

PUNITIVE DAMAGES FOR TEXTING WHILE DRIVING

Texting while driving is dangerous. Although the majority of people in California would agree that texting while driving is unsafe, many of us are guilty of diverting our eyes from the road in order to text and converse with the intended recipient.¹ While accidents that result from texting and driving do not amount to an intentional tort,² the negligent driver who chooses to text and drive should not be excused from paying punitive damages to the victim. The U.S. Centers for Disease Control (CDC) has conducted various studies that have concluded that there are over a thousand people every day injured and 8-10 killed every day in the United States by drivers distracted by cell phone use.³ 80% of accidents are the result of some type of distraction which “takes the drivers eyes off the road, their mind off of driving and / or their hands off the steering wheel.”⁴

Imagine the following two situations: the first denoting a purely negligent driver while the second scenario paints the picture of such despicable conduct from a driver to warrant punishment.

Purely Negligent Driver:

An accident occurs as a result of the driver of a vehicle texting while driving. The collision is at low speed because although the driver acknowledges the danger of texting while driving, he or she attempts to slow down to counter the dangerous effect of the texting communication. The driver waits until there is no traffic and there are no pedestrians.

Court of Appeal,¹³ but the facts surrounding that 2010 accident did not rise to a level warranting punitive damages.¹⁴

In that case, the Plaintiff attempted to petition for writ of mandate to allow punitive damages in an automobile negligence action.¹⁵ The accident occurred in April of 2010.¹⁶ At the pleading stage, Plaintiff/Petitioner stated that the accident was caused due to the “Defendant driver texting or otherwise manipulating his mobile phone immediately prior to losing control of his vehicle, swerving through lanes, and striking multiple vehicles before striking Petitioner’s vehicle, forcing it off the road where it collided head on

Compensation is not a primary function of the doctrine

This new definition of section 3294's malice is significant because it was amended after the DUI punitive damages cases of *Taylor v. Superior Court*⁷⁸ and *Dawes v. Superior Court*.⁷⁹ These are the two keystone cases that allow an injured party to recover punitive damages when an impaired driver is under the influence of alcohol.⁸⁰ On their own, these two cases are not completely clear when determining what actions by the impaired defendant amounts to malice.⁸¹ Therefore, since the definition of malice has subsequently been changed since these cases, and the cases were not expansively clear in their inception regarding a standard to plead punitive damages in an impaired driving scenario, there is room to argue that section 3294's definition of malice can be shown in a texting while driving scenario.

Due to the ambiguity left in the statute, we must look to case law to define section 3294's malice. In *Lackner v. North*,⁸² the court determined "the adjective 'despicable' connotes conduct that is . . . so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people."⁸³

[A] breach of a fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. [Citation.]⁸⁴ The wrongdoer "must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. [Citations.]"⁸⁵ Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy.⁸⁶ The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages. . . . Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.⁸⁷

Although punitive damages typically arise for intentional torts, *Taylor v. Superior Court*⁸⁸ supplied an example of how malice could be shown in an

78. See *Taylor*, 598 P.2d 854.

79. See *Dawes*, 168 Cal. Rptr. 319.

80. Any local case that seeks to include or exclude punitive damages for DUI cases will

‘malice’ under section 3294 if performed under circumstances which disclose a conscious disregard of the probable dangerous consequences.”¹⁰¹ “The ‘malice’ required by section 3294 ‘implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others.’”¹⁰² By reaching this conclusion, the *Taylor* court opened the doors to punitive damages for plaintiffs in such cases.¹⁰³

In order to satisfy the malice requirement, *Taylor*¹⁰⁴ requires that “the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.”¹⁰⁵ To establish such mindset, the plaintiff needs only show that the defendant voluntarily drank, and consumed alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle.¹⁰⁶ This conscious and deliberate disregard of the interests of others may be called willful or wanton.¹⁰⁷

The simplicity of the rule from *Taylor*, which all a plaintiff needs to show is that the defendant voluntarily drank to the point of intoxication knowing that he would have to drive,¹⁰⁸ creates the problem because the court simultaneously emphasizes the details of the complaint as well.

The complaint . . . alleged that . . . [the defendant] had previously caused a serious automobile accident while driving under the influence of alcohol; that he had been arrested and convicted for drunken driving on numerous prior occasions; that at the time of the accident herein, . . . [defendant] had recently completed a period of probation which followed a drunk driving conviction; that one of his probation conditions wa[(si)-6JETq@MC /P 4(a)9ons waahad

beverages, 'was simultaneously driving . . . while consuming an alcoholic beverage,' and was 'under the influence of intoxicants.'¹¹⁰

These specific details of the complaint were considered to be aggravating factors.¹¹¹

Although the plaintiff stressed the additional allegations in the complaint "which include[d] defendant's history of alcoholism, his prior arrests and convictions for drunk driving, his prior accident attributable to his intoxication, and his acceptance of employment involving the transportation of alcoholic beverages," it was unnecessary.¹¹² "While a history of prior arrests, convictions and mishaps may heighten the probability and foreseeability of an accident, [the court did] not deem these aggravating factors essential prerequisites to the assessment of punitive damages in drunk driving cases."¹¹³ Therefore, the rule from *Taylor*¹¹⁴ puts focus solely on the fact that the defendant "became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby."¹¹⁵

B. *Subsequent California Cases Citing the Taylor* 0048004Cases Cne e Tf1 0 0 1 1 TJ1N1e7(f)-

Again in *Peterson v. Superior Court*,¹²² the plaintiff in his complaint alleges aggravating factors instead of simply that the defendant became intoxicated with the knowledge that he would have to drive afterwards.¹²³ In *Peterson*:¹²⁴

[T]he defendant drove with plaintiff in the vehicle at speeds in excess of 100 miles per hour, and that the plaintiff objected to the high speed and demanded that defendant properly control the vehicle.¹²⁵ The parties stopped at a restaurant, and defendant consumed additional alcoholic beverages, then returned to the car and defendant drove at a speed well in excess of 75 miles per hour, losing control of the vehicle and injuring plaintiff.¹²⁶ The complaint alleges that defendant drove the vehicle with knowledge that probable serious injury to other persons would result and in conscious disregard of the safety of plaintiff.¹²⁷

However the California Supreme Court held that the “gravamen of the proposed complaint, as of the complaint in *Taylor*, is that ‘[d]efendant became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby.’”¹²⁸

C. California Civil Code Section 3294 Has Changed Since *Taylor*

*Taylor*¹²⁹ was the first case that allowed punitive damages for DUI cases because it explained that the malice required by section 3294¹³⁰ can be shown by “the act of operating a motor vehicle while intoxicated if performed under circumstances which disclose a conscious disregard of the probable dangerous consequences.”¹³¹ At the time *Taylor* was decided, the malice required by section 3294 implied “an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others.”¹³² A high level of culpability is required for malice; proof of negligence, gross negligence, or recklessness is insufficient.¹³³

122. *Peterson*, 642 P.2d 1305.

123. *Id.* at 1313-15.

124. *Peterson*, 642 P.2d 1305.

125. *Id.* at 1314.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Taylor*, 98 P.2d 854.

130. CAL. CIV. CODE § 3294.

131. *Taylor*, 98 P.2d at 855.

132. *Id.* at 856.

133. *Dawes*, 168 Cal. Rptr. at 322.

“despicable conduct” in its definition, thus there is a common sentiment that

- C) Look to how close in time had the defendant committed either A) or B).¹⁵⁸ Defendant is showing his indifference to the safety of others if he continues to repeat the conduct that has adverse effects to others. A short gap between violations of the same offense tends to show an extreme indifference to the repercussions of the driver's actions. Whereas if there is a wide time gap between offenses, a conscious disregard for the safety of others would be harder to prove.
- D) Look to see how long the defendant was using his phone in committing the negligent act.¹⁵⁹ If he is in a constant conversation or communication for an extended amount of time during his or her drive, that would be closer 1 0 0 1 1745o11(ap)adv or

treating his responsibility for safe driving irresponsibly, this factor would go towards awarding punitive damages.¹⁶³ Driving is already a dangerous proposition without maneuvering tre

*Taylor*¹⁶⁶ and *Dawes*¹⁶⁷ have created the roadmap for when punitive damages is proper in driving while intoxicated cases. Similarly, this should be the roadmap used for all impaired driving cases including texting while driving. Although California has yet to permit punitive damages for texting while driving cases, there will come a time when the facts warrant it or the public sentiment demands it. When that time comes, the aggravated factor based test above will be a solid foundation for the courts to rely upon.

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166. *Taylor*, 598 P.2d 854.

167. *Dawes*, 168 Cal. Rptr. 319.

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