

# PUNITIVE DAMAGES FOR TEXTING WHILE DRIVING

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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.<sup>1</sup> While accidents that result from texting and driving do not amount to an intentional tort,<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup>

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.

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1. This is a phenomenon since drivers could always communicate through telephone calls. Additionally, there are now voice-to-text systems in vehicles that allow you to do so orally. However, human interaction by use of the telephone has migrated towards texting.

2. Intentional tort references an act that the defendant desires to happen whereas a negligent tort is something that the defendant knew or should have known would happen based on the reasonable duty owed to the injured party.

3. Steven M. Sweat, *Should Causing a Car Accident from Texting and Driving Warrant Punitive Damages Under California Law?*, CA ACCIDENT ATTORNEYS BLOG (Aug. 3, 2013), <http://www.californiaaccidentattorneysblog.com/2013/08/03/should-causing-a-car-accident-from-texting-and-driving-warrant-punitive-damages-under-california-law/>.

4. *Id.*

Additionally, the driver is only trying to send a reply message to his family member letting that person know that he or she will be at a certain location for the day; this is not a prolonged communication nor is the driver using his or her phone to check social media or manipulating the phone in a non-necessary fashion.<sup>5</sup>

*Negligent Driver Warranting Punitive Damages:*

The driver of the vehicle is using his phone to have a text communication. He or she has been involved in this text communication for a substantial amount of time during his or her commute, which means that his or her eyes have been off the road for that entire period of time. This driver has had an extensive history of violations and citations stemming from the use of his or her phone while driving. The driver has been speeding and maneuvering in and out of traffic in an area that has a high density of pedestrians while continuing to text.

Currently there is no national ban on texting while driving, but a number of states<sup>6</sup> have passed laws banning texting while driving.<sup>7</sup> California's Vehicle Code section 23123.5<sup>8</sup> has outlawed driving a motor vehicle while writing, sending, or reading text based communications.<sup>9</sup> While California has outlawed texting while driving, its courts have yet to permit an injured party to plead punitive damages for accidents caused by such conduct.<sup>10</sup> Although California courts have not yet allowed punitive damages in such cases,<sup>11</sup> there is no statute or case law preventing punitive damages.<sup>12</sup> Recently, this issue has been raised in front of the California 2nd District

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5. This Note focuses on texting while driving but the general concept can be applied to a driver using or manipulating his or her phone for any purpose. This would include checking Facebook, taking pictures, playing games, etc. . . .

6. Plaintiffs' attorneys have cited to Florida when attempting to plead punitive damages as it is one state that has been more open-minded to the idea.

7. *The Dangers of Texting While Driving*, FCC (Dec. 8, 2014), <https://transition.fcc.gov/cgb/consumerfacts/drivingandtexting.pdf>.

8. CAL. VEH. CODE § 23123.5 (West 2014).

9. *Id.*

10. *Punitive Damages Sought in Texting-Driver Case*, MERCURY NEWS (Mar. 11, 2014), [http://www.mercurynews.com/california/ci\\_25323246/punitive-damages-sought-texting-driver-case](http://www.mercurynews.com/california/ci_25323246/punitive-damages-sought-texting-driver-case).

11. By allowing punitive damages, courts would open the doors and encourage a flooding of punitive damages plead lawsuits which would be against public policy.

12. California courts are hesitant to allow punitive damages in auto accident scenarios. Ultimately, a successfully plead texting while driving case would have to be so abhorrent to demand punitive damages.

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

In that case, the Plaintiff attempted to petition for writ of mandate to allow punitive damages in an automobile negligence action.<sup>15</sup> The accident occurred in April of 2010.<sup>16</sup> 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 with a tree.”<sup>17</sup>

“Section 3294 of the California Civil Code allows the recovery of punitive damages, also known as exemplary damages, in addition to compensatory or actual damages.”<sup>18</sup> For over three decades, California has recognized that driving while intoxicated may warrant punitive damages.<sup>19</sup> The California Supreme Court first concluded this in *Taylor v. Superior Court*<sup>20</sup> and established the precedent that impaired driving<sup>21</sup> may reach the culpability level demanding punitive damages.<sup>22</sup>

Thus far in the realm of impaired driving,<sup>23</sup> California courts have explicitly ruled that intoxicated driving may rise to the culpability level deserving punitive damages.<sup>24</sup> However impaired driving,<sup>25</sup> which reflects mental and motor skills being impaired, can also include distracted driving for purposes of this note; typically, impaired driving would exclusively

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13. *Punitive Damages Sought in Texting-Driver Case*, *supra* note 10.

14. *Id.*

15. Petition for Writ of Mandate, Joseph Shultz v. L.A. Cnty. Super. Ct., Respondent, Terarutyunyan, Defendants and Real Parties in Interest (This was given to me in hard copy and cannot be found on a commercial database).

16. *Id.* at 1.

17. *Id.*

18. Bruce Cameron Bennett, *Punitive Damages in California Under the Malice Standard: Defining Conscious Disregard*, 57 S. CAL. L. REV. 1065, 1065 (1984).

19. Patrick K. Gunning, *Seeking Punitive Damages Against Drivers Distracted by Hand-Held Electronic Devices*, ADVOCATE (Apr. 2014), <http://www.psblaw.com/articles/gunning-advocate.pdf>.

20. *See Taylor v. Super. Ct.*, 598 P.2d 854, 854 (Cal. 1979).

21. Impaired driving for purposes of this note will reflect a decrease of mental and motor skills equivalent to being under the influence of alcohol and/or drugs.

22. *See Gunning*, *supra* note 19.

23. *See supra* note 21.

24. The rule allowing for punitive damages in driving under the influence automobile accidents is stated in *Taylor* and *Dawes*.

25. *See supra* note 21.

reference being under the influence of alcohol and/or drugs.<sup>26</sup> The use of a phone to write, send, or read text based communications falls under the umbrella of distracted driving for purposes of this note.<sup>27</sup> Other activities that would fall under distracted driving include: adjusting the air conditioning, manipulating the radio, reaching for an item in the car, having communications with a passenger, etc. . . . Any one of these distracting driving scenarios on their own should not warrant punitive damages; they would and should amount to negligence.<sup>28</sup> California courts are in agreement that distracted driving<sup>29</sup> of this sort amount to negligence and not punitive damages.<sup>30</sup> Typically, texting and driving is more akin to these other distractions and should not warrant punitive damages. However, there are situations where the conduct of the driver is so abhorrent that such distracted driving is closer to impaired driving like intoxicated driving; thus, justifying punitive damages. The hypothetical automobile accident referenced above as “Negligent Driver Warranting Punitive Damages” is the type of situation that falls closer to the dangerous and reckless behavior of one who drinks then drives.<sup>31</sup> Arguably, this conduct demonstrates a conscious disregard for the safety of others and should result in punitive damages.

This Note seeks to establish that an implicit, California blanket rule denying punitive damages in texting and driving cases is unreasonable.<sup>32</sup> First, this Note will focus on the punitive damages doctrine and section 3294 of the California Civil Code<sup>33</sup> that allows punitive damages. Next, the Note will analyze the California cases allowing punitive damages involving driving while intoxicated accidents.<sup>34</sup> Lastly, this Note will propose a factor

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26. Impaired driving is the act of operating or having care or control of a motor vehicle while under the influence of alcohol and/or drugs to the degree that mental and motor skills are impaired.

27. Distracted driving includes any behavior or action that would take your eyes off the road, your hands off the wheel, or your mind off of driving.

28. For good reason, courts do not designate this behavior as rising to the level of punitive damages. It would be against public policy as the floodgates would open with litigation warranting punitive damages for simple negligent acts.

29. *See supra* note 27.

30. After speaking with multiple judges sitting on the bench for the Los Angeles Superior Court, it is clear that there is reluctance in expanding the punitive damages doctrine to distracted driving. Even for the abhorrent behavior of causing an accident while intoxicated requires aggravated factors to justify punitive damages.

31. Keeping your eyes down or even just your mind concentrated on your phone, for an extended period of time driving at high speeds, is like driving an entire football field blind.

32. There is no explicit statute or case law that prevents punitive damages in texting while driving situations.

33. CAL. CIV. CODE § 3294 (West 1997).

34. *See Taylor*, 598 P.2d at 854; *Dawes v. Super. Ct.*, 168 Cal. Rptr. 319, 321-23 (Ct. App. 1980); *Peterson v. Super. Ct.*, 642 P.2d 1305, 1306 (Cal. 1982).

based test that is a fact intensive inquiry into whether punitive damages should be allowed on a case-by-case basis. The factor-based test will incorporate the ideals set forth in the aggravated factor based test promulgated in *Taylor v. Superior Court*<sup>35</sup> and *Dawes v. Superior Court*.<sup>36</sup>

#### I. PUNITIVE DAMAGES DOCTRINE: HISTORY, PURPOSE, AND CALIFORNIA'S DEFINITION

The Restatement of Torts defines punitive damages as “damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.”<sup>37</sup> Punitive damages are used to punish and deter.<sup>38</sup> The doctrine is really a “hybrid remedy that is neither completely civil nor criminal in nature, and it is this hybrid character” that causes the controversy that has always surrounded the subject.<sup>39</sup> Thus, “the main criticism of punitive damages relates to the confusion of tort and criminal law.”<sup>40</sup>

Simply put, tort law in a civil setting seeks to compensate an injured party<sup>41</sup> for the damages incurred due to the conduct of the tortfeasor or defendant.<sup>42</sup> However, criminal law attempts to punish a defendant by issuing fines or jail time.<sup>43</sup> Therefore, critics argue that if one wanted to punish the tortfeasor, then the case should also be brought in criminal court and leave a criminal judgment as the sole source of punishment.<sup>44</sup> However, proponents of the punitive damages doctrine exclaim that allowing such damages encourages injured parties to bring their claim to court in order to seek justice.<sup>45</sup> Without the possibility of punitive damages, many of these cases would fall on deaf ears and injured parties would be hard-pressed to

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35. See *Taylor*, 598 P.2d at 856.

36. See *Dawes*, 168 Cal. Rptr. at 322-24.

37. RESTATEMENT (SECOND) OF TORTS § 908 (AM. LAW INST. 1979).

38. Lotte Meurkens, *The Punitive Damages Debate in Continental Europe: Food for Thought*, in THE POWER OF PUNITIVE DAMAGES: IS EUROPE MISSING OUT? 3, 5-6 (Lotte Meurkens & Emily Nordin eds., 2012).

39. *Id.*

40. *Id.*

41. The idea is to make an injured party whole, or in the position that he or she was in prior to the injury.

42. Meurkens, *supra* note 38, at 6.

43. *Id.* at 5.

44. *Id.*

45. *Id.* at 6-7.

find representation or an adequate remedy.<sup>46</sup> A defendant liable for punitive damages in a civil setting can still be subject to criminal prosecution. Similar to a criminal act, punitive damages here also require a type of mens rea, or a culpable mind-set, to warrant punitive damages.

Additional relevant criticisms of punitive damages for purposes of this note relate to the vagueness of liability standards and the unpredictability of the awards.<sup>47</sup>

#### A. *History of Common Law Punitive Damages*

Punitive damages is originally a common law doctrine.<sup>48</sup> “The theory behind punitive damages is one of punishment and deterrence.<sup>49</sup> The doctrine’s policy considerations involve a combination of general societal interests with those of the harmed party in particular.”<sup>50</sup> “Something more than the mere commission of a tort is always required for punitive damages.”<sup>51</sup> “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 and deliberate disregard of the interests of others that his conduct may be called willful or wanton.”<sup>52</sup>

#### B. *Purpose of Punitive Damages*

The purpose of punitive damages is the “punishment of the defendant, which should lead to specific deterrence of the defendant and general deterrence of others not to make similar mistakes.”<sup>53</sup> “A person who is injured by the egregious conduct of another ought to be revenged, whereas the tortfeasor deserves to be punished.”<sup>54</sup> However, the other purpose of punitive damages is for deterrence; yet, the deterrent effect of imposing these damages remains questionable.<sup>55</sup>

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46. *Id.*

47. Meurkens, *supra* note 38, at 5.

48. *Id.* at 3.

49. *Id.* at 4.

50. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 908 (AM. LAW INST. 1979).

51. Meurkens, *supra* note 38, at 9.

52. *Id.*

53. *Id.* at 5-6.

54. *Id.* at 6.

55. *Id.*

Compensation is not a primary function of the doctrine<sup>56</sup> because punitive damages are in addition to compensatory damages.<sup>57</sup> Compensatory damages focus on compensating for the injuries sustained while punitive damages target the behavior of the defendant.<sup>58</sup> Punitive damages are focused on the behavior of the defendant rather than the damage, thus based upon ideas of public policy rather than individual compensation.<sup>59</sup> However, “financial incentives in the form of punitive damages stimulate injured parties to file civil claims” so it promotes injured parties to seek out justice.<sup>60</sup> “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.”<sup>61</sup> In fact, punitive damages can only be awarded for aggravated circumstances because a high standard of misconduct is necessary to justify punishing and deterrence purpose.<sup>62</sup>

### C. *Punitive Damages Summed Up*

Punitive damages is a common law doctrine meant to punish and deter which creates confusion for when the doctrine should be appropriately applied in civil cases.<sup>63</sup> The confusion is because typically an injured party seeks compensatory damages against the liable party; these are meant to make the plaintiff whole and recover medical costs and pain and suffering. Punitive damages are solely to punish the despicable behavior of the tortfeasor or defendant which is more akin to what the purpose of criminal convictions is for.

Likewise there is general criticism regarding the vagueness of liability standards and the unpredictability of the awards.<sup>64</sup> Basically, what type of conduct warrants punitive damages and how much should be awarded based on the behavior of the defendant.<sup>65</sup> However, the doctrine is clear in at least one respect, the primary function of punitive damages is not to compensate

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56. While compensatory damages seek to make the injured party whole, punitive damages go one step further by adding a recovery amount based on how much it would take to deter and punish the defendant.

57. Meurkens, *supra* note 38, at 6-7.

58. *Id.* at 6.

59. *Id.* at 6-7.

60. *Id.* at 3.

61. *Id.* at 9.

62. *Id.*

63. *Id.* at 3-5.

64. *Id.* at 5.

65. *Id.* at 9-10.

the plaintiff for his damages.<sup>66</sup> Punitive damages require not only aggravated circumstances, but also a certain state of mind that warrants punitive damages.<sup>67</sup> Therefore, California has included the malice requirement laid out in California Civil Code section 3294.<sup>68</sup>

#### *D. California's Definition of Punitive Damages*

California's definition of when punitive damages are permissible comes from California Civil Code section 3294(a).<sup>69</sup> Section (a) reads that "in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."<sup>70</sup> The relevant part of (a) regarding auto accidents refers to when a defendant acted with malice.<sup>71</sup> The current version of section 3294 defines malice as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others."<sup>72</sup> Therefore, besides the violation of a right and the infliction of actual damages, a certain state of mind of the defendant is needed for punitive damages to be awarded.<sup>73</sup>

The statute was amended in 1980, which changed the definition of malice.<sup>74</sup> Now an injured party can request punitive damages through the malice theory if the plaintiff can show "conduct which is intended to cause injury to the plaintiff [e.g. actual malice] or [despicable] conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others."<sup>75</sup> In attempting to define "malice," which would justify punitive damages, the legislature created additional ambiguities with the inclusion of the term ["despicable conduct"] and "conscious disregard."<sup>76</sup> The legislature chose not to define these terms in the statute.<sup>77</sup>

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66. *Id.* at 5-6.

67. *Id.* at 9.

68. CAL. CIV. CODE § 3294.

69. § 3294(a).

70. *Id.*

71. *See id.*

72. § 3294(c)(1).

73. Meurkens, *supra* note 38, at 9.

74. Bennett, *supra* note 18, at 1065.

75. *Id.* at 1066.

76. *Id.*

77. *Id.*



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*<sup>78</sup> and *Dawes v. Superior Court*.<sup>79</sup> 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.<sup>80</sup> On their own, these two cases are not completely clear when determining what actions by the impaired defendant amounts to malice.<sup>81</sup> 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*,<sup>82</sup> 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."<sup>83</sup>

[A] breach of a fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. [Citation.]<sup>84</sup> The wrongdoer "must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. [Citations.]"<sup>85</sup> Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy.<sup>86</sup> 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.<sup>87</sup>

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

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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 undoubtedly reference both *Taylor* and *Dawes*.

81. The reason is that a lot of the relevant information has been dissected from the dicta in these cases. Additionally, there is not clear and unambiguous language explaining and defining what aggravating factors could warrant punitive damages.

82. *Lackner v. North*, 37 Cal. Rptr. 863 (2006).

83. *Lackner*, 37 Cal. Rptr. at 881; *Mock v. Michigan Millers Mut. Ins. Co.*, 5 Cal. Rptr. 2d 594, 609 (1992); *Cloud v. Casey*, 90 Cal. Rptr. 2d 757, 767 (1999).

84. *Lackner*, 37 Cal. Rptr. at 881.

85. *Id.*

86. *Id.*

87. *Id.*; *Tomaselli v. Transamerica Ins. Co.*, 31 Cal. Rptr. 2d 433, 444 (1994).

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

auto accident case.<sup>89</sup> The California Supreme Court explicitly exclaimed that the defendant's malice could be shown by the decision to drink, knowing that he or she would have to drive afterwards.<sup>90</sup>

## II. CALIFORNIA'S APPROACH FOR ALLOWING PUNITIVE DAMAGES FOR INJURIES RESULTING FROM IMPAIRED DRIVING: DRIVING UNDER THE INFLUENCE

California's seminal case for allowing punitive damages for injuries resulting from a DUI, *Taylor v. Superior Court*,<sup>91</sup> makes it unclear what the pleading standard is for allowing punitive damages. The standard is unclear because the California Supreme Court provides the standard in the holding, but subsequent cases incorporate the opinion's dicta when deciding cases<sup>92</sup> thus showing that the dicta from *Taylor*<sup>93</sup> has been influencing decisions perhaps more than the rule in the holding. Additionally, the rule from *Taylor*<sup>94</sup> needs to be redefined because the case was decided before California Civil Code section 3294's definition of malice was amended to include "despicable conduct."<sup>95</sup> The legislature had a specific intent when adding "despicable conduct" into the definition of malice, which is a requirement for punitive damages. Thus, the rule should be updated to reflect the change in California Civil Code section 2394.<sup>96</sup> First it is important to understand the details of *Taylor*<sup>97</sup> followed by how the new language of section 3294<sup>98</sup> could have affected the original rule.

### A. Analysis of *Taylor v. Superior Court*

*Taylor v. Superior Court*<sup>99</sup> was the first case that allowed a plaintiff to plead punitive damages in a personal injury action brought against an intoxicated driver.<sup>100</sup> The California Supreme Court concluded that "the act of operating a motor vehicle while intoxicated may constitute an act of

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89. *See id.* at 855.

90. *See id.* at 857.

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

92. *See Peterson v. Superior Court*, 642 P.2d 1305 (Cal. 1982).

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

94. *Id.* at 855.

95. CAL. CIV. CODE § 3294(c)(1).

96. *Id.*

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

98. CAL. CIV. CODE § 3294(c)(1).

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

100. *Id.* at 855.

‘malice’ under section 3294 if performed under circumstances which disclose a conscious disregard of the probable dangerous consequences.”<sup>101</sup> “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.’”<sup>102</sup> By reaching this conclusion, the *Taylor* court opened the doors to punitive damages for plaintiffs in such cases.<sup>103</sup>

In order to satisfy the malice requirement, *Taylor*<sup>104</sup> 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.”<sup>105</sup> 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.<sup>106</sup> This conscious and deliberate disregard of the interests of others may be called willful or wanton.<sup>107</sup>

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,<sup>108</sup> 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 was that he refrain from driving for at least six hours after consuming any alcoholic beverage; and that at the time of the accident in question he was presently facing an additional pending criminal drunk driving charge.<sup>109</sup> In addition, . . . [the defendant] accepted employment which required him both to call on various commercial establishments where alcoholic beverages were sold, and to deliver or transport such beverages in his car. Finally, it is alleged that at the time the accident occurred, [defendant] was transporting alcoholic

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101. *Id.*

102. *Id.* at 856.

103. *Id.* at 855.

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

105. *Id.* at 856.

106. *Id.* at 859.

107. *Id.*

108. *Id.*

109. *Id.* at 855.

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

These specific details of the complaint were considered to be aggravating factors.<sup>111</sup>

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.<sup>112</sup> "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."<sup>113</sup> Therefore, the rule from *Taylor*<sup>114</sup> 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."<sup>115</sup>

#### *B. Subsequent California Cases Citing the Taylor Rule*

In *Dawes v. Superior Court*,<sup>116</sup> the plaintiffs pleaded aggravating factors similar to those in *Taylor*.<sup>117</sup> The relevant part of the complaint included facts that the driver, while intoxicated, ran a stop sign and zigzagged in and out of traffic at speeds in excess of 65 miles per hour in a 35-mile-per-hour zone, all with reckless disregard of the probable consequences.<sup>118</sup> Although the complaint lists these aggravating factors, the crux of the complaint is still the same as *Taylor*<sup>119</sup>; the defendant became intoxicated with knowledge that he would have to subsequently drive afterwards.<sup>120</sup> This is one case following *Taylor*,<sup>121</sup> which puts emphasis on the dicta's aggravating factors rather than the rule.

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110. *Id.*

111. *Id.*

112. *Id.* at 857.

113. *Id.*

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

115. *Id.* at 857.

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

117. *Id.* at 321-23.

118. *Id.*

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

120. *Dawes*, 168 Cal. Rptr. at 321.

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

Again in *Peterson v. Superior Court*,<sup>122</sup> 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.<sup>123</sup> In *Peterson*:<sup>124</sup>

[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.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup>

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.’”<sup>128</sup>

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

*Taylor*<sup>129</sup> was the first case that allowed punitive damages for DUI cases because it explained that the malice required by section 3294<sup>130</sup> 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.”<sup>131</sup> 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.”<sup>132</sup> A high level of culpability is required for malice; proof of negligence, gross negligence, or recklessness is insufficient.<sup>133</sup>

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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.

However, section 3294's definition of malice was amended after *Taylor*<sup>134</sup> to include the addition of "despicable conduct."<sup>135</sup> With the inclusion of "despicable conduct," section 3294 plainly indicates that absent intent to injure the plaintiff, "malice" requires more than a "willful and conscious" disregard of the plaintiff's interests.<sup>136</sup> Now, "the additional component of 'despicable conduct' must be found."<sup>137</sup>

"While the Legislature made no effort to define the term 'despicable conduct,' that does not mean it is without significant meaning or that the evidentiary burden necessary to obtain punitive damages is not substantially heavier. Not only must despicable conduct be established, it must be proven by clear and convincing evidence."<sup>138</sup> The Legislature's inclusion of "despicable conduct" was clearly intended to impose a new statutory limitation on the award of punitive damages.<sup>139</sup> Used in its ordinary sense, the adjective "despicable" is a powerful term that refers to circumstances that are "base," "vile," or "contemptible."<sup>140</sup>

The rule from *Taylor v. Superior Court* focuses on the crux of the complaint, which is that the defendant drank and decided to drive.<sup>141</sup>

One who willfully 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. The effect may be lethal whether or not the driver had a prior history of drunk driving incidents.<sup>142</sup>

However, every case puts an emphasis on facts establishing aggravating factors. There seems to be hesitancy from California courts to allow such a low liability standard for punitive damages in cases involving DUI injuries because of opinions relying on the aggravating factors instead of the low standard set forth in *Taylor*.<sup>143</sup> This uneasy feeling to allow such a low standard in such cases looks to be felt by the state legislature. The legislature felt the need to add a higher burden to prove "malice" by including

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

135. CAL. CIV. CODE § 3294(c)(1).

136. *Coll. Hosp. Inc. v. Superior Court*, 882 P.2d 894, 907 (Cal.1994).

137. *Id.*

138. *Mock v. Mich. Millers Mut. Ins. Co.*, 5 Cal. Rptr. 2d 594, 609 (Cal. Ct. App. 1992).

139. *Id.*

140. *Coll. Hosp.*, 882 P.2d at 907.

141. *Taylor v. Superior Court*, 598 P.2d 854, 857 (Cal. 1979).

142. *Id.*

143. See *Lackner v. North*, 37 Cal. Rptr. 3d 863, 881 (Cal. Ct. App. 2006); *Tomaselli v. Transamerica Ins. Co.*, 31 Cal. Rptr. 2d 433, 444 (Cal. Ct. App. 1994).

“despicable conduct” in its definition, thus there is a common sentiment that relying purely on the rule in *Taylor* is not enough and that there should be an aggravated factor based test.

### III. CALIFORNIA’S DUI CASES OPEN THE DOOR FOR PUNITIVE DAMAGES IN TEXTING WHILE DRIVING ACCIDENTS

Although California courts are hesitant to expand on *Taylor* and *Dawes* in allowing punitive damages to be plead in more DUI accident cases,<sup>144</sup> by allowing punitive damages at all opens the door for allowing punitive damages in impaired driving cases. However, it is important to note that there must be egregious facts in the realm of texting while driving to warrant punitive damages. Otherwise, the status quo should be kept regarding these cases being viewed as negligent actions for compensatory damages.

#### A. *Taylor and Lackner Provide a Roadmap for Punitive Damages in Texting While Driving*

*Taylor* requires that “the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.”<sup>145</sup> 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.<sup>146</sup> This conscious and deliberate disregard of the interests of others may be called willful or wanton.<sup>147</sup> *Lackner* explains that the mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages. . . . “[P]unitive 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.”<sup>148</sup>

By looking to *Taylor*’s dicta which incorporates the aggravating factors surrounding the accident, *Taylor* still meets the tougher definition of section 3294.<sup>149</sup> These aggravating factors show an extreme indifference to the plaintiff’s rights.<sup>150</sup> Therefore, by adopting a similar aggravating factor based

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144. *Taylor*, 598 P.2d at 859.

145. *Id.* at 856.

146. *Id.* at 857.

147. *Id.* at 859.

148. *Lackner* 37 Cal. Rptr. 3d at 881 (quoting *Tomaselli*, 31 Cal. Rptr. 2d 433, 444 (Ct. App. 1994)).

149. *See id.*; CAL. CIV. CODE § 3294 (West 2015).

150. *See Taylor*, 598 P.2d at 855; *Lackner*, 135 Cal. App. 4th at 1210.

test for texting while driving accidents, it is possible for a plaintiff to plead punitive damages.

#### IV. IMPAIRED DRIVING AGGRAVATED FACTOR BASED TEST FOR PLEADING PUNITIVE DAMAGES

Since the California DUI cases have established an aggravated factor based test,<sup>151</sup> this Note purports to create a uniform test that can be used for impaired driving in general. Specifically, a version of this aggravated factor based test has been created for texting while driving cases. The test is a case-by-case, fact sensitive inquiry that has been created by looking at the analysis used in *Taylor* and *Dawes*.<sup>152</sup>

The following factors should be looked at in order to determine if a defendant's conduct justifies punitive damages:

- A) Look to previous accidents caused by the same conduct.<sup>153</sup> If the defendant has a history of getting into accidents due to texting while driving, this factor would move a plaintiff closer to being able to plead punitive damages.<sup>154</sup> Defendant is showing his indifference to the safety of others if he continues to repeat the conduct that has adverse effects to others compared to a negligent driver who for the first time, engages in texting while driving and causes an accident. This factor is derived from the fact that in *Taylor*, the driver had a history of drinking while driving.<sup>155</sup>
- B) Look to previous citations for texting while driving.<sup>156</sup> If the defendant has a history of getting citations for texting while driving then the defendant is showing his indifference to the safety of others.<sup>157</sup> The defendant's repeated behavior demonstrates the lack of an appreciation for the harm that his conduct may have on the drivers and pedestrians around him. This also shows that citations aren't sufficiently deterring and punishing the defendant. Thus, punitive damages would work better to punish and deter the behavior.

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151. See *Taylor*, 598 P.2d 854; *Dawes*, 168 Cal. Rptr. 319.

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

153. *Taylor*, 598 P.2d at 855, 857.

154. See *id.* at 855-57.

155. *Id.* at 855.

156. See *id.* at 855, 857.

157. See *id.* at 855-57.



- C) Look to how close in time had the defendant committed either A) or B).<sup>158</sup> 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.<sup>159</sup> If he is in a constant conversation or communication for an extended amount of time during his or her drive, that would be closer to a conscious disregard for the safety of others. However, if the defendant is attempted to send a single text, that looks to be more like a negligent act not deserving punitive damages. Each time we use our phone to text and drive, we are cognitively distracted because our brains are focused on the task of texting and communicating. Texting while driving also causes the driver's eyes off the road, which means for significant distances a driver is effectively driving blind.

Another consideration within this factor would be to determine the destination and duration of the trip. Texting during a trip that extends a great distance or time would be less aggravating than a shorter distance in which the driver need only wait a short period of time before needing to use his or her telephone. This factor in combination with (E) below is relevant.

- E) Look to the speed of the driver.<sup>160</sup> If the driver is moving at high speeds, this would be a factor towards awarding punitive damages.<sup>161</sup> At high speeds, looking down at one's phone to text for short periods of time has dire consequences because of the distance that can be covered in that short period of time at the high speed. Therefore, (D) and (E) can be balanced together. The higher the speed, the less important the duration of the conversation because one text message at high speeds can be more dangerous than a drawn out texting conversation while traveling slowly.
- F) Look to see what type of maneuvering the driver was attempting.<sup>162</sup> If the driver prior to the accident is weaving in and out of traffic and

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158. *See id.* at 855, 857.

159. *See id.*

160. *Dawes*, 168 Cal. Rptr. at 321, 324.

161. *Id.* at 323-24.

162. *See id.*

treating his responsibility for safe driving irresponsibly, this factor would go towards awarding punitive damages.<sup>163</sup> Driving is already a dangerous proposition without maneuvering treacherously and texting while driving. This would be such an absence from driving safely and clearly would show a conscious disregard of the safety of others.

- G) Look to see the environment and area the accident occurred in.<sup>164</sup> If the driver was texting while driving near a school zone or construction zone, both of which demand a higher standard of care and reasonableness, this factor would go towards awarding punitive damages,<sup>165</sup> as opposed to a driver in a desolate area, one where there is unlikely going to be pedestrians or other vehicles nearby. The rarer the chance of being around people, the less likely the act of texting while driving will be deemed to be aggravating and warrant punitive damages.
- H) Look to see what the telephone is being used for. If the communication being conveyed is an emergency matter, one that involves close friends or family, there should be some leniency. However, if the driver is operating his phone's camera or trying to access a function of the phone that is detrimental to driving safe, then this would more closely warrant punitive damages. Examples of such behavior would be using one's telephone to access social media, play games, download music, etc. . . .

## V. CONCLUSION

It is undeniable the dangers that accompany distracted driving. For the most part, a distracted driver who causes an accident should be liable in civil court for compensatory damages. These damages would help the plaintiff pay for medical costs and pain and suffering. However, there are times where texting while driving is more than just distracted driving, it is driving while being impaired. Impaired driving, like driving under the influence, can bring rise to punitive damages that are meant to punish and deter the culpable party for having an extreme lack of respect for the safety of others on the road.

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163. *See id.*

164. *See id.* at 321, 323.

165. *See id.*

*Taylor*<sup>166</sup> and *Dawes*<sup>167</sup> 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.

\* Gregory Selarz has served as a member of Southwestern's Law Journal (2013-2014) and Southwestern's Law Review (2014-2015). He would like to thank the judges of the Los Angeles Superior Court who inspired him to write on this topic and also the numerous amounts of attorneys, friends, and family who have offered their input and insight on the topic of drunk driving and texting while driving. Regrettably, we live in a time where people are addicted to being connected, whether it is their telephones, computers, or tablets. Although this is the trend we are moving towards, there is a time and a place to use one's phone. Texting while driving is not one of those situations.