (West Supp. 1986). A property damage plaintiff evidently may obtain one or the other, but may not obtain both punitive damages and the statutory treble damages. For a discussion of this Indiana statute, see Note, *Punitive Damages for Crime Victims: New Possibilities for Recovery in Indiana*, 18 IND. L. REV. 655 (1985). For a comprehensive review of the origin and development of the traditional *Taber* rule prior to the enactment of the 1984 statute, see Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945), and Note, *Double Jeopardy and the Rule Against Punitive Damages of Taber v. Hutson*, 13 IND. L. REV. 999 (1980).

66. See 1 J. GHIARDI & J. KIRCHER, *supra* note 16, § 3.02, at 2, in which the authors state that "[a]n overwhelming majority of jurisdictions allow the imposition of punitive damages in a civil action even though the same wrongful conduct of the defendant may subject him to criminal punishment." The authors cite cases from 31 jurisdictions in support of this broad proposition, *id.*, § 3.02, at 5-6 n.3, but note that "[m]ost of those jurisdictions have either failed to address the double jeopardy argument or, if they have done so, have merely relied on 'the great weight of authority' to support their rulings following the majority." *Id.*, § 3.02, at 2.

67. *Id.*

68. See *E.F. Hutton & Co., Inc. v. Anderson*, 42 Colo. App. 497, 498-99, 596 P.2d 413, 414-15 (1979); *Svejcar v. Whitman*, 82 N.M. 739, 741, 487 P.2d 167, 169 (1971); *Brown v. Swineford*, 44 Wis. 282, 287-88 (1878), *cited in* 1 J. GHIARDI & J. KIRCHER, *supra* note 16, § 3.02, at 6 n.5. See also *supra* note 63 for a discussion of the fifth amendment meaning of "offense."

69. See *Hauser v. Griffith*, 102 Iowa 215, 218, 71 N.W. 223, 223 (1897); *Doehoefer v. Shewmaker*, 123 Ky. 646, 655-59, 97 S.W. 7, 9-11 (1908); *Elliot v. Van Buren*, 33 Mich. 49, 56-57 (1875); *Morris v. McNab*, 25 N.J. 271, 281-82, 135 A.2d 657, 662-63 (1957).

70. Note, *supra* note 48, at 415. See also 1 J. GHIARDI & J. KIRCHER, *supra* note 16, § 3.02, at 3, stating that "[u]nder this approach, a violation of the double jeopardy prohibition is not found when a person subject to criminal sanction is also punished by punitive damages since both the public and the person injured by the wrongful act are furnished with distinct and concurrent remedies."

as a double punishment, but only when the criminal penalty is not sufficient to achieve the goals of punishment and deterrence.⁷¹

Punitive damages also have been assailed because of a lack of clear standards by which the jury can assess the proper amount of damages.⁷² Many courts, however, do require that the amount of punitive damages bear some reasonable proportion to the plaintiff's actual, compensatory damages.⁷³ Moreover, the same lack of clear standards argument can be asserted against compensatory awards for intangible harms for which recovery is clearly allowed under American law.⁷⁴ In addition, punitive damages are subject to both reduction by the trial court under the doctrine of remittitur and to appellate review; the jury's discretion is never completely unsupervised.⁷⁵ Perhaps more importantly, the flexibility given to the jury in assessing punitive damages is desirable in that it allows an individualized punishment that is commensurate with the reprehensibility of the defendant's conduct and with the defendant's wealth.⁷⁶

In sum, although the criticisms of punitive damages deserve serious consideration, they do not warrant the complete abolition of the doctrine. Punitive damages are available in an overwhelming majority of states⁷⁷ because they continue to serve several useful purposes.

Punitive damages have been justified as serving at least four distinct purposes: compensating the tort victim, appeasing both the victim's and society's possible desire for revenge, punishing the defendant, and deterring both the defendant and others from engaging in similar conduct in the future.⁷⁸ Only four states expressly recognize the compensatory function of punitive damages as the primary function of the doctrine.⁷⁹ The Connecticut Supreme Court, for example, has stated that the

71. This approach is advocated by several commentators. See Mallor & Roberts, *supra* note 18, at 658; Morris, *supra* note 50, at 1195; Note, *supra* note 29, at 524; Note, *supra* note 48, at 415.

72. DUFFY, *supra* note 18, at 8; Note, *supra* note 48, at 419.

73. 2 J. GHIARDI & J. KIRCHER, *supra* note 16, § 18.06, at 19-22. This reasonable relationship test, however, is of little utility because of its vague parameters. See *id.*, discussing cases in which ratios of 11:1, 15:1, and 40:1 have been found not to be excessive. Generally, once the question of punitive damages has been submitted to the jury, the court will pay great deference to the jury's determination of damages because the jury is seen as the sole judge of the amount that is necessary to punish and deter. See *id.* at § 18.04.

74. Mallor & Roberts, *supra* note 18, at 646. See also *supra* note 29 and accompanying text.

75. Mallor & Roberts, *supra* note 18, at 646; Note, *supra* note 42, at 1171-72. On the doctrine of remittitur, see generally 2 J. GHIARDI & J. KIRCHER, *supra* note 16, ch. 18.

76. Mallor & Roberts, *supra* note 18, at 646-47; Note, *supra* note 42, at 1170; Note, *supra* note 29, at 528.

77. See *supra* note 33.

78. Note, *supra* note 29, at 520.

79. These four states are Connecticut, Georgia, Michigan, and New Hampshire. See *Waterbury Petroleum Prod., Inc. v. Canaan Oil & Fuel Co.*, 193 Conn. 208, 235, 238, 477 A.2d 988, 1003, 1004 (1984) (rejecting plaintiff's proposal that Connecticut abandon its compensatory approach to punitive damages and "join the majority of jurisdictions which permit an amount of 'punitive' damages which serves to 'punish and deter' wrongdoers who act wantonly and recklessly," in order to fully compensate a plaintiff for his injuries (including litigation expenses) and yet "[avoid] the potential for injustice which may result from the exercise of unfettered discretion by a jury."); *Wise v. Daniel*, 221 Mich. 229, 233, 190 N.W. 746, 747 (1922) (punitive damages "may enlarge the compensatory allowance, but they are not to be considered as authorizing a separate sum by way of example or punishment."); *Vratsenes v. N.H. Auto, Inc.*, 112 N.H. 71, 72, 289 A.2d 66, 67 (1972) (noting that the punitive function of exemplary damages has been rejected in New Hampshire, but that in cases involving "wanton, malicious, or oppressive" acts, "the compensatory damages for the resulting actual material loss can be increased to compensate for the vexation and distress caused the plaintiff . . ."). New Hampshire has since adopted an even more restrictive position with the enactment of N.H. REV. STAT. ANN. § 507.16

purpose of punitive damages is "not to punish the defendant for his offense[,] but to compensate the plaintiff for his injuries, and [the] so-called punitive or exemplary damages cannot exceed the amount of the plaintiff's expenses of litigation, less taxable costs."⁸⁰ More recently, the Connecticut Supreme Court reviewed and reaffirmed its "compensatory" punitive damages rule, stating that:

In permitting awards of punitive damages, but limiting such damages as we do, our rule strikes a balance—it provides for the payment of a victim's costs of litigation, which would be otherwise unavailable to him, while establishing a clear reference to guide the jury fairly in arriving at the amount of the award.⁸¹

The Michigan Supreme Court has taken a somewhat different compensatory view by recognizing punitive damages as being in the nature of compensation for embarrassment and injured feelings.⁸² New Hampshire also adheres to this latter view,⁸³ which is actually a recognition of the English concept of "aggravated" damages.⁸⁴

Even in those states which do not recognize the compensatory element of punitive damages as the primary function of the doctrine, elements of compensation such as attorney's fees can be identified in punitive damages awards.⁸⁵ Thus, although the original compensatory function of punitive damages has largely been fulfilled by an expanded definition of actual damages,⁸⁶ the compensatory element is still directly prevalent in four states and indirectly present in several others.

Injured plaintiffs may seek punitive damages in part because of a desire for revenge.⁸⁷ By ensuring that a plaintiff can afford financially to pursue a remedy, the doctrine of punitive damages "encourages plaintiffs to prefer legal action over violent self-help."⁸⁸ Although "[a] modern legal system can hardly be based on revenge, . . . [insofar] as self-help is discouraged by satisfying a plaintiff's vindictive spirit a useful purpose is served by awarding exemplary damages."⁸⁹

(1986), which provides that "[n]o punitive damages shall be awarded in any action, unless otherwise provided by statute."

The status of punitive damages in Georgia is rather confusing because of the interplay between three separate sections of the Georgia Code governing civil damages and a lack of clarity among the courts that have applied those statutes. See I J. GHIARDI & J. KIRCHER, *supra* note 16, at § 4.04 for a good discussion of Georgia's approach to punitive damages, which the authors classify as being primarily compensatory in nature. *Id.* at § 4.02.

80. *Doroska v. Lavine*, 111 Conn. 575, 578, 150 A. 692, 692-93 (1930).

81. *Waterbury Petroleum Prod., Inc. v. Canaan Oil & Fuel Co.*, 193 Conn. 208, 237, 477 A.2d 988, 1004 (1984).

82. *Willett v. Ford Motor Co.*, 400 Mich. 65, 71, 253 N.W.2d 111, 113 (1977).

83. See *Vratsenes v. N.H. Auto, Inc.*, 112 N.H. 71, 72, 289 A.2d 66, 67 (1972), discussed *supra* note 79.

84. I J. GHIARDI & J. KIRCHER, *supra* note 16, § 4.07, at 8.

85. See, e.g., *New Orleans, J. & G.N.R.R. v. Allbritton*, 38 Miss. 242, 272-73 (1859) (holding that in cases for exemplary damages, counsel fees may be taken into consideration); *New York, C. & St. L.R. Co. v. Grodek*, 127 Ohio St. 22, 24-25, 186 N.E. 733, 734 (1933) (holding that compensation for services of plaintiff's attorney may be recovered only when the wrong complained of involved elements of fraud, malice, or wantonness which would authorize a punitive award).

86. See cases cited *supra* note 29.

87. Note, *supra* note 29, at 522. Two early decisions, *Merest v. Harvey*, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814) and *Grey v. Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764), explicitly acknowledged that one purpose of large damages awards was to prevent dueling.

88. *Mallor & Roberts*, *supra* note 18, at 650.

89. Note, *supra* note 29, at 522.

Punitive damages also constitute a type of public revenge by reflecting society's outrage at the defendant's conduct in the form of a verdict awarding such damages.⁹⁰ In this context, punitive damages give an incentive to the plaintiff to serve as a "private attorney general" and bring to "justice" a wrongdoer whose misconduct might otherwise go unpunished.⁹¹

A vast majority of jurisdictions justify the imposition of punitive damages as serving the dual functions of punishment and deterrence.⁹² In an opinion representative of this majority position, the Iowa Supreme Court stated that:

[T]hey [punitive damages] are awarded under proper circumstances and conditions as a punishment for the particular party involved and as a warning and an example to him in the future, and to all others who may offend in like manner. . . . The opinions of this Court have always emphasized the thought that the purpose of exemplary damages was the punishment, and prevention of similar future offenses.⁹³

Indeed, it has even been argued that punitive damages must be recognized as serving the functions of both punishment and deterrence because the two cannot logically be separated.⁹⁴ Basing punitive damages solely on a desire to punish, it is argued, would be "irrational" because "it seeks to inflict present suffering to 'remedy' past injuries that cannot be undone."⁹⁵ Inflicting punishment for past acts, however, tends to control future conduct in that the defendant and others will seek to avoid the consequences of such acts in the future.⁹⁶ With these justifications for punitive damages in mind, the focus of this Comment will now shift to a discussion of the different legal standards which have been utilized to support punitive awards, and of particular types of conduct in operating motor vehicles which courts often have held to be sufficiently culpable to justify punitive damages awards.

III. CIRCUMSTANCES JUSTIFYING THE RECOVERY OF PUNITIVE DAMAGES

A. Generally

Punitive damages differ significantly from compensatory damages in that exemplary damages deliberately focus attention upon the character of the defendant's conduct rather than upon the extent of harm suffered by the plaintiff.⁹⁷ In general:

[s]omething more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious

90. *Id.*; see also Long, *supra* note 36, at 877-78; Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 654 (1982).

91. Long, *supra* note 36, at 877-78; Mallor & Roberts, *supra* note 18, at 649-50; Comment, *supra* note 90, at 654.

92. Cases and statutes from 36 states are cited in 1 J. GHIARDI & J. KIRCHER, *supra* note 16, at § 4.14 n.1 (1985 & Supp. 1986) in support of this broad statement.

93. *Sebastian v. Wood*, 246 Iowa 94, 100, 66 N.W.2d 841, 844-45 (1954).

94. Mallor & Roberts, *supra* note 18, at 648.

95. *Id.*

96. Mallor & Roberts, *supra* note 18, at 648.

97. 1 J. GHIARDI & J. KIRCHER, *supra* note 16, at § 5.01.

and deliberate disregard of the interests of others that his conduct may be called willful or wanton.⁹⁸

Simply stated, ordinary negligent conduct is not sufficiently culpable to justify the sanction of civil punishment.⁹⁹ The sanction of punitive damages should be reserved for situations in which the defendant's state of mind "transforms conduct from the understandable to the intolerable. . . . The *closer* a defendant's state of mind comes to a subjective perception of the risk of harm to another, the more likely it becomes that punitive damages will be awarded."¹⁰⁰

Thus, to justify the imposition of punitive damages, a defendant's conduct generally need not be motivated by a conscious objective to harm the plaintiff. Such a conscious objective to harm, or actual malice toward the plaintiff, would however, most easily justify an award of punitive damages.¹⁰¹ The difficulty arises in determining when the defendant's state of mind is *sufficiently close to a subjective perception of the risk of harm to others* to warrant punitive damages.¹⁰² Courts and legislatures have employed a wide variety of terms, including gross negligence,¹⁰³

98. W. PROSSER & W. KEETON, *TORTS* § 2, at 9-10 (5th ed. 1984).

99. See *Greyhound Corp. v. Townsend*, 234 Miss. 839, 846-47, 108 So. 2d 208, 210 (1959); *Spackman v. Ralph M. Parsons Co.*, 147 Mont. 500, 510-11, 414 P.2d 918, 923-24 (1966); *Sheffield Division Armco Steel Corp. v. Jones*, 376 S.W.2d 825, 829 (Tex. 1964); *Wright v. Everett*, 197 Va. 608, 612-15, 90 S.E.2d 855, 858-60 (1956) (punitive damages not awarded solely on basis of gross negligence). See also *Mallor & Roberts*, *supra* note 18, at 651.

100. *Mallor & Roberts*, *supra* note 18, at 651 (emphasis added).

101. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). It should be made clear that the actual malice standard requires an inquiry into the state of mind of the defendant, and usually a finding of express ill will towards the plaintiff. In some jurisdictions, however, actual malice may be evidenced by conduct other than express ill will. See, e.g., *Detling v. Chockley*, 70 Ohio St. 2d 134, 137-38, 436 N.E.2d 208, 210-11 (1982) ("[A]ctual malice may take . . . the form of reckless, willful or wanton behavior which can be inferred from surrounding circumstances"); *Glidden v. Skinner*, 142 Vt. 644, 647, 458 A.2d 1142, 1144 (1983) (actual malice sometimes may be shown by "reckless or wanton disregard of one's rights") (quoting *Shortle v. Central Vt. Pub. Serv. Corp.*, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979)).

Implied malice, on the other hand, is a more imprecise concept with judicial interpretations of the phrase ranging "from mere reckless disregard of the rights of others, to wanton or willful disregard of the rights of others, to actual malice implied by the evidence adduced at trial." Note, *supra* note 4, at 647 (footnote omitted). While the *Tuttle* court used the terms "implied malice" and "legal malice" interchangeably, 494 A.2d 1353, 1361 (Me. 1985), it has been argued that a better evaluation of the egregiousness of Raymond's conduct could be made by recognizing implied malice as malice implied-in-fact and legal malice as malice implied-in-law. Note, *supra* note 4, at 647-48. The former "is nothing more than actual malice inferred from circumstantial evidence," while malice implied-in-law is a distinct legal concept referring to "deliberately wrongful behavior possessing some additional element of outrageousness or flagrancy so as to be considered morally equivalent to malicious conduct and therefore deserving of similar treatment." *Id.* at 648.

102. See *infra* notes 157-74 and accompanying text.

103. Some courts have listed "gross negligence" as a possible ground for a punitive damages award, but usually only in combination with other words denoting aggravated culpability. See, e.g., *Gandall v. Ganz*, 96 Idaho 785, 787, 537 P.2d 65, 67 (1975) (quoting *Unfried v. Libert*, 20 Idaho 708, 728-29, 119 P. 885, 891 (1911) ("[where] the action of the wrongdoer is wanton, malicious or gross and outrageous, or where the facts are such as to imply malice and oppression . . . [or where the facts] show willful malice, fraud, or gross negligence.)); *Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 314, 362 N.E.2d 845, 847 (1977) (quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 609, 349 N.E.2d 173, 180 (1976) ("whenever the elements of fraud, malice, gross negligence or oppression *mingle* in the controversy.")). (emphasis supplied by the court in *Hibschman*).

Conversely, other courts have explicitly declared that mere "gross negligence" is not enough to support a recovery of punitive damages. See *Davis v. Gordon*, 183 Md. 129, 133, 36 A.2d 699, 701 (1944); *Wright v. Everett*, 197 Va. 608, 612-15, 90 S.E.2d 855, 858-60 (1956). Likewise, W.L. Prosser has said that gross negligence is "a term of ill-defined content" which should not be used to justify punitive damages awards. W. PROSSER & W. KEETON, *TORTS* § 2, at 10 (5th ed. 1984).

willful and wanton misconduct,¹⁰⁴ malice,¹⁰⁵ and reckless disregard for the rights or safety of others,¹⁰⁶ in order to justify punitive damages awards.¹⁰⁷ While there has been much disagreement over the meaning of these terms,¹⁰⁸ they all stand for essentially the same basic, unscientific proposition: that the defendant's conduct was sufficiently outrageous to warrant punitive damages.¹⁰⁹

The next section will discuss motor vehicle tort cases in which a particular type of conduct has or has not been held to satisfy the various standards for imposing punitive damages. It may be somewhat artificial to divide automobile accident cases into categories based upon a particular type of conduct because the cases often

104. Several states have included willful and wanton misconduct as part of their definitions of conduct justifying exemplary awards. *See, e.g.*, *Cloroben Chemical Corp. v. Comegys*, 464 A.2d 887, 892 (Del. 1983) (citing *Riegel v. Aastad*, 272 A.2d 715, 718 (Del. 1970) (when the defendant's wrongful act was committed wilfully and wantonly)); *Enright v. Lubow*, 202 N.J. Super. 58, 76, 493 A.2d 1288, 1297-98 (1985) (quoting *LaBruno v. Lawrence*, 64 N.J. Super. 570, 575, 166 A.2d 822, 824 (1960), *cert. denied*, 34 N.J. 323, 168 A.2d 694 (1961) ("actual malice, which is nothing more or less than intentional wrongdoing—an evil-minded act; or, . . . an act accompanied by a wanton and willful disregard of the rights of another.")); *Petsch v. Florom*, 538 P.2d 1011, 1013 (Wyo. 1975) ("the act of the defendant was committed maliciously, willfully or wantonly."); *IOWA CODE ANN.* § 668A.1 (West 1987) ("willful and wanton disregard for the rights or safety of another.").

105. Both actual and implied malice, *see supra* note 101, have been cited as proper grounds for punitive damages awards in the following cases and statutes: *Columbus Finance, Inc. v. Howard*, 42 Ohio St. 2d 178, 183-84, 327 N.E.2d 654, 658 (1975) ("punitive damages may be awarded in tort cases involving fraud, insult or malice" with "intentional, reckless, wanton, wilful and gross acts" being relevant to the extent that "actual malice may be inferred from conduct and surrounding circumstances."); *MONT. CODE ANN.* § 27-1-221 (1985) ("where the defendant has been guilty of oppression, fraud, or malice, actual or presumed."); *NEV. REV. STAT.* § 42.010 (1986) ("where the defendant has been guilty of oppression, fraud or malice, express or implied."); *S.D. CODIFIED LAWS ANN.* § 21-3-2 (1967 & Supp. 1986) ("where the defendant has been guilty of oppression, fraud, or malice, actual or presumed.").

The statutes just cited all contain peculiarities and special limitations regarding the availability of punitive damages. They should be consulted individually for a more precise delineation of the punitive damages standard in each particular state.

106. Courts have cited reckless disregard or indifference to the rights or safety of others as a justification for punitive damages in the following cases: *Alyeska Pipeline Serv. Co. v. O'Kelley*, 645 P.2d 767, 774 (Alaska 1982) (quoting *Bridges v. Alaska Housing Authority*, 375 P.2d 696, 702 (Alaska 1962)) (where conduct is "outrageous, such as acts done with malice or bad motives or [a] *reckless indifference to the interests of another*, to extent that reckless indifference indicates malice, express or implied) (emphasis added); *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976) (quoting *Baker v. Winslow* 184 N.C. 1, 110 S.E. 570 (1922)) ("fraud, malice, *such a degree of negligence as indicates a reckless indifference to consequences*, oppression, insult, rudeness, caprice, willfulness.") (emphasis added); *Jordan v. Sauve*, 219 Va. 448, 452, 247 S.E.2d 739, 741 (1978) (quoting *Giant of Virginia v. Pigg*, 207 Va. 679, 685-86, 152 S.E.2d 271, 277 (1967)) ("where there is misconduct or actual malice, or *such recklessness or negligence as to evince a conscious disregard of the rights of others*;" but only to the extent that the recklessness indicates actual malice) (emphasis added); *Jeffers v. Nysse*, 98 Wis. 2d 543, 548, 297 N.W.2d 495, 497 (1980) (quoting *Kink v. Combs*, 28 Wis. 2d 65, 79, 135 N.W.2d 789, 797 (1965)) ("a showing of wanton, wilful, or *reckless disregard of the plaintiff's rights*.")) (emphasis added).

107. *See* 1 J. GHIARDI & J. KIRCHER, *supra* note 16, at § 5.01 for a complete listing of the various standards used by courts and legislatures to justify punitive damages awards.

108. *See, e.g.*, *Nichols v. Texas Electric Serv. Co.*, 206 S.W.2d 860, 862 (Tex. Civ. App. 1947) (citing cases that define gross negligence as an entire want of care which would raise a presumption of a conscious indifference to consequences). *Cf.* *Bailey v. Smith*, 132 S.C. 212, 225, 128 S.E. 423, 428 (1925) (defining gross negligence as conduct such that "a person of ordinary prudence and reason would say that it constituted a reckless disregard of the rights of others."). *See generally* *Roberson, Exemplary Damages for Negligence: A Definitional Analysis*, 33 *BAYLOR L. REV.* 619 (1981); Note, *supra* note 42, at 1164-65.

109. *See, e.g.*, *Hull v. Seaboard Air Line R. Co.*, 76 S.C. 278, 57 S.E. 28 (1907) (stating that "[e]ach of the words 'wantonness,' 'willfulness,' and 'recklessness' embodies the element of malice, either express or implied, and [they] are in law substantially the equivalent of each other, [insofar] as they give rise to an action based upon punitive damages."). *See also* *Ellis, Fairness and Efficiency in the Law of Punitive Damages*, 56 *S. CAL. L. REV.* 1, 35 (1983) (in which the author states that: "Terms such as 'wilful,' 'wanton,' 'conscious indifference,' 'reckless disregard,' and 'recklessness' are overlapping and to a substantial extent redundant. Accordingly, they will be referred to collectively as the recklessness group."). *Cf.* *Mallor & Roberts, supra* note 18, at 652, concluding that "to the extent that [these terms] indicate that the defendant had or should have had a subjective perception of the risks involved, punitive damages are properly awarded."

involve a combination of several types of conduct which might warrant the imposition of punitive damages. Nonetheless, the courts in the following cases awarded punitive damages based primarily upon a particular type of conduct.

B. *Excessive Speed As a Basis of Recovery*

Several courts have awarded punitive damages when the charge of misconduct was based primarily upon the speed at which the defendant drove.¹¹⁰ In *Shirley v. Shirley*,¹¹¹ for example, the plaintiff had to establish that the defendant's conduct was accompanied by wantonness in order to recover punitive damages under a state wrongful death statute.¹¹² The court found that the plaintiff had satisfied this standard by introducing evidence that the defendant was traveling at a speed of 75-100 miles per hour into a curve when he lost control and went off the road.¹¹³ Similarly, in *Claunch v. Bennet*,¹¹⁴ in which the defendant was racing within the city limits at speeds reaching ninety miles per hour, eventually colliding with the plaintiff's car, the court held that his conduct was so grossly negligent as to justify an award of punitive damages.¹¹⁵ Another example of sufficiently outrageous conduct occurred in *Morgan v. Bates*,¹¹⁶ in which the defendant, after promising the plaintiff passenger that he would drive carefully, drove his car at ninety miles per hour while trying to pass a second car on a curve.¹¹⁷ After the defendant lost control of the car, it rolled over five or six times, seriously injuring the plaintiff.¹¹⁸ The court held that this conduct supported an exemplary award of \$1,000.¹¹⁹ It is significant that in each of these cases upholding awards of punitive damages based on excessive speed, the courts recognized as a proper basis for imposing punitive damages, some sort of misconduct which is less culpable than a subjective intent to harm the plaintiff, because (as in most motor vehicle tort cases) there was no evidence of actual malice.

Other courts, however, have expressed a general reluctance to permit an award of punitive damages based primarily on excessive speed. In *Missouri Pacific Transportation Co. v. O'Neal*,¹²⁰ there was evidence that the defendant was operating a bus "at an excessive or dangerous rate of speed"¹²¹ on a gravel highway, causing several passengers to become extremely nervous and frightened, and eventually causing the plaintiff's injuries when the driver lost control and went into a ditch.¹²² Nonetheless, the court held, without any explanation, that the claim for punitive

110. See generally Annot., 62 A.L.R.2d 813, § 3, at 821-22 (1958).

111. 261 Ala. 100, 73 So. 2d 77 (1954).

112. *Id.* at 109, 73 So. 2d at 85 (1954).

113. *Id.* at 106, 73 So. 2d at 82 (1954).

114. 395 S.W.2d 719 (Tex. Civ. App. 1965).

115. *Id.* at 724.

116. 390 P.2d 486 (Okla. 1964).

117. *Id.* at 488.

118. *Id.*

119. *Id.* at 487-88.

120. 105 F.2d 625 (8th Cir. 1939).

121. *Id.* at 627.

122. *Id.* at 626-27.

damages was properly kept from the jury.¹²³ In *Brock v. Waldron*,¹²⁴ a wrongful death action, the plaintiff sought a reversal of the trial court's finding of no reckless misconduct by providing evidence of "speed so great that the decedent's body was hurled one hundred and twenty feet through the air."¹²⁵ The court refused to disturb the trial court's findings, stating that the evidence fell far short of a claim of reckless misconduct.¹²⁶ The only change the court felt justified in making was the addition of a finding that physical facts as well as the plaintiff's testimony were "offered to prove that the car was going fast."¹²⁷ The court, however, stated that the plaintiff's reliance on excessive speed depended entirely on "doubtful physical facts," and that the plaintiff's own testimony as to speed was entitled to little weight.¹²⁸ Ultimately, the court held that even if the issue of reckless misconduct had been submitted to the jury, it could not reasonably have found "other than a high degree of negligence."¹²⁹

In these cases involving excessive speed, liability for punitive damages generally turned upon the factual inquiry as to whether the actor knew or had reason to know of facts which created an unreasonable risk of harm "under the circumstances."¹³⁰ Under this test, courts are likely to permit punitive damages awards based on excessive speed when, for example, the speeding occurred on particularly dangerous roads or during treacherous weather conditions and no special, exigent circumstances existed at the time which made the speeding reasonable. Likewise, courts generally will deny punitive damages when exceptional circumstances do make it reasonable to travel at a high rate of speed.¹³¹

123. *Id.* at 628. This conclusory holding seems strange in light of the fairly egregious conduct of the defendant. An award of punitive damages in a fact situation such as this arguably would promote the traditional functions of punitive damages. See *supra* notes 78-96 and accompanying text.

124. 127 Conn. 79, 14 A.2d 713 (1940).

125. *Id.* at 81, 14 A.2d at 714.

126. *Id.*, 14 A.2d at 714.

127. *Id.*, 14 A.2d at 714.

128. *Id.* at 84, 14 A.2d at 715.

129. *Id.*, 14 A.2d at 715.

130. RESTATEMENT (SECOND) OF TORTS § 500 comment a (1965) (emphasis added). See *infra* text accompanying note 169 for text of § 500.

131. See, e.g., *Reilly v. City of Philadelphia*, 328 Pa. 563, 569, 195 A. 897, 900 (1938) (holding that police officer's high rate of speed during chase of a fleeing felon was in the performance of an official emergency duty and not a reckless disregard for the safety of others. Cf. *Cavey v. City of Bethlehem*, 331 Pa. 556, 560, 1 A.2d 653, 655 (1938) (holding that motorcycle policeman's high speed chase of speeding sedan into a busy intersection was not in the performance of an emergency duty and constituted a reckless disregard for the safety of others).

Although the issue in these cases was not whether punitive damages could be recovered (rather, the issue was whether the plaintiff had proven the reckless disregard necessary to recover *any* damages from the city under a Pennsylvania statute), the cases clearly indicate that the concept of recklessness depends upon the reasonableness of the actor's conduct under the circumstances. Compare RESTATEMENT (SECOND) OF TORTS § 500 comment a, which provides in part, that:

While under ordinary circumstances it would be reckless to drive through heavy traffic at a high rate of speed, it may not even be negligent to do so if the driver is escaping from a bandit or carrying a desperately wounded man to the hospital for immediately necessary treatment, or if his car has been commandeered by the police for the pursuit of a fleeing felon

If an accident occurs in a more typical situation, reckless misconduct often will support an award of punitive damages. See *supra* note 106 and *infra* note 176. But, if the speed at which a defendant drove is found to have been reasonable in a particular set of circumstances, and thus not even negligent, much less reckless, it is unlikely that punitive damages would be permitted under a reckless disregard standard in a case primarily based upon allegations of excessive speed.

C. Evidence of Intoxication As a Basis of Recovery

Another type of conduct which often will support a punitive damages award in motor vehicle tort cases is driving while intoxicated. Although this section is not intended to be an exhaustive discussion of the effect of intoxication upon the availability of punitive damages,¹³² a brief summary is warranted here because of the frequency and seriousness of these cases. The cases basically fit into three groups in determining the effect of intoxication when assessing punitive damages.

Many courts have held that evidence of driving while intoxicated, in itself, comports with their definitions of conduct which justifies an award of punitive damages.¹³³ Generally, these courts express grave concerns about the extreme risks involved in operating a motor vehicle while under the influence of alcohol and a desire to deter such conduct by all possible means. In *Taylor v. Superior Court of Los Angeles*,¹³⁴ for example, the California Supreme Court stated that:

[O]ne who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others.¹³⁵

In expressing a desire to deter drunken driving, the court quoted the following sentence from *Harrell v. Ames*:¹³⁶

[T]he 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.¹³⁷

132. For a thorough treatment of this topic, see Kotler, *Imposing Punitive Damage Liability on the Intoxicated Driver*, 18 AKRON L. REV. 255 (1984); Note, *Punitive Damages in California: The Drunken Driver*, 36 HASTINGS L.J. 793 (1985); Note, *Punitive Damages and the Intoxicated Driver: An Approach to Taylor v. Superior Court*, 31 HASTINGS L.J. 307 (1979); Comment, *Punitive Damages and the Drunken Driver*, 8 PEPPERDINE L. REV. 117 (1980-81); Note, *Punitive Damages in Drunk-Driving Cases: A Call for a Strict Standard and Legislative Action*, 19 SUFFOLK U.L. REV. 607 (1985). See generally 1 J. GHIARDI & J. KIRCHER, *supra* note 16, at § 5.03; Annot., 65 A.L.R.3d 656 (1975).

133. See, e.g., *Taylor v. Superior Court of Los Angeles*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (voluntary consumption of alcoholic beverages to point of intoxication when the individual knows from the outset that he must thereafter operate a motor vehicle demonstrates a conscious disregard of the safety of others and may constitute malice sufficient to justify award of punitive damages); *Infeld v. Sullivan*, 151 Conn. 506, 509, 199 A.2d 693, 695 (1964) (characterizing driving while under the influence coupled with fleeing the scene of an accident as "wanton misconduct"); *Sebastian v. Wood*, 246 Iowa 94, 107-08, 66 N.W.2d 841, 848 (1954) (evidence that defendant was very intoxicated indicated a "wilful disregard of the plaintiff's rights and therefore legal malice," justifying the allowance of punitive damages); *Hawkinson v. Geyer*, 352 N.W.2d 784, 788-89 (Minn. App. 1984) (drinking to point of extreme intoxication with knowledge that car would be driven later that day sufficient to submit punitive damages claim before jury based on "willful indifference to the rights or safety of others"); *Colligan v. Fera*, 76 Misc. 2d 22, 24-25, 349 N.Y.S.2d 306, 309 (1973) (drunken driving equated with the necessary "gross, wilful, and wanton negligence" and labeled "morally culpable"); *Focht v. Rabada*, 217 Pa. Super. 35, 40, 268 A.2d 157, 160 (1970) (equating drunken driving with the necessary "outrageous conduct . . . [done with] reckless indifference to the interests of others"). See generally 1 J. GHIARDI & J. KIRCHER, *supra* note 16, § 5.03, at 15-16; Annot., 65 A.L.R.3d 656, § 3, at 661-64 (1975 & Supp. 1986).

134. 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).

135. *Id.* at 897, 598 P.2d at 857, 157 Cal. Rptr. at 697.

136. 265 Ore. 183, 508 P.2d 211 (1973).

137. 24 Cal. 3d 890, 897, 598 P.2d 854, 857, 157 Cal. Rptr. 693, 697 (1979) (quoting *Harrell v. Ames*, 265 Ore. 183, 190, 508 P.2d 211, 214-15 (1973)) (emphasis added by court).

Other courts have expressed the view that evidence of driving while intoxicated must be accompanied by a separate showing of malice to support an award of punitive damages.¹³⁸ In *Giddings v. Zellan*,¹³⁹ for example, the United States Court of Appeals for the District of Columbia held that proof of drunken driving did not constitute proof of malice, fraud, or evil intent which was required for an award of punitive damages under Maryland law. The court stated that “[i]n automobile negligence cases the Maryland court obviously is of opinion that criminal statutes are a better deterrent than civil penalties.”¹⁴⁰ The Ohio Supreme Court, in *Detling v. Chockley*,¹⁴¹ expressed a similar reluctance to base an award of punitive damages solely upon evidence of intoxication, but for a different reason. The court reasoned as follows:

Allowance of punitive damages simply because a defendant was intoxicated at the time of an accident, without establishing causation and without demonstrating intention, or deliberation through, at the least, aggravating circumstances, virtually would impose strict liability for intoxication in negligence actions. This would not be in concert with our well-developed jurisprudence of punitive damages, and we see no persuasive reason for taking such a step.¹⁴²

Finally, scant authority can be found for the proposition that intoxication may eliminate the mental element necessary for an award of punitive damages.¹⁴³ This view, in effect, regards intoxication as possibly eliminating the defendant’s ability to consciously choose a course of action either with knowledge of the serious risk of harm to others or with knowledge of facts which would disclose the danger to a reasonable person.¹⁴⁴ This reluctance to infer the necessary mens rea from the conduct of an intoxicated defendant has been criticized as “quite odd in light of the massive public education in this country on the serious dangers of intoxicated driving and in light of auto accident statistics on the relationship of intoxicated driving to property damage, personal injury and death on our highways.”¹⁴⁵

The following section will address the specific question of whether reckless disregard of the circumstances in a motor vehicle tort situation should justify the

138. See, e.g., *Giddings v. Zellan*, 160 F.2d 585 (D.C. Cir.), cert. denied, 332 U.S. 759 (1947) (holding that proof of drunken driving did not equal proof of malice, fraud, or evil intent, as required for punitive damages under Maryland law); *Detling v. Chockley*, 70 Ohio St. 2d 134, 436 N.E.2d 208 (1982) (holding that evidence of intoxication alone was insufficient to raise a jury question on punitive damages because a showing of intention or deliberation through, at the least, aggravating circumstances, was required); *Baker v. Marcus*, 201 Va. 905, 114 S.E.2d 617 (1960) (holding that drunken driving may be negligent, wrong, reckless, and unlawful, but that it was not necessarily a malicious act which had to be proven to recover punitive damages). See generally 1 J. GHIARDI & J. KIRCHER, *supra* note 16, § 5.03, at 16–17; Annot. 65 A.L.R.3d 656, § 4, at 664–66.

139. 160 F.2d 585 (D.C. Cir.), cert. denied, 332 U.S. 759 (1947).

140. *Id.* at 587.

141. 70 Ohio St. 2d 134, 436 N.E.2d 208 (1982).

142. *Id.* at 139–40, 436 N.E.2d at 212 (1982).

143. 1 J. GHIARDI & J. KIRCHER, *supra* note 16, § 5.03, at 17.

144. *Id.* (citing *Russell v. Elkins*, 115 Ohio App. 341, 177 N.E.2d 355 (1961) (evidence of intoxication in and of itself not sufficient to constitute wanton misconduct because the evidence failed to show that defendant’s decedent was conscious of the fact that his conduct would probably result in injury)).

This view was squarely rejected by the Connecticut Supreme Court of Errors in *Infeld v. Sullivan*, 159 Conn. 506, 509, 199 A.2d 693, 695 (1964) (“An operator may well be in this [intoxicated] condition and, at the same time, be able to exercise the conscious choice which is a requisite of wanton misconduct.”).

145. 1 J. GHIARDI & J. KIRCHER, *supra* note 16, § 5.03, at 17. The statistics referred to in this quotation indicated that drinking was a causal factor in at least one-half of the fatal motor vehicle accidents in 1977. *Id.* at § 5.03, at 18 n.11.

imposition of punitive damages. Particular emphasis will be placed upon evaluating the holding of the *Tuttle* court which answered this question in the negative.

IV. SHOULD RECKLESS DISREGARD OF THE CIRCUMSTANCES BE CONSIDERED SUFFICIENTLY CULPABLE CONDUCT TO JUSTIFY THE IMPOSITION OF PUNITIVE DAMAGES?

In *Tuttle v. Raymond*, the Supreme Judicial Court of Maine held that the malice necessary to assess punitive damages “will *not* be established by the defendant’s mere reckless disregard of the circumstances.”¹⁴⁶ The court acknowledged that other jurisdictions would support a punitive damages award under a reckless disregard standard,¹⁴⁷ but it purported to “adopt a narrower view in order to reduce the vagueness and uncertainty surrounding the concept of implied malice in this context.”¹⁴⁸ The court sought to reject punitive damages standards under which “the stated goal of deterring reprehensible conduct would be furthered only marginally or not at all.”¹⁴⁹ Specifically, the court rejected a reckless disregard of the circumstances standard because it “overextends the availability of punitive damages, and dulls the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct.”¹⁵⁰

The court’s restrictive approach, however, is underinclusive because it excludes a large class of misconduct which is “truly reprehensible conduct” that might be deterred by the threat of punitive damages. The court simply characterized Raymond’s conduct as “reckless operation of an automobile,” and summarily concluded that the punitive damages award should be vacated because the deterrent function would not be served in the absence of malice.¹⁵¹ This conclusion is suspect because of the court’s failure to carefully analyze *each aspect* of the defendant’s conduct, and then make a determination as to whether any degree of deterrence might be achieved by affirming the punitive damages award. Moreover, the *Tuttle* opinion is largely unsupported by judicial authority. A vast majority of jurisdictions would permit a punitive damages award in a situation such as that involved in *Tuttle*.¹⁵² Finally, the decision is likely to cause even more confusion in this area of the law of damages because of the vague implied malice standard set forth by the court.¹⁵³ In short, the *Tuttle* opinion constitutes an excessive limitation upon the doctrine of punitive damages in situations in which the doctrine traditionally has been justified as serving the functions of compensating tort victims,¹⁵⁴ appeasing both the victim’s and

146. 494 A.2d 1353, 1361 (Me. 1985).

147. *Id.* at 1361–62.

148. *Id.* at 1362.

149. *Id.* at 1360.

150. *Id.* at 1361.

151. *Id.* at 1362.

152. See *infra* notes 175–85 and accompanying text.

153. See *infra* notes 183–98 and accompanying text.

154. See *supra* notes 79–86 and accompanying text.

society's possible desire for revenge,¹⁵⁵ and the complementary functions of punishment and deterrence.¹⁵⁶

First of all, the court failed to justify adequately its conclusion that the deterrence function of punitive damages cannot be served when they are awarded based upon a reckless disregard standard. Several aspects of the defendant's conduct arguably were sufficiently culpable to justify a punitive damages award in furtherance of the goal of deterrence.

Recall that the defendant in *Tuttle* was traveling fast enough to shear in half the Plymouth in which the plaintiff was a passenger. He had also gone through a red light immediately prior to the accident.¹⁵⁷ This conduct is sufficiently outrageous to warrant the imposition of punitive damages because the defendant's state of mind probably approached, in certain respects,¹⁵⁸ a subjective realization of a substantial risk to the safety of others. Moreover, even if Raymond did not subjectively realize the substantial risk of harm to others created by his conduct, he will be held, under section 500 of the Restatement (Second) of Torts, to have possessed the knowledge of risk of harm that a reasonable person in the circumstances would have had.¹⁵⁹ This objective type of recklessness, as well as subjective recklessness, is considered sufficiently culpable to justify a punitive damages award under the Restatement (Second) of Torts.¹⁶⁰ Simply stated, the defendant's conduct (whether subjectively reckless or objectively reckless) was flagrant and "[a]s the defendant's misconduct becomes more flagrant, the need to deter such conduct increases."¹⁶¹

A thorough analysis of the culpability of Raymond's misconduct can be made through the use of an analytical spectrum of misconduct, under which the goal of deterrence will or will not be achieved depending on the state of mind of the defendant. More specifically, at one end of the spectrum lie acts of passion such as assault and battery. Deterrence is least likely to be achieved in these situations because often the defendant simply does not think at all before acting.¹⁶² At the opposite end of the spectrum lie intentional acts such as fraud. In these situations, deterrence is probably the most effective because the defendant must make a conscious and deliberate choice to commit the act.¹⁶³ If the defendant realizes the potential for having to pay a large punitive damages award, he or she is more likely to refrain from committing the intentional act.

The concept of reckless conduct lies somewhere between these two extremes. The probable effectiveness of punitive damages as a deterrent to reckless conduct depends on whether recklessness is defined objectively or subjectively. If reckless-

155. See *supra* notes 87-91 and accompanying text.

156. See *supra* notes 92-96 and accompanying text.

157. *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985).

158. See *infra* notes 171-74 and accompanying text.

159. RESTATEMENT (SECOND) OF TORTS § 500 (1965). See *infra* text accompanying note 169 for text of § 500.

160. RESTATEMENT (SECOND) OF TORTS § 908 & comment b (1965). See also *infra* notes 183-92 and accompanying text.

161. *Mallor & Roberts*, *supra* note 18, at 667.

162. Note, *supra* note 42, at 1162 n.31 (citing *Walker v. Sheldon*, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 492 (1961) for the converse proposition that punitive damages are most likely to achieve their desired deterrent effect when imposed against a wrongdoer who engages in a systematic scheme to defraud the general public).

163. See *supra* note 162.

ness is defined subjectively, as in the Model Penal Code,¹⁶⁴ the defendant must *consciously disregard* a substantial and unjustifiable risk of harm for his conduct to be considered reckless.¹⁶⁵ Under this definition of recklessness, the defendant's conduct approaches that of an intentional act and punitive damages are more likely to achieve deterrence.¹⁶⁶

On the other hand, if recklessness is defined objectively as in the Restatement (Second) of Torts,¹⁶⁷ the defendant must have acted¹⁶⁸ "*knowing or having reason to know of facts which would lead a reasonable man to realize . . . that his conduct creates an unreasonable risk of physical harm to another, [and] that such risk is substantially greater than that which is necessary to make his conduct negligent.*"¹⁶⁹ Under this definition, the defendant may not have actually realized that his conduct created a substantial risk of harm to others, but rather, the law imposes upon him the knowledge of risk of harm that a reasonable person in the circumstances would have had. In this situation, deterrence is less likely to be achieved because the defendant personally may not have realized the risk of harm that he or she had created, and thus probably would not have considered any potential liability for punitive damages before engaging in the dangerous act.¹⁷⁰

Considering that the defendant in *Tuttle* was traveling fast enough to shear in half the Plymouth in which the plaintiff was a passenger, and that he had just driven through a red light immediately prior to the accident,¹⁷¹ the defendant's conduct may be considered sufficiently culpable to satisfy the more stringent, subjective definition of recklessness.¹⁷² Of course, under this definition, any conscious choice exercised by Raymond refers to his choosing to drive in a dangerous manner in the face of a

164. MODEL PENAL CODE § 2.02(2)(C) (1962).

165. *Id.*

166. See *supra* notes 162-63 and accompanying text.

167. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

168. Section 500 also includes as part of its definition of reckless disregard of safety the *intentional failure to do an act* which a person knows is his duty to perform to another, knowing or having reason to know that his failure to perform creates an unreasonable and substantial risk of harm to the other. In this regard, Raymond's failure to stop at a red light just before the impact, see *supra* text accompanying note 5, may constitute reckless misconduct under § 500 if it was an intentional failure to stop. To the extent that a defendant's conduct is characterized as reckless under § 500 of the Restatement, it also will be considered sufficiently culpable to justify an award of punitive damages under § 908 of the Restatement. See RESTATEMENT (SECOND) OF TORTS § 908 & comment b (1965). See also *infra* notes 183-92 and accompanying text.

169. RESTATEMENT (SECOND) OF TORTS § 500 (1965) (emphasis added).

170. It may be argued, however, that a degree of both general and special deterrence may still be achieved when recklessness is defined in a more objective sense. See, e.g., G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 43, at 123 (2d ed. 1961), in which the author states:

Although the harmful result of careless driving is not intended, there is often an element in the careless driving that is intended (e.g., pulling out on a blind corner), and the punishment, coupled with the recollection of the circumstances of the accident, may "condition" the driver not to repeat his mistake, and may even cause him to be more careful in other respects. Conceivably, it may also improve the conduct of others who come to know of the mistake that was made.

171. *Tuttle v. Raymond*, 494 A.2d 1353, 1355 (Me. 1985).

172. See *supra* notes 164-66 and accompanying text. Cf. Note, *supra* note 4, at 649-50, stating that:

. . . [I]ntent may refer to the conduct itself; the conduct is an intermediate fact of consequence. For example, conduct may be intentionally wrongful or intentionally illegal. Under this definition it may have been apparent to a jury that Raymond wrongfully intended to drive in a manner he knew to be both illegal and dangerous to the public. Arguably, such intent warrants consideration of punitive damages as malice implied-in-law. (footnotes omitted).

substantial and unjustifiable risk of harm to others; it does not refer to an intent to harm others.¹⁷³ In this regard, Raymond's knowledge of the high rate of speed at which he was traveling may constitute subjective recklessness if he actually knew of the substantial risk of harm to others and consciously chose to proceed in the face of this known danger. Moreover, if Raymond knew that he was about to travel through a red light and he chose to disregard the substantial risk that this would create, this aspect of his conduct might also be considered subjectively reckless. Under the subjective view of recklessness, the defendant's conduct would approach the culpability level of an intentional tort for which the imposition of punitive damages is more likely to achieve the goal of deterrence.¹⁷⁴ Unfortunately, the court's summary treatment of the facts in *Tuttle* precludes a sound analysis as to whether the defendant actually did consciously disregard a known risk of harm to others.

In any event, the holding in *Tuttle* that malice will not be implied from reckless disregard of the circumstances, and thus, that punitive damages may not be obtained under a reckless disregard standard,¹⁷⁵ is clearly contrary to the vast majority of judicial authority.¹⁷⁶ The court cited only one case in support of its holding, *Miller Pipeline Corp. v. Broecker*.¹⁷⁷ In *Miller Pipeline*, the Indiana Court of Appeals expressed concern that "[t]o sanction punitive damages solely upon the basis of conduct characterized as heedless disregard of the consequences would be to allow

173. See *supra* note 172.

174. See *supra* notes 162-66 and accompanying text. See also *supra* note 172.

175. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985).

176. It is very difficult to isolate "reckless disregard of the circumstances" as the sole ground for a punitive damages award because the phrase is often used in conjunction with other phrases denoting aggravated circumstances, see *supra* notes 103-07 and accompanying text, and because reckless disregard, gross negligence, and wilful and wanton misconduct are often used interchangeably to justify a punitive award. See *supra* notes 108-09 and accompanying text.

Nonetheless, the cases and statutes cited in 1 J. GHIARDI & J. KIRCHER, *supra* note 16, at § 5.01 indicate that 27 states include some form of a "reckless disregard of the circumstances" standard as part of their definitions of the type of conduct warranting an award of punitive damages. *Id.* (citing cases or statutes from Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Kentucky, Michigan, Mississippi, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin).

These states utilize a variety of recklessness phrases, including "reckless disregard," "reckless indifference," "conscious disregard," "conscious indifference," and "aggravated disregard." Thus, in some of these states, the defendant must have known of the risk of substantial harm created by his conduct and consciously chose to disregard that risk, while in others the defendant will be held to have possessed the knowledge of risk of harm that a reasonable person in the circumstances would have had. It is unclear from the *Tuttle* opinion whether the court merely rejected the latter, objective definition of reckless disregard as a basis for punitive damages, or whether it also rejected the subjective, conscious disregard type of recklessness. Thus, it is impossible to compare with any degree of precision the exact number of these states which would disagree with the *Tuttle* court's holding.

Despite this imprecision, insofar as the terms wanton or willful misconduct are often used as an equivalent of reckless disregard of safety, see RESTATEMENT (SECOND) OF TORTS § 500, Special Note at 587 (1965), up to an additional 10 states could be added to the list of states which conceivably would disagree with the holding in *Tuttle*. See 1 J. GHIARDI & J. KIRCHER, *supra* note 16, at § 5.01 (citing cases or statutes from Delaware, Idaho, Illinois, Iowa, Minnesota, New Hampshire, New Jersey, Texas, Wyoming, and from the District of Columbia) (utilizing "wilful or wanton misconduct" language and often omitting "reckless disregard" language). Moreover, in an additional five states, "reckless disregard of the circumstances" might be sufficient to justify a punitive award to the extent that the recklessness constitutes evidence of implied malice. *Id.* (citing cases or statutes from Missouri, Montana, Nevada, North Dakota, and South Dakota).

Regardless of the precise number of states which conceivably would disagree with *Tuttle*'s rejection of a reckless disregard standard, and regardless of the manner in which they would disagree, it has been observed that: "Coupled with its denial of punitive damages under the facts of *Tuttle*, the court's limitation effectively removed Maine's interpretation of implied malice from the mainstream of current practice." Note, *supra* note 4, at 646.

177. 460 N.E.2d 177 (Ind. App. 1984).

virtually limitless imposition of punitive damages.”¹⁷⁸ In citing *Broecker*, the *Tuttle* court seems to have ignored the fact that Indiana courts have traditionally disfavored punitive damages “because they are a windfall to the plaintiff”¹⁷⁹ and “allow punishment without the safeguards of criminal procedure.”¹⁸⁰ The *Tuttle* court originally rejected these arguments when it decided to retain the doctrine of punitive damages,¹⁸¹ but, in an indirect way, embraced them when the court attempted to find support for its strict limitation upon the availability of punitive damages.¹⁸²

A vast majority of jurisdictions¹⁸³ adhere to a view similar to that expressed in the Restatement (Second) of Torts section 908: “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.”¹⁸⁴ Comment b to section 908 then refers to section 500 as defining the type of reckless indifference which may provide the necessary state of mind to justify an award of punitive damages.¹⁸⁵

The definition of reckless disregard of safety in section 500 of the Restatement is a more precise and workable standard for imposing punitive damages than the implied malice standard set forth in *Tuttle*. The Restatement definition of reckless disregard provides that the actor must know or have reason to know of facts which would lead a reasonable man to realize that his conduct will create an unreasonable risk of harm to others and that such risk is substantially greater than that which is necessary to make his conduct negligent.¹⁸⁶ This definition encompasses two different types of reckless conduct: (1) conscious disregard of a known risk, and (2) situations in which the defendant does not subjectively realize or appreciate the high degree of risk involved, but in which the law will impose upon the defendant the knowledge of risk of harm that a reasonable person in the circumstances would have had.¹⁸⁷ In the latter situation, an objective standard is applied to the defendant whose “inability to realize the danger may be due to his own reckless temperament, or to the abnormally favorable results of previous conduct of the same sort. . . .”¹⁸⁸ It is sufficient that the defendant know or have reason to know of “circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.”¹⁸⁹ This standard properly encompasses situations such as *Tuttle*, in

178. *Id.* at 185.

179. *Id.*

180. *Id.* See also *supra* note 65 and accompanying text for a discussion of the origin and evolution of the traditional Indiana rule prohibiting a claim for punitive damages based upon conduct which might also be the subject of a criminal prosecution.

181. 494 A.2d 1353, 1356–60 (Me. 1985). The court, however, did state that the jury “may consider any criminal punishment imposed for the conduct in question as a mitigating factor on the issue of punitive damages.” *Id.* at 1358.

182. See also Note, *supra* note 4, at 651–53 (“the court’s reliance on . . . *Miller Pipeline Corp. v. Broecker* for its conclusions may have been misplaced.”). *Id.* at 651 (citation omitted).

183. See *supra* note 176.

184. RESTATEMENT (SECOND) OF TORTS § 908(2) (1965) (emphasis added).

185. *Id.* at comment b.

186. *Id.* at § 500.

187. RESTATEMENT (SECOND) OF TORTS § 500 comment a (1965).

188. *Id.* at comment c.

189. *Id.*

which the defendant either consciously realized,¹⁹⁰ or should have realized,¹⁹¹ that his conduct created an unreasonable risk of physical harm to others.¹⁹²

In contrast, the implied malice standard for punitive damages announced by the court in *Tuttle* is vague and unworkable. The court stated that, in addition to situations of actual malice, punitive damages will be available “where deliberate conduct by the defendant . . . is *so outrageous that malice . . . can be implied.*”¹⁹³ The court, however, never defined this conduct. It merely stated that reckless disregard of the circumstances will *not* establish implied malice.¹⁹⁴ The reckless disregard standard has been regarded as an adequately stringent basis for possible imprisonment in cases involving vehicular homicide,¹⁹⁵ so “there appears to be no valid reason for deeming it too liberal for imposing civil sanctions.”¹⁹⁶ The lack of any definition for implied malice in *Tuttle*, on the other hand, will lead to arbitrary decisions as to what conduct is “so outrageous” as to imply malice and justify an award of punitive damages.

V. CONCLUSION

The Supreme Judicial Court of Maine unduly restricted the availability of punitive damages in *Tuttle v. Raymond*. The doctrine of punitive damages continues to serve the functions of compensating tort victims, appeasing both the victim’s and society’s possible desire for revenge, punishing the defendant, and deterring both the defendant and others from engaging in similar conduct in the future.¹⁹⁷ The court announced a standard that will be very difficult to apply and which will deny punitive damages in cases in which they would properly serve these functions.

190. See *supra* notes 171–74 and accompanying text.

191. Even if Raymond did not subjectively realize the unacceptable degree of risk of harm to others which his conduct created, *supra* notes 171–74 and accompanying text, several factors gave Raymond “reason to know of facts which would lead a reasonable man to realize” that his conduct created an unreasonable and substantial risk of harm to others, as contemplated by § 500 of the Restatement (Second).

For example, although Raymond may not have subjectively realized that he was about to drive through a red light, the excessive speed at which he was driving gave him “reason to know” that a red light might suddenly appear and of the danger that he would create by driving through it. Similarly, the mere fact of driving at a high rate of speed in a populated, 25 mile per hour zone also would lead a reasonable man to realize the substantial risk of harm to others given the likelihood that pedestrians and other vehicles would be in the area. Section 500 will not insulate the defendant from a finding of reckless disregard merely because he did not personally appreciate the substantial risk of harm to others created by his conduct.

192. Compare Note, *supra* note 4, at 653, which argues that:

If Raymond had failed to appreciate the nature and severity of the risk he had created, even though substantial, and even though he should have been aware of the risk, his behavior would not warrant punitive damages. The Law Court correctly removed this class of conduct from the scope of punitive damages.

193. 494 A.2d 1353, 1361 (Me. 1985) (emphasis added).

194. *Id.*

195. See, e.g., *State v. Chekmizoff*, 82 Ariz. 176, 179, 309 P.2d 796, 798 (1957) (citing RESTATEMENT OF TORTS § 500 (1934) for the definition of reckless conduct and holding that defendant could be found guilty of negligent homicide for such conduct which included passing traffic at excessive speeds on a dark night, running a red light, and traveling on the shoulder of the road just before crashing into a bridge abutment which resulted in the death of a passenger); *State v. Carpenter*, 85 Idaho 232, 237, 378 P.2d 188, 190 (1963) (quoting RESTATEMENT (FIRST) OF TORTS § 500 (1934) in support of a charge of negligent homicide against defendant who drove his automobile at an excessive rate of speed on left side of highway, striking an approaching auto and killing four people).

196. *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 168, 297 A.2d 721, 732 (1972).

197. See *supra* notes 77–96 and accompanying text.

Under the *Tuttle* standard, future jurors in Maine are likely to award punitive damages under the guise of compensation because “[t]he theory of punitive damages (without the name) is built into the average juror’s value system.”¹⁹⁸ The wiser course is to allow juries to be straightforward and explicitly award punitive damages for injuries caused by reckless conduct. This would facilitate appellate review and conserve judicial resources by allowing, if necessary, remittitur, or new trials on the punitive damages issue alone.¹⁹⁹

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198. Morris, *Punitive Damages in Personal Injury Cases*, 21 Ohio St. L.J. 216, 226 (1960). See also Note, *supra* note 29, at 521 n.35, citing a Wisconsin case which “was tried three times before different juries in different counties, twice with punitive damages allowed and once without; each verdict . . . for the same total amount.” *Id.* at 521. The case referred to is *Bass v. Chicago & N.W. Ry.*, 36 Wis. 450 (1874) (\$4,500, including both punitive and compensatory damages), 39 Wis. 636 (1876) (\$4,500 compensatory damages), 42 Wis. 654, 671–72 (1877) (\$2,500 compensatory, \$2,000 punitive).

199. Mallor & Roberts, *supra* note 18, at 646.

