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Pleading punitive damages

PERFORM A THOROUGH INVESTIGATION SO YOUR COMPLAINT CAN SURVIVE MOTION PRACTICE. WE TAKE A SPECIAL LOOK AT PUNITIVE DAMAGES IN DUI CASES

We know that punitive damages are intended to punish a defendant and deter that defendant (and potentially others) from future wrongdoing. The landmark punitive damages cases that get the most public attention concern serious harm to the average person (e.g., lying and destroying evidence that proved tobacco caused cancer [Phillip Morris]; massive oil spills [Exxon-Valdez]; an auto manufacturer failing to make a simple repair to its gas tanks [General Motors]; and most recently, lying about and failing to disclose the link between talc containing asbestos and ovarian cancer [Johnson & Johnson].)

In practice, these cases are rare. Almost all of what we deal with in the personal injury arena concerns some kind of negligence-based conduct unique to our client. On occasion though, we encounter a case that goes beyond mere negligence; it involves an incident in which our client was hurt by a defendant who was under the influence of alcohol and/or drugs.

When this occurs, our reflexive response is often to seek punitive damages. However, we owe it to our clients, the Court, and even our defense colleagues to understand what actually constitutes punitive conduct in California

and what specifically must be pled to provide the defendant “adequate notice of the kind of conduct charged against him.” (*Smith v. Superior Ct.* (1992) 10 Cal.App.4th 1033, 1041.)

The purpose of this article is to provide guidance about the law regarding punitive damages and what steps we can take in drafting the complaint to avoid (or defeat) a demurrer, motion to strike, or summary judgment motion. We owe our clients a duty to litigate and resolve their cases expeditiously and competently and motion practice slows down our cases, congests the Courts, and forces trial continuances.

How bad does the conduct have to be in order to successfully plead punitive damages?

A plaintiff may seek punitive damages for “oppression, fraud or malice” by the defendant. (Civ. Code, § 3294 subd. (a).) Section 3294 provides statutory definitions for each term:

- “Malice” means conduct intended by the defendant to cause injury to the plaintiff or despicable conduct that is carried on by the defendant with a willful and conscious disregard for the rights or safety of others. (Civ. Code, § 3294 subd. (c)(1).)
- “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights. (Civ. Code, § 3294 subd. (c)(2).)
- “Fraud” means intentional misrepresentation, deceit or concealment of a material fact with the intention of depriving a person of property or legal rights, or otherwise causing injury. (Civ. Code, § 3294 subd.(c)(3).)

The cases we handle most frequently in which punitive damages may be available concern conduct that is malicious and/or oppressive. Intentional conduct is generally straightforward and unambiguous: defendant punched plaintiff in the face, intending to cause him harm. (See *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1212 [punitive damages are “typically awarded for intentional torts such as assault and battery, false imprisonment, intentional infliction of emotional distress, defamation, nuisance intentionally maintained, fraud, trespass, conversion, civil rights violations, insurer’s breach of covenant of good faith, wrongful termination and job discrimination, and products liability cases”].)

The more nuanced (and more common) issue is determining when non-intentional conduct warrants punitive damages. California law makes clear that a specific intent to harm is not required to sustain a punitive damage claim. “Even ‘nonintentional torts’ may

form the basis for punitive damages when the conduct constitutes conscious disregard of the rights or safety of others.” (*SKF Farms v. Superior Ct.* (1984) 153 Cal.App.3d 902, 907 [citation omitted].) “Nonintentional conduct comes within the definition of malicious acts punishable by the assessment of punitive damages when a party intentionally performs an act from which he knows, or should know, it is highly probable harm will result.” (*Ibid.* [citation omitted]; see also, *CRST, Inc. v. Superior Ct.* (2017) 11 Cal.App.5th 1255, 1261 [“California courts have long held that punitive damages may, under appropriate circumstances, be recoverable for nondeliberate or unintentional torts...”]; *Ford Motor Co. v. Home Ins. Co.* (1981) 116 Cal.App.3d 374, 382 [“Therefore, although conduct resulting in injury may be characterized as nondeliberate, when done in conscious disregard of safety, it is sufficiently blameworthy to warrant an assessment of punitive damages”].)

Thus the determination for whether non-intentional conduct is bad enough to warrant punitive damages depends on what constitutes “despicable conduct” and a “willful and conscious disregard” for your client’s rights and safety, while keeping in mind the burden of proof we will ultimately bear in opposing a summary judgment motion and at trial.

Despicable conduct

“Despicable conduct” is conduct that is “so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by most ordinary decent people.” (*Pac. Gas & Elec. Co. v. Superior Court* (2018) 24 Cal.App.5th 1150, 1159 [citation omitted].) Such conduct refers to actions that have “the character of outrage frequently associated with crime.” (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287 [citation omitted].)

Examples of what courts consider despicable conduct include the following:

- Failing to disclose and warn of pelvic inflammatory disease caused by Dalkon

Shield. (*Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 391-92);

- Willful mishandling of repeated gas and oils spills at a gas station, including failing to implement clean-up procedures, affirmatively instructing employees to not clean up spills and to stop warning customers about those spills, and failing to install adequate lighting. (*Nolin v. National Convenience Stores, Inc.* (1979) 95 Cal.App.3d 279, 288);
- Failing to conduct adequate testing and warning of defective tampons after having received continuing complaints from consumers. (*West v. Johnson & Johnson Products, Inc.*, (1985) 174 Cal.App.3d 831, 867-79); and
- Driving drunk coupled with other dangerous conduct, including intentionally speeding and swerving in areas of other traffic and pedestrians (and discussed more fully below). (*Taylor v. Superior Court* (1979) 24 Cal.3d 890; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82.)

Willful and conscious disregard

“‘Willful and conscious disregard’ of your client’s rights and safety means that the defendant was actually “‘aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.”” (*Pac. Gas & Elec. Co.*, 24 Cal.App.5th at 1159 [quoting *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61].) Stated differently, the defendant must “‘have actual knowledge of the risk of harm it is creating and, in the face of that knowledge, fails to take steps it knows will reduce or eliminate the risk of harm.”” (*Id.*, emphasis in original, quoting *Ehrhardt v. Brunswick, Inc.* (1986) 186 Cal.App.3d 734, 742; see also *King v. U.S. Bank Nat’l Ass’n* (2020) 53 Cal.App.5th 675, 712 [“We assume [defendant] felt no personal animus toward [plaintiff]. But ‘intent,’ in the law of torts, denotes not only those results the actor desires, but also those consequences which he [or she] knows are substantially certain to result from his [or her] conduct.”] (citation omitted).)

Examples of where courts have found a “willful and conscious disregard” for a plaintiff’s rights and safety include the following:

- Manufacturer was consciously aware of potential health risks associated with weed killer but failed to perform further studies, and instead helped author an article downplaying weed killer’s health and safety concerns. (*Hardeman v. Monsanto Company* (9th Cir. 2021) 2021 WL 1940550);
- Rental car company defendant was actually aware that – in the absence of taking any steps to verify a license’s validity – they would inevitably rent vehicles to persons who were not licensed, and that defendant chose to run the risk that the losses caused by such drivers being involved in accidents would be less than the cost of verifying licenses. (*Snyder v. Enter. Rent-A-Car Co. of San Francisco* (N.D. Cal. 2005) 392 F. Supp.2d 1116, 1130 (citing *Taylor*, 24 Cal.3d at 895));
- Manufacturer fully understood that asbestos dust endangered workers, but did not issue warnings to customers for more than a decade, notwithstanding its awareness that they used the products in ways that generated considerable asbestos dust. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1301); and
- Landlord’s eviction was deliberate and intentional, with knowledge that it was likely illegal and that plaintiff would suffer because she had a serious work-related injury and had nowhere to go. (*Spinks v. Equity Residential Briarwood Apts.* (2009) 171 Cal.App.4th 1004, 1055-56.)

Clear and convincing evidence

Assuming you adequately pled facts sufficient to sustain your claim for punitive damages, in opposition to a summary judgment motion, and at trial, you must prove your client’s entitlement to these damages by “clear and convincing evidence.” (Code Civ. Proc. § 3294 subd. (a); *Pac. Gas and Elec. Co.* 24 Cal.App.5th at 1158.) While this is generally a jury question, courts can determine in ruling on a summary

judgment motion whether plaintiff has sufficient, admissible evidence of punitive conduct “since if a plaintiff is to prevail on a claim for punitive damages, it will be necessary that the evidence presented meets the higher evidentiary standard.” (*Spinks* 171 Cal.App.4th at 1053, citation omitted.)

What specifically constitutes “clear and convincing evidence” is not always clear, as there appears to be a conflict in our jury instructions and case law. CACI 201 instructs that this means plaintiff “must persuade you that it is highly probable that the [alleged punitive] fact is true.” Case law, on the other hand, seems to hold that this heightened standard “requires a finding of high probability... ‘so clear as to leave no substantial doubt’; ‘sufficiently strong to command the unhesitating assent of every reasonable mind.’” (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1211 [quoting *In re Angelia P.* (1981) 28 Cal.3d 908, 919].) In addressing this seeming conflict, the court in *Nevarrez v. San Marino Skilled Nursing & Wellness Ctr., LLC* (2013) 221 Cal.App.4th 102 held that it was error to modify CACI 201 with this language, as it was “dangerously similar to that describing the burden of proof in criminal cases.” (*Id.* at 882.)

Nevertheless, be alert that as you are litigating and working up your case, you are going to need ample admissible evidence that demonstrates with high probability the defendant’s conduct was so bad that he needs to be punished for it.

Punitive damages and drunk driving

Our most common cases that raise the specter of punitive damages involve driving under the influence. Plaintiffs’ attorneys are well familiar with *Taylor v. Superior Court* (1979) 24 Cal.3d 890 where the California Supreme Court held that a driver operating a vehicle while under the influence of alcohol may be liable for punitive damages. Frequently cited and often discussed, *Taylor* has been read to hold that a defendant who harms someone while driving under the

influence automatically entitles plaintiff to punitive damages.

In fact the *Taylor* court detailed several aggravating factors beyond simply driving under the influence that made the risk of harm probable instead of merely possible. These factors included the defendant’s prior DUI convictions, including one involving a crash in which a passenger was harmed; that he had just completed probation for one of his prior DUIs when this crash occurred; that he had a pending DUI charge when the subject crash occurred; that he accepted employment where he would take and transport alcohol in his own car; and that he was drinking alcohol when the subject crash occurred. (*Id.* at 893.) The court found these allegations aggravating and outrageous circumstances beyond merely driving while intoxicated and that there was “no valid reason whatever for immunizing the driver himself from the exposure to punitive damages given the demonstrable and almost inevitable risk visited upon the innocent public by his voluntary conduct as alleged in the complaint.” (*Id.* at p. 898.)

Notably though, after summarizing these many aggravating factors, the *Taylor* court held that “we do not deem these aggravating factors essential prerequisites to the assessment of punitive damages in drunk driving cases.” (*Id.* at 896.) “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.” (*Id.* at 897.)

So, while a plaintiff could rightfully believe he could pursue punitive damages for being struck by a drunk driver, two post-*Taylor* cases made clear there needs to be additional bad conduct beyond simply intoxication in order for a plaintiff to sustain a viable punitive damage claim.

Dawes v. Superior Court

Dawes v. Superior Court (1980) 111 Cal.App.3d 82 concerned a drunk driver who hit a 13-year-old child. In reversing a trial court's order striking plaintiff's punitive damage claim, the court emphasized the many additional aggravating factors alleged in the complaint beyond just intoxication. This additional bad conduct included zigzagging in and out of traffic in a Ferrari, in excess of 65 mph in a 35 mph zone, at 1:30 p.m. on a Sunday afternoon, on a street that was filled with pedestrians, and then lying to the police that the passenger was actually driving. (*Id.* at 88.)

In citing these factual allegations, the *Dawes* court drove home the point that, when deciding whether a defendant could be liable for punitive damages, courts are to draw a distinction between "ordinary driving under the influence" and driving under the influence while engaging in other dangerous activity. The distinction between the two being "ordinary" drunken driving only involved a risk of injury that was "foreseeable...but...not necessarily probable," while additional aggravating conduct made the risk probable. (*Id.* at 89.)

While *Dawes* acknowledged the general proposition that "driving a vehicle while intoxicated *may* in appropriate circumstances evidence a conscious disregard of probable injury to others and be sufficient to warrant an award of punitive damages, (111 Cal.App.3d at 88 [emphasis added]), it clearly reflected the many aggravating factors discussed in *Taylor*. Indeed, a review of trial court orders dealing with motions to strike punitive damage claims that cite to *Dawes* often cite to the permissive "*may*" language to hold that driving under the influence, alone, is generally not enough.

In other words, *Dawes* seemed to pay little mind to *Taylor's* pronouncement that additional bad conduct was not an "essential prerequisite" to assessing punitive damages and that additional aggravating factors must be present.

Peterson v. Superior Court

Peterson v. Superior Court (1982) 31 Cal.3d 147 concerned another DUI collision. While the opinion dealt mainly with whether *Taylor's* holding could be applied retroactively, it also concerned whether the trial court properly struck plaintiff's demand for punitive damages. Like *Dawes*, it generally referenced "gravamen of the proposed complaint" in *Taylor* as "[d]efendant became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby." (*Id.* at 163.) But, also like *Dawes*, the *Peterson* court emphasized the additional aggravating facts that it believed were sufficient to sustain a demand for punitive damages. These factual allegations included the defendant drinking alcohol and then driving his vehicle with plaintiff as his passenger "at speeds in excess of 100 mph, and that the plaintiff objected to the high speed and demanded that defendant properly control the vehicle." (*Id.* at 162.) Then 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 mph, losing control of the vehicle and injuring plaintiff." (*Ibid.*) The plaintiff further alleged that defendant knew full well throughout this entire course of conduct that "probable serious injury to other persons would result and in conscious disregard of the safety of plaintiff." (*Ibid.*)

So while *Taylor* seemingly holds that punitive damages are available when a defendant causes harm to a plaintiff as a result of driving under the influence, *Dawes* and *Peterson* hold that you need something more than just "ordinary driving under the influence" in order to survive a demurrer or motion to strike. That something more is specific facts about additional illegal conduct (e.g., speeding, driving erratically) that, when combined with driving under the influence, caused the subject incident and your client's harm.

Specific facts must be pled in order to sustain a demand for punitive damages

Virtually every single meet-and-confer letter (and subsequent motion to strike) will claim that your complaint contains nothing more than legal conclusions bereft of specific facts that would justify punitive damages. Considering that plaintiff is seeking exemplary damages in order to punish defendant, it rightfully should be that a complaint must have something more than just the descriptors that defendant's conduct was "despicable" and performed with a "conscious disregard" for plaintiff's safety as these are a "patently insufficient statement of 'oppression, fraud, or malice' within the meaning of section 3294." (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1042.)

As a result, we need to learn as much as we can about the facts of the cases before we file the complaint. This should not be too onerous considering that if the conduct is truly bad enough to warrant punitive damages, there is usually actual documentation and evidence of that behavior, e.g., a traffic collision report with an intoxication narrative, scene photographs, vehicle photographs, footage from dash cameras or body-worn cameras, statements from parties and eyewitnesses, a criminal docket report, etc. This information needs to be mined and scrutinized because it likely will contain the specific facts that must be pled in your complaint.

You can also in good faith draw reasonable factual inferences from this evidence. For example, the traffic-collision report for your particular incident may not state a specific speed defendant was driving or, conversely, it may have an entirely self-serving (and unreasonably low) speed estimate from the defendant driver. If this happens, turn to the scene photos and damage photos. With enough experience in auto crash cases – including interactions with accident reconstruction experts and their

work – you can credibly allege speed estimates in your complaint based on your own experience and the documented physical evidence you possess at the time of filing.

Other helpful investigative tools include Google Maps and Google Street View, which allow you to see things from all perspectives that could be informative to your allegations, like whether the roadway was curved or sloped, the locations of speed limit signs and traffic control devices, and even what surrounding vehicle and pedestrian traffic could be like during a given part of the day.

While there may be an impulse to file suit before receiving this information, if you believe there is a good-faith basis to allege punitive damages, it is worthwhile to gather and analyze this evidence so you can allege the specific facts supporting your claim, with the goal of avoiding motion practice.

Once you have the specific facts, the next step is to allege them in your complaint with as much detail as you can. This means ditching the often used form complaint, or standard complaint and writing a pleading with the goal of putting everyone who gets it on notice. Compare these examples from drafts of a recent complaint we filed:

Compare: Defendant acted with oppression and malice when he drove his vehicle while intoxicated. As a result of driving while intoxicated, defendant

veered out of his lane and into oncoming traffic where he then crashed directly into plaintiff's vehicle. Such conduct was despicable and demonstrated a willful disregard for plaintiff's rights and safety.

With: Defendant knew before getting behind the wheel of his Ford F-150 that it was illegal to drive while intoxicated. He also knew that if he were to drive his truck while under the influence of alcohol, that it was entirely probable that he would lose control of the truck and cause a collision with another motorist. Despite this actual knowledge, defendant purposely drank beer and whiskey with the specific intention of getting drunk. By the time he got behind the wheel, defendant was well past the legal limit of .08% blood alcohol concentration. Despite knowing he was unfit to drive, defendant started his truck and began driving down State Route 2. He knew the speed limit was 45 mph, however, he decided to drive at speeds in excess of 70 mph. Defendant did this fully aware that there was going to be heavy traffic in the area because it was just after rush hour. As his excessive drunkenness and speeding was not enough for him, defendant also began weaving in and out of his lane, speeding and passing vehicles that were slowing him down. Then, just before the off ramp, defendant lost complete control of his truck and veered directly into opposing oncoming traffic, causing a horrible head-on crash with plaintiff's vehicle, thereby severely injuring plaintiff

in the process. At the scene, when administered a Breathalyzer exam by the CHP, defendant registered a .18%, which was more than double the legal limit.

Obviously, the second paragraph has significantly more facts and details and does not rely only on the conclusory language that defendant's conduct was malicious. With such factual allegations, it would seem unusual that a Court would require plaintiff to plead something more as defendant (and his counsel) now certainly have "adequate notice" of the type of bad conduct plaintiff is seeking to punish.

Ultimately we owe our clients a duty to explore and allege all potential paths of recovery, including punitive damages, if the facts and the law support that recovery. With an understanding of what the law requires when pleading and proving punitive damages, we can avoid early motion practice and focus on putting maximum pressure on defendant and his carrier to bring the case to a proper and just resolution.

Andrew Owen is an attorney with Panish Shea Boyle & Ravipudi LLP. He focuses his practice on litigating and trying catastrophic personal injury and wrongful death cases involving trucks, commercial vehicles, pedestrians, industrial or construction accidents, as well as dangerous conditions of public and private property.

