



Distracted drivers: Seeking punitive damages

COMBATTING THE COMMON DEFENSES WHEN YOU SEEK PUNITIVE DAMAGES AGAINST THE DISTRACTED DRIVER

On July 25, 2009, 19-year-old Eric Okerblom was killed when his bike was struck by a truck traveling at 60 miles per hour near his home in Santa Maria, California. He was a molecular biology student at UC Berkley. He was riding on a straight road on a clear day. Cell phone records indicate that the driver was texting just before the collision.

On December 1, 2010, 2-year-old Calli Ann Murray and her mother Ling were walking home from a park just blocks from their home in Rohnert Park, California. As they crossed the street in the crosswalk, a young driver texting on her cell phone struck Calli and Ling with her car. Calli was killed instantly, and Ling was critically injured.

On December 8, 2013, attorney Milton Olin was riding in a dedicated bicycle lane when he was struck from behind and killed by a sheriff's deputy. Records show that shortly before the deputy's vehicle entered the dedicated bicycle lane the deputy had been texting.

DUI down, distracted driving up

The National Highway Traffic and Safety Administration (NHTSA) offers some sobering statistics. According to NHTSA as of December, 2014, 169.3 billion text messages were sent in the U.S. every month. In 2014, 3,179 people were killed, and 431,000 were injured in motor vehicle crashes involving distracted drivers. (The NHTSA statistics in this article as well as the stories of Eric Okerblom, Calli Ann Murray, and Ling Murray come from the NHTSA-operated website distracteddriving.gov.)

In 2014, the NHTSA reported that 9,967 people were killed in alcohol-impaired driving crashes. The amount of people killed in alcohol-related crashes is at its lowest point in decades. During that same period deaths caused by distracted driving have been dramatically increasing. There are a number of explanations for the increase in distracted

driving deaths vs. the decrease in alcohol-related driving deaths. The explosion of mobile devices and the way we communicate on those devices is one part of the equation. Another part of the equation is that legal, social, and financial consequences for driving while intoxicated have become so high that it is changing societal behavior. The consequences and stigma of driving while intoxicated are so severe that more drivers are unwilling to take the risk of driving while intoxicated.

In addition to facing a civil lawsuit, in California a drunk driver may also face liability for punitive damages. (See *Taylor v. Superior Court* (1979) 24 Cal.3d 890 ("Taylor").) While we often focus on the personal punishment element of punitive damages, punitive damages are not just about punishment. California Civ. Code § 3294(a) explains that a plaintiff may recover punitive damages 'for the sake of example and by way of punishing the defendant.' An important element of punitive damages is not only to deter future conduct by the defendant but also to make an example of the defendant to the community at large so that it also causes deterrence and/or change on a societal level.

Studies have shown that a driver who is distracted by texting is just as dangerous as a driver who is under the influence of alcohol. The death and carnage caused is the same whether the driver is distracted or intoxicated. If legal, social and financial consequences can help deter drivers from driving under the influence, those same tools can and should be used to deter drivers from driving while distracted. If punitive damages can make an example out of drunk drivers, punitive damages can and should also be available to help make an example of distracted drivers.

This article will examine how punitive damages can be applied to cases where distracted drivers strike pedestrians and cyclists. It will also examine

distracted driver defenses to punitive damages and how to combat such defenses.

Punitive damages are not limited to intentional torts

In a distracted-driving case, you should anticipate that your defendant will try to attack a claim for punitive damages as a matter of law. The argument will essentially be that distracted driving is not an intentional tort. The defendant will claim that at best, distracted driving is negligence or gross negligence. The defendant will claim that a plaintiff cannot seek damages for negligence or gross negligence. The defendant will attempt to convince the Court that absent an intentional tort, distracted driving does not qualify for punitive damages. Do not let the defendant mislead the court.

Punitive damages may be awarded where a party presents evidence that a defendant acted with 'oppression, fraud, or malice.' (Code Civ. Proc., § 3294, subd. (a).) Section 3294 defines 'oppression' as 'despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (Code Civ. Proc., § 3294, subd. (c)(2).)

Plaintiffs do not have to prove that a distracted driver is an agent of pure evil or a mustache-twirling ax murderer. In interpreting the intent of section 3294 the California Supreme Court held that malice can be shown where a defendant has 'conscious[ly] disregard[ed] the safety of others,' and that punitive damages may be awarded where a plaintiff establishes that 'the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.' (*Taylor v. Sup. Ct.*, 24 Cal.3d at pp. 895-96, citing *G.D. Searle & Co. v. Sup. Ct.* (1975) 49 Cal.App.3d 22, 32) (emphasis added); see also *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 329.)

Van Gelder, Next Page

Under the statute, malice does not require actual intent to harm. Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1228.)

In *Taylor*, the defendant injured the plaintiff in an automobile collision. Plaintiff brought an action for negligence and in connection with the negligence action sought punitive damages by alleging that defendant was driving while intoxicated. The trial court struck the claim for punitive damages based on the defense argument that punitive damages could not be pled in a negligence case and that a drunk driver lacked the ability to form a malicious intent to kill.

The California Supreme Court overturned the motion to strike and stated that a plaintiff asserting a claim for negligence could also seek punitive damages. 'We suggest conscious disregard of safety as an appropriate description of the animus malus which may justify an exemplary damage award when nondeliberate injury is alleged.' (*Id.*, 24 Cal.3d at p. 895.)

The Supreme Court went on to hold, 'One 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 wilful or wanton.' (*Taylor*, at p. 899.)

A distracted driving defendant may attempt to argue that the law of punitive damages has undergone significant changes since 1979. While the law on punitive damages has changed, the core holding of *Taylor* remains valid. A defendant can be held liable for punitive damages in a non-intentional tort case with proof of conscious disregard.

For example, in *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1300-1301, the court upheld an award of punitive damages against a manufacturer that failed to warn about the dangers of asbestos in its products. In analyzing the evidence that supported punitive damages the court wrote:

To begin, the evidence showed that during the 1970's, JCI knew that asbestos dust was hazardous, and it took action to protect its own employees from the hazards. George Springs, JCI's representative, testified that in 1970, JCI learned that handling raw asbestos was hazardous to certain workers. In 1972, OSHA promulgated regulations requiring manufacturers of asbestos-based products to monitor the concentrations of asbestos fibers in the air in their factories. In compliance with the regulations, JCI began monitoring the air in its factories for asbestos particles, and used engineering controls to suppress dust levels. ...

The evidence also supports the inference that JCI knew that its products were likely to pose a danger to users, whom it did not warn. Under the OSHA regulations, manufacturers were required to place warning labels on their products unless the asbestos fibers had been modified 'by a bonding agent ... so that during any reasonably foreseeable use, ... no airborne concentrations of asbestos fibers in excess of [specified] exposure limits [would] be released.' According to Springs, JCI knew that users replaced gaskets using methods that created asbestos dust or fragmented old gaskets, yet it never tested its products to determine whether those methods generated concentrations of asbestos fibers exceeding the regulatory limits. ...

We conclude that the evidence was sufficient to show malice, that is, despicable conduct coupled with a conscious disregard for the safety of others. In view of JCI's compliance with the OSHA regulations regarding its own workplace, JCI fully understood

that asbestos dust endangered workers, but it did not issue warnings to customers until 1983, notwithstanding its awareness that they used the products in ways that generated considerable asbestos dust. Indeed, although JCI informed its employees that the asbestos used in making 2150 sheet gaskets caused cancer, JCI provided that information to customers only when they asked for the 2150 safety data sheet. The evidence thus established that JCI carried on despicable conduct with an awareness of the 'probable dangerous consequences,' and 'willfully fail[ed] to avoid such consequences.' (*Angie M. v. Superior Court, supra*, 37 Cal.App.4th at p. 1228.) (*Ibid.*)

Conscious disregard of public safety

The plaintiff's lawyer must explain how distracted driving constitutes a despicable conscious disregard of public safety. The distracted driver may attempt to argue that texting while driving does not constitute despicable conduct or conduct that is in conscious disregard of public safety. In support of this argument the defendant will try to claim that texting while driving causes 'momentary distraction.' The driver may argue that texting while driving is no different than briefly taking your eyes off the road to change the radio station, look at a billboard, or look for an address on a building. The defendant may also attempt to argue that texting while driving only results in a citation while drunk driving is treated as a felony under the law.

There are a number of factual and legal arguments to help combat these claims by the driver. The accident reconstruction can also potentially provide you with some key facts to distinguish the case from a brief but ill-timed glance at a radio dial.

According to NHTSA, a driver's eyes are off the road for an average of five seconds while texting. According to NHTSA, at 55 miles per hour, a texting driver is basically covering the length of a football field blindfolded.

Van Gelder, Next Page

Inattention blindness

The distraction caused by a text is likely much worse than five seconds. Texting while driving does not just take a person's eyes off the road, it also takes their attention off the road as well. This has been referred to as 'inattention blindness.' The person has to decide to look at their phone, read a text, decide to respond to the text, and formulate a response to the text – all before reaching for the phone to start texting. Even if the driver's eyes are on the road, the driver is diverting all or a substantial amount of attention to the process. Furthermore, even after the driver has completed the text message, there will be a period of time when the driver must return attention back to the road. Essentially the driver is suffering from distraction related 'hangover' while re-orienting attention back to the road. Thus the driver distraction is longer than just sending the text itself. It begins prior to sending the message, continues through the sending of the message, and continues after the message is sent.

If a person is driving 55 miles per hour on a freeway and intentionally decides to wear a blindfold for 20 seconds, it is not hard to argue that during those 20 seconds the person is acting in conscious disregard of public safety. It is not hard to argue that the person is acting despicably and knows there is a substantial likelihood of causing injury or death to the public. It would be hard to argue that such an action does not warrant punitive damages.

A public menace

The same principle holds for distracted drivers who are texting. If drivers become so consumed by personal text messaging that they intentionally take their eyes/attention off the road for a prolonged period of time in an area popular with cyclists, they are abusing their cell phones and becoming a public menace. The issue is the distraction that the driver intentionally creates the prolonged lack of attention on the road. If the driver is staring at a DVD player for 20 seconds and not on the road, the result is

the same. If the driver turns his back from the road for 20 seconds, the result is the same. The driver is consciously gambling with the lives of those around him in substantial disregard of public safety. Taking one's eyes off the road for 20 seconds is not trivial or momentary.

When a driver engages in conduct that can be considered, 'characterized as a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created,' malice sufficient to support a murder charge may be implied. Under certain circumstances, a driver can be charged for murder even if the driver is NOT intoxicated. The conduct on the date of the incident and prior knowledge are enough to demonstrate criminal malice. See for example, *People v. Ortiz* (2003) 109 Cal.App.4th 110, explaining that murder is committed 'when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.' (*Ibid.*)

In *People v. Ortiz* the defendant driver (who was not intoxicated) was driving a Ford pickup truck and speeding. He attempted to pass a Toyota 4 Runner in front of him by crossing a double yellow line. He made the move about 350 feet from an approaching Ford Taurus. When he crossed, the defendant had a full view of oncoming traffic when he attempted to pass the Toyota, and was traveling at approximately 65 miles an hour. Given the road terrain and highway visibility, a prosecution expert testified, defendant's driving was 'extremely dangerous.' The Ford Truck collided head on with the Ford Taurus resulting in multiple fatalities. Although the defendant was not intoxicated at the time, he had previous convictions for drunk driving and reckless driving.

At Ortiz's murder trial, the prosecution successfully introduced evidence of the prior drunk driving and reckless driving convictions. The Court reasoned that Ortiz's conduct in making such a dangerous pass was sufficient to support a murder charge. The Court also reasoned that Ortiz's prior convictions for

drunken/reckless driving were sufficient to put him on notice of the dangers of his conduct on the date of the incident.

People v. Contreras (1994) 26 Cal.App.4th 944, involved a 'bandit' tow-truck driver who rear-ended a vehicle and killed a child. Before the collision, he was racing another tow truck down the street (between 47 to 55 miles per hour) to an accident scene driving with compromised brakes. He also had a prior history of accidents and reckless driving citations. The court affirmed his conviction for murder.

Knowingly engaging in dangerous behavior

These criminal cases are cited for an important point. Knowingly engaging in dangerous driving behavior (even while sober) has been deemed reprehensible enough under California law to support criminal convictions. An improper, ill-timed lane change can result in a criminal conviction. Speeding on a residential street to race to a towing job and suddenly coming across a vehicle at a red light is sufficient to support a criminal charge.

This is where the accident reconstruction can be an important tool. What were the visibility conditions on the date of the incident? Was there a dedicated lane for cyclists? Was there a marked crosswalk with pedestrians and traffic signals warning of the approaching crosswalk? At what point should the cyclist have become visible to the driver? Was there evidence of texting during this window of visibility?

A current example

Consider the following example from a wrongful-death case currently being litigated in Los Angeles County (a case that successfully defeated a motion to strike claims for punitive damages). The plaintiff is able to allege that at the time of the incident visibility conditions on the road were excellent. The plaintiff is also able to allege that the defendant knew he was riding on a one-lane highway next to a clearly marked dedicated bicycle lane. The plaintiff also has

Van Gelder, Next Page

admissions from the driver that he knew texting while driving was dangerous and that it was the equivalent of drunk driving. The plaintiff, through accident reconstruction, can also allege that immediately prior to the accident the driver's vehicle drifted into the dedicated bicycle lane. The accident reconstruction also allows plaintiff to allege that if the driver was paying attention to the road, the cyclist was visible to the driver for at least 20 seconds.

The driver claims he never saw the cyclist prior to hitting him. Based on the accident reconstruction plaintiff can allege that the only way the driver does not see the cyclist is if the driver had his attention off the road for a minimum of 20 seconds. According to cell phone records, the driver sent a text message during that 20-second window where he should have seen the cyclist.

With the aid of cell phone records and an accident reconstruction, the driver's use of a cell phone is no longer the same as a brief ill-timed glance at a billboard. The driver is intentionally choosing to drive blind for an extended period of time in an area he knows features a dedicated bicycle lane. The longer the driver's attention is off the road, the

more outrageous and reprehensible his conduct becomes. The driver doesn't need to send the text message while driving. He can pull over to the side of the road or wait until he reaches his destination to send the text message. He is intentionally choosing to text either for convenience or instant gratification. He is intentionally ignoring his duties as the driver of a multi-ton vehicle in an area he knows is frequented by cyclists. He has decided to gamble with public safety and has taken his eyes/attention off the road for an extended period of time just to do something that makes him feel good. If he had just focused his attention on the road for a few seconds during that 20-second window, he would have seen the cyclist and the cyclist would be alive today. As one can see, under this presentation the conduct is certainly in conscious disregard of public safety and warrants punishment via punitive damages.

Conclusion

This article has made several analogies between texting while driving and drunk driving. There is an argument to be made that in some respects texting while driving may be more reprehensible than driving while intoxicated. From a

moral perspective the drunk driver can try to claim that at some point his judgment became impaired as a result of his intoxication. A texting driver has no such excuse. The texting driver's judgment is completely sober and unimpaired when he intentionally decides to get lost in his phone and drive blind.

Punitive damages are designed not only to punish but to make an example of defendants to help change society for the better. Punitive damages can help hammer home the message that driving while distracted is to be treated the same as driving while intoxicated. The more drivers that get this message, the more likely cyclists, pedestrians, and society as a whole will benefit.

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