



Daniel Kramer



Cathryn G. Shoemaker

## Evidence for punitive damages in common types of negligence cases

A look at the type of evidence that may support a punitive damages claim in PI actions such as hit and run, DUI, premises liability, dog bites

Punitive damages in negligence cases are often difficult to establish and met with vigorous defenses. However, with strategic discovery, you can get past a demurrer, motion to strike, and/or motion to adjudicate your punitive damages claim in the following types of cases:

- Hit and Run
- Driving Under the Influence
- Texting and Driving
- Trucking Cases
- Premises Liability
- Products Liability
- Dog Bites

Generally, punitive damages, also known as exemplary damages, are damages intended to deter the defendant and prevent others from engaging in conduct similar to that which led to the lawsuit. Punitive damages are awarded only in cases where the defendant's conduct is found to be malicious. Malicious conduct is defined 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." (Code Civ. Proc., § 3294.)

### Hit and run

For hit-and-run cases, the toughest part is keeping punitive damages in past the pleadings stage. To avoid getting the damages knocked out, it is imperative to allege intentional infliction of emotional distress in addition to your negligence causes of action. Most courts will take a totality-of-the-circumstances approach in analyzing whether the defendant's acts rise to the level of extreme and outrageous conduct. Further, there often must be a serious injury or at least the appearance of a serious injury.

In addition, it will be important to show that the defendant willfully fled the scene while the plaintiff was injured. In order to successfully do this, you need to use written discovery and depositions to establish that the defendant knew he or she hit the plaintiff and fled the scene without rendering aid. Use California Criminal Jury Instruction 2140 as a guide. The instruction applies to defendants who fail to perform a duty following an accident that causes injury or death. The pertinent portion of the jury instruction reads:

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The duty to *stop immediately* means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.

To *provide reasonable assistance* means the driver must determine what assistance, if any, the injured person needs and make a reasonable effort to see that such assistance is provided, either by the driver or someone else. *Reasonable assistance* includes transporting anyone who has been injured for medical treatment, or arranging the transportation for such treatment, if it is apparent that treatment is necessary or if an injured person requests transportation. The driver is not required to provide assistance that is unnecessary or that is already being provided by someone else. However, the requirement that the driver provide assistance is not excused merely because bystanders are on the scene or could provide assistance.

The driver of a vehicle must perform the duties listed regardless of who

was injured and regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable." (California Criminal Jury Instruction 2140.)

You also want to establish that the defendant fleeing the scene put the plaintiff in such a severe emotional state that it increased their damages. This allows you to use a lot of the evidence you gather under the guise of punitive damages in the negligence and damages phases.

Last, most defendants are going to argue that if the tortious conduct alone in causing the accident cannot give rise to the claim for punitive damages, then post-accident conduct in leaving the scene of the accident will not support the claim for punitive damages. However, there is zero authority for this proposition. In fact, punitive damages have been allowed in a case where a defendant driver falsely identified himself and gave false insurance information to the plaintiff (*Latkin v. Watkins Associated Industries* (1993) 6 Cal.4th 664).

### Summary of information to gather

- Did the defendant provide reasonable assistance?
- Did the defendant call the police?
- Did the defendant exchange information at the scene?
- Did the defendant transport the individual from the scene or arrange for transportation?
- Did the defendant see the plaintiff lying on the ground?
- Did the defendant believe the plaintiff was injured?
- All phone records from the defendant to back up his/her story and subpoena the 911 call.

See Kramer & Shoemaker, Next Page

## Driving under the influence

Punitive damages in these types of cases permit an injured party to recover damages to punish the defendant for drinking and driving. In the seminal case of *Taylor v. Superior Court* (1979) 24 Cal.3d 890, the Supreme Court addressed the issue of whether punitive damages are recoverable in a personal injury action brought against an intoxicated driver. Here, the court found that the act of driving a motor vehicle while intoxicated at the time of an automobile accident is sufficient to demonstrate a conscious disregard to establish malice under section 3294 and support a claim for punitive damages. (*Id.* at 892.) “In order to justify an award of punitive damages on this basis, 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.” (*Id.* at 895-96.) Ultimately, the court held that “[O]ne who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle demonstrates, in the words of Dean Prosser, ‘such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.’” (*Id.* at 899.)

Similarly, the Court of Appeal reversed an order striking a claim for punitive damages in a case where the defendant was zigzagging in and out of traffic at a speed in excess of 65 miles per hour in a 35 miles per hour zone, at the entrance to a popular recreation area on a Sunday afternoon, when many pedestrians and bicyclists were in the immediate vicinity. (*Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 88.) The *Dawes* court further found that while the risks of driving while intoxicated, alone, were foreseeable, the additional reckless conduct of the defendant raised that foreseeability to a probability. (*Id.* at 89.)

Most importantly in DUI cases, you want to show that the defendant was sufficiently intoxicated, obviously the higher

the blood alcohol content the more likely a judge will keep in the punitive damages claim. You also want to show that the defendant knew he was going to drive after consuming alcohol. This makes it easier to persuade a judge that the defendant driver had a conscious disregard for the rights or safety of others.

### Summary of information to gather

- Did the defendant consume alcohol knowing he would thereafter operate a vehicle?
- What were the defendant’s plans to get home after consuming alcohol?
- All charges and convictions against the defendant stemming from the accident involving the plaintiff
- All prior DUI charges and convictions
- Defendant’s DMV record
- Police report
- Blood alcohol content report
- Defendant’s experience with alcohol or drugs (which can be shown through social-media postings as well as through depositions of friends and family members)

## Texting and driving

There are currently no published cases in California that allow punitive damages in cases where the defendant driver was texting while driving, however, with nearly every driver now possessing a smart phone, courts throughout the country are beginning to rule that punitive damages can be sought in cases where a plaintiff is injured by a texting driver. Many of the cases demonstrate that courts are acknowledging the growing danger texting and driving has on our society and that drivers who engage in this conduct have a deliberate indifference to the safety of innocent drivers. One key way to persuade a judge that texting and driving qualifies as conscious disregard for the safety of others is by analogizing it to drinking and driving. For example, utilize the factors in *Taylor* to establish that texting and driving is not only illegal, but can rise to the level of conscious disregard for the safety of others, as with drinking and driving.

As of March 2014, a man who suffered moderate injuries when a driver struck several cars on the 134 Freeway

and forced him off the road, asked a California Appeals Court for permission to seek punitive damages against the defendant driver, who he claims was texting at the time of the incident. The trial court ruled that punitive damages were barred in the negligence suit against the driver. Attorneys for the plaintiff in this suit argue that if the law by itself is not preventing tragedies from occurring, perhaps the imposition of punitive damages will prevent drivers from texting while driving. If the appellate court overrules the lower court decision, it will be the first such ruling in the country.

### Summary of information to gather

- Immediately send a preservation of evidence letter for all electronic devices
- Subpoena the driver’s cell phone records before and after the collision
- Subpoena the cell phone records of the individual who received texts around the time of the collision
- If the case warrants it, request to have your expert inspect the electronic or mobile device
- For employer liability, gather all records where employers require their employees to always have access to electronic devices

## Trucking cases

In cases throughout the country, punitive damages have been awarded in trucking matters where drivers violate federal limitations on maximum driving time and drive while fatigued. (See *Torres v. North American Van Lines, Inc.* (1983) 135 Ariz. 35; *Elbar, Inc. v. Claussen* (1989) 774 S.W.2d 45.) Under federal regulations controlling the hours of service of drivers, which are designed to prevent fatigued drivers from endangering the general public who use the same highways, drivers are required to fill out log books as to the total number of hours the driver is on duty each day. (49 C.F.R. § 395.1, et seq.) In *Torres*, the court found the evidence, including that the defendant driver failed to log his time on several occasions and his employer’s knowledge and disregard of this requirement, sufficient to support an award of punitive

See *Kramer & Shoemaker, Next Page*

damages. (*Torres v. North American Van Lines, Inc.*, *supra*, at p. 39.)

In *Elbar*, the jury was presented with evidence that: (1) the defendant company only provided its drivers with one week of instruction, whereas the minimum amount of time the federal government recommends for driver training is eight weeks; (2) drivers did not receive adequate rest between driving runs; (3) the driver log was not in compliance with D.O.T. regulations, (4) the defendant company's general manager, who was responsible for safety, was unaware of studies or statistics regarding truck driver fatigue; and (5) the defendant company required drivers to operate their trucks for long, continuous periods of time. In weighing this evidence, the court found the jury's award of punitive damages to be proper. (*Elbar, Inc.*, *supra*, at p. 49.)

The court found there was substantial evidence to support an award of punitive damages in a wrongful death case where the defendant truck driver was speeding at the time of the accident, received five citations for speeding or defective equipment within five years prior to the accident, a witness at the scene testified that the driver told bystanders that he advised the company and his boss to get the truck fixed, and the truck was not properly inspected. (See *D'Arbonne Constr. Co. v. Foster* (2003) 354 Ark. 304.)

#### **Summary of evidence to gather**

- The driver's log books for the relevant time period
- History of training provided to the driver
- The company's policies and procedures for regulating the number of hours worked by drivers
- Any citations the driver received for personal and commercial vehicles within the relevant time period
- All inspection and maintenance reports for the subject truck.

#### **Premises liability**

In any case where a party pleads causes of action based solely in negligence, a defendant is likely to file a motion to strike the punitive damages allegations. While this places a burden on

most plaintiffs, this should not deter an attorney from seeking punitive damages where appropriate.

In premises liability cases, to support an award of punitive damages on the basis of conscious disregard of the safety of others, a 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." (*Penner v. Falk* (1984) 153 Cal.App.3d 858, 867 (citing *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 895-96).)

In *Penner*, the plaintiff appealed from an order of dismissal after demurrer to his third amended complaint was sustained without leave to amend. Upon review of whether the plaintiff adequately pled a basis for the award of punitive damages, the Court of Appeal held that the pleadings sufficiently alleged facts setting forth existing physical conditions on the premises which threatened harm to the tenants, that the defendants knew of those conditions, that defendants had the power to make changes, and yet defendants failed to take curative and corrective measures. (*Ibid.*)

The court went on to argue that the alleged specific facts relating to plaintiff's assault by two non-tenant intruders, if proven, *would* support an award of punitive damages. (*Ibid.*) Specifically, plaintiff alleged that within the two years prior to his assault: (1) tenants of the building requested that the defendants inspect, repair, and/or replace the doors, gates, locks, interior hallway, security measures and entrances to the building, which defendants refused to do; (2) the building and surrounding area provided convenient hiding places for individuals to hide and gain access to the building; (3) the interior lights provided inadequate illumination and were periodically out or inoperative and were not replaced for unreasonable periods of time; (4) various crimes had been committed in the neighborhood and on the premises, including the garages, laundry room, hallways, walkways, and gateways, including trespass, robbery, burglary, physical assault, battery, rape, murder, prostitution, vandalism and other crimes against

persons and property; and (5) tenants had complained that unauthorized persons were often in the building, had notified defendants and requested that security be installed, repaired or replaced, and had warned defendants that unless repairs or replacements to security measures were made, someone would be the victim of criminal attack on the premises. (*Id.* at 863-64.)

#### **Summary of evidence to gather**

- Prior complaints relating to the premises and the defendant's response
- The measures in place to prevent harm or danger to tenants
- Prior issues on the premises or the surrounding areas
- Any documents that would reasonably put the defendant on notice of danger to tenants, including public "wanted" notices

#### **Products liability**

A plaintiff may recover punitive damages under Civil Code section 3294 in a strict products liability case based on defect against a defendant who has acted despicably with a conscious disregard for the safety of others. (See *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 402.)

In *Hasson*, the Court upheld the award of punitive damages, where a 30-year high-level employee of Ford Motor Co. testified that although Ford knew of a fluid boil problem with one of its vehicles based on dealer and customer complaints, it deliberately failed to warn dealers or owners of available remedial steps, because it was protecting the reputation of the vehicle among customers. (*Id.* at 402-403.) The high-level employee further testified that Ford deliberately failed to run adequate tests to accurately define the nature of the brake loss problem and to install a dual master cylinder. (*Id.* at 403.)

Under *Grimshaw v. Ford Motor Co.*, "malice," an element used to establish punitive damages, may be found when the evidence establishes "conduct evincing callous and conscious disregard for public safety by those who manufacture and market mass produced articles..."

See *Kramer & Shoemaker, Next Page*

(*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 810.) Here, through the results of crash tests, Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20- to 30-mile-per-hour collision. (*Id.* at 813.) There was also evidence that Ford could have corrected the hazardous design defects at minimal costs but decided against it. (*Ibid.*) Further, plaintiff provided substantial evidence that management was fully aware of the crash tests showing the vulnerability of the fuel tank. (*Id.* at 814.)

It is important to point out that an additional benefit of alleging punitive damages is that evidence that is traditionally inadmissible may be allowed when punitive damages are alleged. For example, evidence which deals with events occurring after a plaintiff last used a product is generally inadmissible. (*Hilliard v. A.H. Robins Company* (1983) 148 Cal.App.3d 374, 401.) However, on the issue of malice and punitive damages, a plaintiff may present any evidence that tends to prove the essential factors of the conscious disregard concept of malice. This includes evidence of subsequent activities and conduct of the defendant. (*Blank v. Coffin* (1942) 20 Cal.2d 457, 463.)

#### **Summary of evidence to gather**

- Was the product ever examined? If so, what were the nature and results of each examination? Identity of the person(s) who performed each examination and each document that refers to the examination
- Was any testing, study, or analysis ever conducted concerning possible safety or health hazards? If so, what were the results of each test, study, or analysis and when was it performed? Identify each person who performed it and each document that refers to it
- Identify the time, place, and circumstances under which the defendant first became aware that exposure to or use of the product was harmful or hazardous
- Identify any and all prior complaints relating to the product, from any source

#### **Dog-bite cases**

California's dog-bite statute provides that "The owner of any dog is liable for

the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness." (Civ. Code, § 3342.)

While this statute makes the owner of a dog strictly liable for any damages, a plaintiff still has the option to seek punitive damages (despite the lack of published appellate decisions on the issue). In such cases, it would be helpful for the plaintiff to obtain evidence regarding the owner's knowledge about previous aggressive episodes of the dog, whether the dog attacked another person prior to the subject incident, animal control or police reports from prior incidents, veterinary records, and the owner's knowledge that certain breeds are inherently dangerous and more aggressive than other breeds.

#### **Financial condition of defendant**

It is critical to a case where a party is seeking punitive damages, that the plaintiff presents meaningful evidence of the defendant's financial condition. "Because the quintessence of punitive damages is to deter future misconduct by the defendant, the key question before the reviewing court is whether the amount of damages 'exceeds the level necessary to properly punish and deter.'" (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110 (quoting *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928).) As such, a court cannot determine whether an award of punitive damages is excessive unless the plaintiff presents evidence of the defendant's financial condition. (*Adams v. Murakami*, *supra*, at p. 110-11.) So, in summary, if you fail to present evidence of financial condition, your client will not receive punitive damages, regardless of the level of evil of the defendant.

The *Adams* court makes it clear that the burden is on the plaintiff to present evidence of net worth, not the defendant's burden to rebut it. (*Id.* at 120-21.) To discover pretrial evidence of financial condition, under Civil Code section 3295, subdivision (c), plaintiffs are

required to file a motion with the court before the defendant is required to respond to such discovery. To be successful on the motion, the plaintiff must then present evidence that there is a substantial possibility that the plaintiff will prevail on the claim under Civil Code section 3294. The filing of this motion is not a challenging decision to make when there is overwhelming evidence that a defendant is guilty of malice, oppression, or fraud. If, however, the case is not as clear, an attorney should strongly consider the implications of losing the motion, including a summary adjudication motion on punitive damages or a motion in limine at trial requesting an evidentiary hearing regarding reference to malice, oppression, or fraud, given the fact that plaintiff would not even be able to prove financial condition. Moreover, losing this type of motion would tend to give momentum to the defendants in your case.

In the alternative, if there is no evidence of the defendant's financial condition and no pre-trial motion is filed, Civil Code section 3295, subdivision (c) allows a plaintiff to subpoena documents of financial condition for delivery at trial. However, the documents must be described with particularity or they will likely not be produced.

An additional key is to make sure that evidence is presented of gross revenue and assets *as well as* the defendant's expenses and liabilities, so that the court is provided a complete picture of the defendant's ability to pay punitive damages *at the time of trial*. Without this information, you are destined to have an award of punitive damages vacated.

*Dan Kramer is the managing partner of Kramer Holcomb Sheik LLP in Century City. He is a trial lawyer who has taken numerous cases to verdict as lead counsel. He was named a Top Personal Injury Attorney by Pasadena Magazine in 2013 and 2014. Mr. Kramer, originally from Atlanta, GA, is a die-hard fan of the Braves and Colorado Buffaloes, his alma mater.*

*Cathryn G. Shoemaker practices personal injury law. She is a graduate of Trinity College and New England School of Law.*