

8-15-2013

Filling the Gaps: The Value of the Common Law Approach to Gross Negligence and Punitive Damages

Justin Ward

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**FILLING THE GAPS: THE VALUE OF THE COMMON LAW
APPROACH TO GROSS NEGLIGENCE AND PUNITIVE
DAMAGES**

Justin Ward*

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I. INTRODUCTION

Under the American legal regime, criminal sanctions may only be imposed where expressly allowed by law. However, there are gaps in the law. Circumstances often arise which are not covered by criminal statute, but merit some level of punishment. Consider this scenario: a seventy-seven year old patient suffering from advanced Alzheimer's disease is placed in a nursing home after being hospitalized with pneumonia.¹ "The patient is bedridden, incontinent, and his limbs [are] contracted."² Upon his admission, the nursing home staff observes a very large, dark red area around his buttocks that is identified as a Stage I or II bedsore.³ The staff fails to take the appropriate action to treat the sore and, as a result, the condition worsens to a Stage III bedsore, which broke open after eleven days.⁴ The patient is finally removed from the care facility and hospitalized. By the time a doctor examines the patient, the bedsore has deteriorated to Stage IV, which means that the man's bones are exposed.⁵ The patient files suit, alleging that the caregivers were grossly negligent in their failure to properly treat the bedsore.⁶ The caregivers' grossly negligent conduct is unlikely to result in criminal sanction. It falls within a gap in the legal regime; a gray area in which punishment

1. See *Convalescent Services, Inc. v. Schultz*, 921 S.W.2d 731, 733-34 (Tex. App. 14th. Dist. 1996) (This factual hypothetical was taken from a case heard by a Texas court, in which the court held the defendants grossly negligent).

2. *Id.*

3. *Id.*

4. *Id.* (when a bedsore has progressed to this point, the skin breaks open and the sore becomes an open wound).

5. *Id.*

6. *Id.*

and deterrence is merited, but not provided for by law. Allowing the recovery of punitive damages for grossly negligent behavior allows for courts to fill these gaps in the law.

The concept of gross negligence is a highly malleable, ill-defined legal concept that falls somewhere on a scale between negligent and intentional conduct.⁷ It is generally defined as conduct that can be considered more blameworthy than simple negligence, but less blameworthy than intent.⁸ While it's generally accepted that gross negligence, willful, wanton and reckless conduct is an aggravated form of negligence, courts and scholars have had difficulty giving any firm definition to the concept.⁹ Prosser and Keeton have discussed gross negligence, and the difficulties associated therewith, at length. According to them, the terms "willful, wanton and reckless" have been applied to that degree of fault which lies "between intent to do harm . . . and the mere reasonable risk of harm involved in ordinary negligence":¹⁰

They apply to conduct, which is still merely negligent rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended The usual meaning assigned to [these terms] . . . is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.¹¹

7. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *LOUISIANA TORT LAW* § 1.06 (2d ed., LexisNexis 2009).

8. *Id.*

9. PROSSER & KEETON, *ON THE LAW OF TORTS* 209–11 (5th ed., W. Page Keeton et al. eds., West 1984) (Some scholars have tried to place gross negligence, willful, wanton, and reckless conduct at separate points on the scale of negligence and create a scheme in which each term describes a different form of conduct with varying degrees of liability. However, because this is such an unworkable scheme, most courts and scholars consider these phrases synonymous; all describing the same general type of conduct that can be considered more blameworthy than simple negligence, but less blameworthy than intent).

10. *Id.* at 212.

11. *Id.* at 212-13.

Louisiana courts have joined the collective cry and lamented the lack of clarity surrounding gross negligence.¹² In *Rosenblath's, Inc. v. Bakers Industries, Inc.*, the Louisiana Second Circuit Court of Appeals sought to distill a workable definition of gross negligence.¹³ The court discussed a number of Louisiana statutes that provide varying definitions of gross negligence.¹⁴ From its statutory consideration the court concluded that the legislature intended to define gross negligence as a reckless disregard, or careless indifference, which may involve a gross or substantial deviation from an expected standard of care.¹⁵ The court then moved on to judicial interpretations that yielded an even more muddled definition than that distilled from statute.¹⁶ From previous interpretations, the court found that gross negligence falls generally between negligence and intent.¹⁷ The court went on to conclude that Louisiana, through statutes and jurisprudence, generally defines gross negligence as conduct that falls below what is expected of a reasonably careful person under like circumstances, or less diligence than even a careless man is accustomed to exercise.¹⁸

Both the Louisiana bijural system and the majority of common law jurisdictions have arrived at a working theory of gross negligence as an extreme departure from the ordinary standard of care, which even a careless man would exercise, with complete disregard for the consequences of those actions.¹⁹ Although their definitions are similar, Louisiana's application of the gross negligence standard is remarkably different from that applied in

12. *Rosenblath's, Inc. v. Baker Industries, Inc.*, 634 So. 2d 969, 972 (La. App. 2d Cir. 1994).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 973 (The court went further to say that gross negligence is a reckless disregard or careless indifference and may involve a gross or substantial deviation from an expected or defined standard of care).

19. *See id.* at 972-3; KEETON, *supra* note 9, at 211-12.

her sister states. The common law employs gross negligence in a more aggressive fashion, allowing its use as an offensive weapon to create greater liability and allow recovery of punitive damages.²⁰ In Louisiana, gross negligence is primarily used in the context of the defense of immunity, when legislation promotes public policy by limiting liability for certain actors.

This article focuses on the traditional areas of development of gross negligence in tort law (immunities, contributory negligence, and punitive damages)²¹ and compares the practical application of the concept in Louisiana with its application in other common law jurisdictions. Although in many respects gross negligence operates in the same fashion regardless of the jurisdiction, there is one major point of distinction: Louisiana has chosen to limit the offensive utility of gross negligence by severely curtailing the availability of punitive damages. In so doing, Louisiana has chosen to focus on the use of gross negligence in the context of immunities, in order to raise the threshold of liability for certain actors.

Section II of this essay considers the historical development of gross negligence and its arrival into American and, more specifically, Louisiana law. Sections III and IV consider the application of gross negligence, in both common law jurisdictions and in Louisiana. Finally, after an examination of the distinctions in application in Louisiana and other common law jurisdictions, this essay argues that Louisiana should incorporate the common law application of gross negligence and punitive damages into its legal system to fill the gap between criminal and civil law.

20. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 491-93 (2008). Nebraska does not apply punitive damages under any circumstances. Louisiana, Massachusetts, Washington, and New Hampshire only allow recovery of punitive damage under certain limited circumstances prescribed by statute.

21. This essay focuses on the use of gross negligence in its traditional areas of tort development: immunities, punitive damages, and contributory negligence. Gross negligence is also applied to other areas of the law including contractual indemnity and workers compensation; however, these applications will not be addressed here.

II. LOOKING BACK: THE HISTORICAL DEVELOPMENT OF GROSS NEGLIGENCE

The concept of varying degrees of negligence has its origin in Roman law.²² Under the Roman scheme, there were three levels of negligence: *culpa lata*, gross negligence; *culpa levis*, ordinary negligence; and *culpa levissima*, slight negligence.²³ Although gross negligence in the common law and in Louisiana both trace their roots back to this original Roman concept, the theory made its way into each system through very different routes.²⁴

A. Bringing Gross Negligence into American Jurisprudence

Gross negligence made its way into American jurisprudence by way of the English writ system²⁵ from which the modern American common law developed.²⁶ Under the writ system, tort law developed on a case-by-case basis, as the need arose. Gross negligence entered the English common law in 1704 in *Coggs v. Bernard*.²⁷ Chief Justice Hold of the Kings Bench saw the need to establish varying degrees of fault in dealing with bailment cases.²⁸ To establish this system, he looked to the Roman tradition and adopted its concepts of gross negligence, ordinary negligence, and slight negligence.²⁹

American jurisprudence adopted the *Coggs* approach in 1822 with *Tracy v. Wood*.³⁰ Justice Story adopted gross negligence in

22. Patrick H. Martin, *The BP Spill and the Meaning of "Gross Negligence or Willful Misconduct"*, 71 LA. L. REV. 957, 977–78 (2011).

23. *Id.*

24. See WILLIAM E. CRAWFORD, 12 LOUISIANA CIVIL LAW TREATISE: TORT LAW 2–3 (2d ed., West 2009); Martin, *supra* note 22, at 977–78.

25. On the writ system, see EDGAR BODENHEIMER ET AL., AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM: READINGS AND CASES 26 (4th ed., West 2004).

26. *Id.*

27. (1703) 92 Eng. Rep. 107 (K.B); 2 Ld. Raym. 909.

28. *Id.*

29. *Id.*

30. Martin, *supra* note 22, at 1007.

Tracy as a means of limiting the liability for gratuitous bailees.³¹ Since *Tracy*, the American judiciary has developed gross negligence in relation to three different areas of tort law: punitive damages, contributory negligence, and immunity statutes.³² Under the modern common law approach, gross negligence can be used to justify an award of punitive damages, to overcome contributory negligence as a bar to a plaintiff's recovery, and to limit the liability of certain actors with legislative immunity statutes.

B. The Louisiana Perspective

Louisiana's civilian tort theory traces its origins directly to Roman law through the laws of France and the laws of Spain, applicable during the colonial period. The civil law notion of obligation is derived from Roman law, which defined an obligation as a *vinculum juris*, or bond of law, which obliges a person to do or to refrain from doing something.³³ The Roman law of delict was based on a simple overarching principle: "A man must see that he does not willfully invade another's right, or in breach of a duty, willfully or carelessly cause him pecuniary loss. If he does either of these things, he is answerable in damages."³⁴ It was under this Roman theory of tort law that separate levels of negligence first developed.³⁵

Roman law found its way into Louisiana through French and Spanish laws.³⁶ Antoine Crozat was granted a charter to develop Louisiana in the name of France in 1712.³⁷ The charter provided that the *Coutume de Paris*, along with all Royal Ordinances and

31. *Tracy v. Wood*, 24 F. Cas. 117 (C.C.D.R.I. 1822).

32. See Martin, *supra* note 22, at 992-1014.

33. See CRAWFORD, *supra* note 24, at 2.

34. *Id.* at 5 (this principle found its way into many modern civil codes, including the Louisiana Civil Code).

35. Martin, *supra* note 21, at 977-978. See also, discussion *supra* Part I.A (In Roman law, there were three levels of negligence: *culpa lata* (gross negligence), *culpa levis* (ordinary negligence), and *culpa levissima* (slight negligence)).

36. See CRAWFORD, *supra* note 24, at 10-11.

37. *Id.* at 8.

Edicts, would govern the territory.³⁸ This form of French law remained in effect until 1769, when Louisiana came under Spanish rule.³⁹ The transition from French to Spanish rule meant that, at least theoretically, Roman law, as received in Spain and codified in *Las Siete Partidas*, governed the Louisiana territory until 1808.⁴⁰ In 1808, the legislature of the Territory of Orleans tasked James Brown and Louis Moreau-Lislet with collecting and codifying the civil laws of the Territory, as Spanish law had been maintained after the Louisiana Purchase.⁴¹ Moreau-Lislet and Brown produced the Digest of 1808, which the Legislative Council adopted on March 31, 1808.⁴² There has been a great deal of debate over whether the Digest of 1808 was based on the *Code Napoléon* of France or *Las Siete Partidas* of Spain.⁴³ Regardless of which source the Digest of 1808 more closely resembles, both the *Code Napoléon* and *Las Siete Partidas* find their roots in the Roman tradition.

Under modern civilian theory, legislation is the law and is to be treated as the solemn will of the legislature.⁴⁴ Judicial opinion is nothing more than the interpretation of the law.⁴⁵ However, because the code articles governing delicts are very limited, Louisiana courts have been forced to write the majority of tort law under the guise of interpretation.⁴⁶ Louisiana courts have thus developed the state's modern tort law, including the concept of

38. *Id.*

39. *Id.* at 10.

40. *Id.* at 7, 10.

41. *Id.* at 10-11.

42. *Id.*

43. *Id.*

44. LA. CIV. CODE ANN. art. 2 (2010) (“Legislation is a solemn expression of legislative will”).

45. LA. CIV. CODE ANN. art. 1 (2010) (“The sources of law are legislation and custom”).

46. *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1156 (La. 1988) (“The framers conceived of fault as a breach of a preexisting obligation, for which the law orders reparation, when it causes damage to another, and they left it to the court to determine in each case the existence of an anterior obligation which would make an act constitute fault”).

gross negligence. Like the common law, Louisiana adopted gross negligence from the Roman law and then developed the concept through jurisprudence, focusing on punitive damages, contributory negligence, and immunity statutes, just as in the common law states.

III. GROSS NEGLIGENCE IN THE COMMON LAW

After the adoption of gross negligence into American jurisprudence in 1822, the judiciary began to develop the concept in the context of punitive damages, contributory fault, and immunity statutes.⁴⁷ Punitive damages are employed to punish certain behavior just as immunities are employed by the legislature to promote certain behavior.⁴⁸ On the one hand, a plaintiff is allowed to recover punitive damages upon a showing of gross negligence while on the other, legislatures use gross negligence as a limit to the defense of immunity, allowing the plaintiff to recover when establishing that the defendant has been grossly negligent.

A. Gross Negligence and Punitive Damages in the American Common Law

The idea of punishment as a civil mechanism can be traced back to a number of ancient legal systems, including the *Twelve Tables*—the original codification of ancient Roman law.⁴⁹ The English common law adopted the concept of extra damages to punish reprehensible conduct in the 1763 case of *Wilkes v. Wood*.⁵⁰ In *Wilkes*, the court granted an award for “more than the injury received” against the Secretary of State for conducting an unlawful

47. See Martin, *supra* note 22, at 1007.

48. See *BMW of North America v. Gore*, 517 U.S. 559 (1996) (The Supreme Court recognized that states have a legitimate interest in protecting their citizens from extra blameworthy behavior and affirmed the use of punitive damages to punish the actor and deter future conduct of a similar nature).

49. John W. deGravelles, J. Neale deGravelles, *Louisiana Punitive Damages—A Conflict of Traditions*, 70 LA. L. REV. 579, 580 (2010).

50. *Id.* at 581.

search of the plaintiff's papers.⁵¹ Afterwards, the English courts began to routinely grant awards in excess of a plaintiff's actual damages when the defendant's actions merited punishment.⁵²

In 1784, punitive damages crossed the Atlantic and entered American case law in *Genay v. Norris*.⁵³ Since the adoption of punitive damages into American law, the Supreme Court has evaluated the appropriate use of the concept. In *BMW of North America v. Gore*, the Court observed that some wrongs are more blameworthy than others.⁵⁴ The Court affirmed that states have a legitimate interest in protecting their citizens from extraordinarily blameworthy behavior by allowing punitive damages, which the Justices reasoned would serve to punish the actor and function as a deterrent of future behavior of a similar nature.⁵⁵ In a later decision, the Court was forced to address exactly what type of conduct was worthy of civil punishment.⁵⁶ The Court determined that punitive damages should only be used to punish a defendant who was guilty of outrageous conduct, and affirmed the traditional notion that gross negligence was the threshold for punitive damages liability.⁵⁷ Many states have chosen to follow the Supreme Court's example.⁵⁸ Nevertheless, the availability of punitive damages varies on a state-by-state basis.⁵⁹ This being said, most states will allow the plaintiff to recover punitive damages upon a showing of gross negligence.⁶⁰ In fact, this application has become so entrenched in the American judicial

51. (1763) 98 Eng. Rep. 489, (K.B.) 498.

52. *Huckle v. Money*, (1763) 95 Eng. Rep. 768, (K.B.) 768-69.

53. *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 410 (2009) (citing *Genay v. Norris*, 1 S. C. L. 6, 7, 1784 WL 26 (C. P. and Gen. Sess. (1784))).

54. 517 U.S. 559, 575-76 (1996).

55. *See id.* at 569.

56. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493 (2008).

57. *Id.*

58. *See id.* at 492-94.

59. *Id.* at 494. (Nebraska does not apply punitive damages under any circumstances. Louisiana, Massachusetts, Washington, and New Hampshire only allow recovery of punitive damage under certain limited circumstances prescribed by statute).

60. *Martin*, *supra* note 22, at 994.

mind that the Seventh Circuit has speculated that the primary function of gross negligence is to justify an award of punitive damages.⁶¹

Georgia and New York are representative of the common law approach to punitive damages and gross negligence.⁶² Georgia employs a statutory regime that governs the application of gross negligence and punitive damages,⁶³ while in contrast, punitive damages in New York are governed exclusively by case law.⁶⁴ A consideration of the application of gross negligence to punitive damages in Georgia and New York is illustrative of the broader common law approach.

1. Punitive Damages under Georgia Law

The availability of punitive damages in Georgia is governed by statute. State law allows the recovery of punitive damages where the plaintiff can establish that the defendant's actions showed "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences."⁶⁵ Under Georgia law, punitive damages are primarily used to deter similar conduct in the future by punishing a guilty actor in the present.⁶⁶ If the court finds a defendant to be merely negligent, then damages are limited to the amount necessary to make the plaintiff whole.⁶⁷ Punitive damages

61. Kelly v. Malott, 135 F. 74 (7th Cir. 1905).

62. Both Georgia and New York set the minimum threshold for punitive damages at gross negligence.

63. GA. CODE ANN. § 51-12-5(a) (LexisNexis 2011); Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980).

64. See Welch v. Mr. Christmas, Inc., 440 N.E.2d 1317 (1982).

65. GA. CODE ANN. § 51-12-5.1(b) (LexisNexis 2011).

66. WMH, Inc. v. Thomas, 398 S.E.2d 196, 198 (Ga. 1990) (the court insisted that the primary goal of punitive damages is deterrence, and a jury award which had the sole purpose of punishing wrongful behavior cannot be upheld).

67. Molton v. Commercial Credit Corp., 193 S.E.2d 629, 633 (Ga. Ct. App. 1972).

are only recoverable when the defendant's conduct is worthy of deterrence.⁶⁸

Under this standard, a Georgia court awarded punitive damages in *Comcast Corporation et al. v. Warren*.⁶⁹ The plaintiff in this case sustained severe injuries in an automobile accident when the defendant's employees failed to properly warn of an obstruction they had created in the roadway.⁷⁰ After coming to an immediate stop to avoid the obstruction, Mr. Warren was struck in the rear by another vehicle.⁷¹ The jury awarded Mr. Warren \$280,000 in compensatory damages and \$720,000 in punitive damages.⁷² The trial court subsequently reduced the award of punitive damages to \$250,000, to bring the award amount within the appropriate statutory guidelines.⁷³ On appeal, the Georgia Court of Appeals considered the scenario and determined that the employees of Comcast had behaved "negligently, recklessly, wantonly, and with a conscious disregard for the consequences" of their actions in their failure to warn of the obstruction they had created.⁷⁴ If the court had determined that the defendants were merely negligent, the plaintiffs would have been limited to compensatory damages.⁷⁵ But, because the court concluded that the defendants were grossly negligent, punitive damages were appropriate.⁷⁶

2. *Punitive Damages under New York Law*

In contrast to Georgia, punitive damages in New York are governed primarily by case law. Under the New York standard, punitive damages are to be employed to punish the defendant for

68. *Id.*

69. 650 S.E.2d 307 (Ga. Ct. App. 2007).

70. *Id.* at 309.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 312–13.

75. *Molton v. Commercial Credit Corp.*, 193 S.E.2d 629, 633 (Ga. Ct. App. 1972).

76. *Id.*

his conduct and to deter similar future behavior.⁷⁷ To sustain a claim for punitive damages, the plaintiff must show that his or her damages were the result of “intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of others.”⁷⁸ If the plaintiff can establish one of these aggravating factors, punitive damages may be awarded.⁷⁹

Under this standard, the Supreme Court of New York’s Kings County upheld an award of punitive damages in *Hall v. Consolidated Edison Corporation*.⁸⁰ In *Hall*, Consolidated Edison employees entered a building on a Friday afternoon under the pretense of being elevator repairmen.⁸¹ Once inside, the employees shut off electrical service to the common hallways and elevators of the apartment building, which held over 500 tenants.⁸² The plaintiff, attempting to care for elderly and bedridden patients, slipped on wax drippings in a darkened stairway and sustained injuries from a fall.⁸³ The jury returned a verdict of gross negligence and awarded punitive damages in the amount of \$5,000,000.⁸⁴ On appeal the court upheld the lower court’s finding of gross negligence and the award of punitive damages, but reduced the amount of damages awarded by the jury.⁸⁵

3. A Final Look at Punitive Damages

In the end, punitive damages are only awarded when the actions of the defendant go far beyond the pale of reasonable conduct. In 2005, punitive damages were only pled in an estimated

77. *Le Mistral, Inc. v. Columbia Broad. Sys.*, 402 N.Y.S.2d 815, 817 (N.Y. App. Div. 1978).

78. *Don Buchwald & Assocs. v. Rich*, 723 N.Y.S.2d 8, 9 (N.Y. App. Div. 2001).

79. *See Le Mistral, Inc.*, 402 N.Y.S.2d at 817–18.

80. *Hall v. Consol. Edison Corp.*, 428 N.Y.S.2d 837 (N.Y. 1980).

81. *Id.* at 842.

82. *Id.* at 838.

83. *Id.*

84. *Id.* at 838–39.

85. *Id.* at 842–43.

twelve percent of state court trials nationwide,⁸⁶ and awarded in only five percent of all cases where the plaintiff won.⁸⁷ As these statistics indicate, courts reserve punitive damage awards for the limited circumstances where punishment is merited and deterrence is necessary.⁸⁸ Most states consider gross negligence as meriting punishment. In the majority of common law states, just as in New York and Georgia, grossly negligent behavior will give the plaintiff an opportunity to pursue an award of punitive damages.

B. Contributory Negligence in the Common Law

A second historical application of gross negligence has been in the realm of contributory negligence.⁸⁹ Under the theory of contributory negligence, any conduct on the part of the plaintiff, which contributes to his injuries, bars the plaintiff from recovery.⁹⁰ Many courts were dissatisfied with the traditional contributory negligence rule, but were unable to abolish it without stepping into the shoes of the legislature.⁹¹ Instead, the courts developed gross negligence as a means of overcoming contributory negligence as a bar to the plaintiff's recovery.⁹² Courts concluded that wherever it appeared that the plaintiff's negligence was comparatively slight and the defendant was guilty of gross negligence, the plaintiff should not be denied recovery.⁹³

Recognizing the harsh nature of contributory negligence, most states have moved toward some form of comparative fault.⁹⁴ Under

86. Thomas H. Cohen & Kyle Harbacek, U.S. Department of Justice, *Special Report: Punitive Damage Awards in State Courts, 2005* (March 2011), available at <http://permanent.access.gpo.gov/gpo35184/pdasc05.pdf>.

87. *Id.* at 4.

88. *BMW of North America v. Gore*, 517 U.S. 559, 568 (U.S. 1996).

89. *Martin*, *supra* note 22, at 1002.

90. *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1230 (Cal. 1975).

91. *Martin*, *supra* note 22, at 1002.

92. Comment, *Negligence: Exceptions to the Rule that Contributory Negligence Is a Defense: Gross Negligence*, 17 CAL. L. REV. 65, 66 (1928).

93. *Id.*

94. *North Carolina's Contributory Negligence Rules Outdated and Unfair*, Disabled World (August 13, 2010), www.disabledworld.com/news/america/nc/negligence-laws.php (last visited Jul. 30, 2013).

a pure comparative fault scheme, liability is apportioned according to fault.⁹⁵ For example, if the plaintiff is ninety percent at fault and the defendant only ten percent, the plaintiff is still entitled to recover ten percent of his damages from the defendant.⁹⁶ In contrast, under an ordinary comparative fault scheme, liability is apportioned up to the point at which the plaintiff's fault is greater than or equal to that of the defendant's.⁹⁷ Under an ordinary comparative fault scheme, the plaintiff is entitled to recover for his or her damages up until the point at which he or she is forty-nine percent at fault, and the defendant fifty-one percent at fault.⁹⁸ If it reaches the point where the plaintiff is fifty percent or more at fault, recovery is barred.⁹⁹ Thirteen states have a pure comparative fault scheme and thirty-three states have chosen to follow an ordinary comparative fault scheme.¹⁰⁰ Only four have chosen to continue applying contributory negligence.¹⁰¹

The decline of contributory negligence has lessened the need for courts to use gross negligence as a means of awarding damages despite a plaintiff's negligence. However, in the few jurisdictions that continue to apply the doctrine of contributory negligence, gross negligence can still be used to circumvent a bar to recovery. For example, under North Carolina law, contributory negligence still serves as a bar to recovery and gross negligence is still used as a means of overcoming it.¹⁰²

C. Immunity Statutes in the Common Law

95. *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1242–43 (Cal. 1975).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *North Carolina's Contributory Negligence Rules Outdated and Unfair*, *supra* note 96.

101. *Id.*

102. *Yancey v. Lea*, 550 S.E.2d 155, 157 (N.C. 2001) (The court accepted the jury's finding that negligence on the part of both the plaintiff and defendant were a cause of the plaintiff's injuries and denied the plaintiff's recovery on the grounds of contributory fault).

A third significant source of development of gross negligence has been its use in conjunction with immunity statutes.¹⁰³ Many scholars believe the use of gross negligence to overcome immunity statutes is best seen as an “escape route” that allows a court to avoid the absurd results that could be reached with unqualified immunity.¹⁰⁴ Professor Fredrick Schauer proposed that:

Legal systems must provide some escape route from the occasional absurdity generated by literal application because applying the literal meaning of a rule can at times produce a result which is plainly silly, clearly at odds with the purpose behind the regulation, or clearly inconsistent with any conception of wise policy.¹⁰⁵

Using gross negligence in conjunction with immunity statutes provides a heightened threshold of liability for a defendant; however, it also allows courts the option of permitting the plaintiff to recover when the defendant’s actions are of such a nature that to deny damages would be absurd.¹⁰⁶

Traditionally, legislatures have granted broad immunity to actors whose conduct is considered valuable to society.¹⁰⁷ These statutes are enacted under the theory that, while the defendant may be a wrongdoer, there is greater social utility derived from protecting him than in making an injured plaintiff whole.¹⁰⁸ Therefore, when legislatures view an actor’s activity as beneficial to society, they may wish to protect that actor by limiting his or her liability in tort action.¹⁰⁹

Immunity statutes provide an affirmative defense to certain tortious conduct.¹¹⁰ Most states do not provide unqualified immunity for privileged actors.¹¹¹ Rather, they raise the threshold

103. Martin, *supra* note 22, at 1006.

104. *Id.* at 1007.

105. Fredrick Schauer, *Formalism*, 97 Yale L.J. 509, 525 (1988).

106. Martin, *supra* note 22, at 1007.

107. PROSSER & KEETON, *supra* note 9, at 1032.

108. *Id.*

109. Martin, *supra* note 22, at 1007.

110. *Id.*

111. *Id.*

of their liability from negligence to gross negligence.¹¹² Plaintiffs have to prove that the otherwise-immune defendants were grossly negligent for recovery to be available.

Although there is some variation from state to state, almost all common law jurisdictions employ governmental immunity statutes, automotive guest statutes, recreational activity statutes, and Good Samaritan legislation.¹¹³ The recreational land use statute is one of the most common immunity statutes in effect.¹¹⁴ It encourages landowners to open their property for public recreational use, free of charge, by limiting the owner's liability for accidents that occur on the property.¹¹⁵

Georgia's recreational land use law illustrates how common law immunity statutes operate to promote the governmental goal of encouraging certain behavior by limiting an actor's liability for injuries that may occur on the property.¹¹⁶ Under Georgia law, a land owner generally owes no duty to keep his or her property safe for recreational users;¹¹⁷ however, the owner will be liable for injuries if he or she was grossly negligent in failing to warn or guard against a dangerous condition, use, or activity.¹¹⁸

A Georgia court addressed the state's recreational use laws in *Spivey v. City of Baxley*.¹¹⁹ The plaintiff brought suit for injuries sustained while attending a softball game at a field maintained by the County Recreation Board.¹²⁰ Mrs. Spivey alleged that she fell after stepping from a concrete slab covering a drainage ditch.¹²¹

112. *Id.*

113. *Id.*

114. See The University of Vermont, *Recreational Use Statutes*, <http://asci.uvm.edu/equine/law/recreate/recreate.htm> (last visited Oct. 2, 2011).

115. *Id.*

116. GA. CODE ANN. § 51-3-20 (LexisNexis 2011) (Georgia takes a traditional, middle-of-the-road view of gross negligence. The way the state's legal regime employs the concept in punitive damages and immunity statutes is representative of how other common law jurisdictions treat gross negligence.).

117. GA. CODE ANN. § 51-3-22 (LexisNexis 2011).

118. GA. CODE ANN. § 51-3-25 (LexisNexis 2011).

119. 437 S.E.2d 623 (Ga. Ct. App. 1993).

120. *Id.* at 624.

121. *Id.*

She maintained that her injuries were a result of the defendant's failure to correct a dangerous condition existing on the property.¹²² In answer to Mrs. Spivey's claims, the defendant asserted its immunity under Georgia's recreational land use statute.¹²³

The court recognized that, under Georgia law, a defendant who allows free access to the property can only be held liable if the plaintiff established that the defendant's actions showed a "willful failure to guard or warn."¹²⁴ The court stated that for the defendant to be found grossly negligent, he or she must have knowledge that a condition which posed an unreasonable risk of death or serious bodily harm existed, that the condition was not apparent to those using the property, and that the owner chose not to guard or warn against the danger in disregard of the consequences.¹²⁵

The *Spivey* court considered that, while Georgia's recreation land use statute did not expressly include spectators at athletic events, the purpose of the statute clearly encompassed this sort of use; therefore, the recreational land use statute was applicable.¹²⁶ The court concluded that the defendant was not guilty of grossly negligent conduct and could not be held liable.¹²⁷

As the Georgia land use statute illustrates, immunity statutes operate as an affirmative defense by allowing a negligent plaintiff to escape liability. Had a state immunity statute not covered the landowner in *Spivey*, it would have been liable to the plaintiff for negligently failing to warn of the obstruction. However, because the immunity statute was in play, the landowner was able to plead as a defense that, because he was not grossly negligent, he could not be held liable.

Immunity statutes are employed by the legislature to encourage certain behavior just as punitive damages are awarded to

122. *Id.*

123. *Id.* at 625.

124. *Id.*

125. *Id.*

126. *Id.* at 625-26.

127. *Id.* at 626.

discourage certain behavior. Immunities raise the threshold of liability from negligence to gross negligence. If an immunity statute covers the defendant, he or she will escape liability if the plaintiff is unable to prove that the defendant was grossly negligent. This applies in Louisiana in the same manner as in common law states.

IV. THE LOUISIANA APPROACH TO GROSS NEGLIGENCE

Like the common law, Louisiana's law of gross negligence traces its origins to the Roman legal system.¹²⁸ Similarly, the framework of Louisiana's gross negligence law was generally developed in the context of punitive damages, contributory negligence, and immunity statutes.¹²⁹ However, the end result differs slightly from that of common law jurisdictions. Unlike common law jurisdictions, Louisiana has chosen to severely curtail the use of gross negligence in the context of punitive damages. However, it is still very much alive within the state in the context of immunities.

A. *Gross Negligence and Punitive Damages in Louisiana*

Prior to 1917, Louisiana took an approach to punitive damage that was identical to that of common law jurisdictions.¹³⁰ Courts allowed recovery upon a showing of gross negligence, even though early versions of the Louisiana Civil Code contained no punitive damages provisions.¹³¹ Louisiana courts acknowledged the conflict between the state's civilian heritage, which did not recognize punitive damages, and this approach.¹³² In *Dirmeyer v. O'Hern*, the Louisiana Supreme Court observed that punitive damages were

128. See discussion, *supra* Part II.B.

129. *Id.*

130. deGravelles, *supra* note 49, at 584–85.

131. *Id.*

132. *Dirmeyer v. O'Hern*, 3 So. 132, 134 (La. 1887).

borrowed from the common law¹³³ and that Louisiana's practice of granting this form of recovery was against the long-standing rule in civilian jurisdictions that the purpose of awarding damages was to repair the harm sustained by the victim, not to punish the conduct of the wrongdoer.¹³⁴ In 1917, the Louisiana Supreme Court sought to rectify this discrepancy in *Vincent v. Morgan's Louisiana*.¹³⁵ The court held that pecuniary penalties intended to punish the tortfeasor would no longer be recoverable in Louisiana unless expressly allowed by statute.¹³⁶

As a result of the *Vincent* decision, modern Louisiana law only allows recovery of punitive damages where expressly authorized by statute.¹³⁷ The statutory basis for punitive damages can be found in the Civil Code, which provides instances where "exemplary" damages may be recoverable.¹³⁸ The code allows recovery of exemplary damages for child pornography, intoxicated driving, and criminal sexual activity occurring during childhood.¹³⁹ Using the words "exemplary damages," these Code articles allow recovery of punitive damages upon a showing that the damages were caused by a "wanton and reckless disregard for the rights and safety of others,"¹⁴⁰ or gross negligence. If a plaintiff's claim does not fall within one of these narrowly defined categories, punitive damages are unavailable, regardless of the depravity of the defendant's conduct.

133. *Id.*

134. deGravelles, *supra* note 49, at 580.

135. 74 So. 541 (La. 1917).

136. *See id.* at 548.

137. *See id.* at 548-49.

138. *See* LA. CIV. CODE. ANN. art. 2315.3 (2010); LA. CIV. CODE. ANN. art. 2315.4 (2010); LA. CIV. CODE ANN. art. 2315.7 (2010) (The legislature set forth three codal provisions outlining circumstances in which punitive or exemplary damages may be awarded: 1) Article 2315.3, additional damages for child pornography; 2) Article 2315.4, additional damages for intoxicated defendant; and 3) Article 2315.7, liability for damages caused by criminal sexual activity occurring when the victim was 17 years old or younger).

139. *Id.*

140. *See id.*

In *Mosing v. Domas*, a Louisiana court addressed the purpose of punitive damages in Louisiana: “[Punitive damages] . . . are given to the plaintiff over and above full compensation for his injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant’s example.”¹⁴¹

Following this line of reasoning, the Louisiana legislature enacted a limited set of laws detailing under what circumstances the defendant’s actions are sufficiently blameworthy to merit punitive damages.¹⁴² Each of Louisiana’s punitive damage provisions makes a textual reference to gross negligence; however, courts have moved away from requiring the plaintiff to make an actual showing of gross negligence.¹⁴³ Instead, courts often presume that the defendant was grossly negligent if the plaintiff can establish certain facts and causation.¹⁴⁴

1. Gross Negligence and Louisiana Civil Code Article 2315.4

141. *Mosing v. Dumas*, 798 So. 2d 1105, 1113 (La. Ct. App. 3d Cir. 2001) (citing *Rivera v. United Gas Pipeline Co.*, 697 So. 2d 327 (La. Ct. App. 5th Cir. 1997)).

142. See LA. CIV. CODE ANN. art. 2315.3 (2010); LA. CIV. CODE ANN. art. 2315.4 (2010); LA. CIV. CODE ANN. art. 2315.7 (2010).

143. See *Bourgeois v. State Farm*, 562 So. 2d 1177, 1182 (La. Ct. App. 4th Cir. 1990) (“Several courts have . . . indicated that a presumption of recklessness can be made when the intoxication of the defendant is the cause in fact of the accident”); *Myres v. Nunsett*, 511 So. 2d 1287, 1289 (La. Ct. App. 2d Cir. 1987):

A number of other states take the position that operating a motor vehicle on the public road after voluntary intoxication in and of itself constitutes sufficient reckless disregard to warrant an award of exemplary damages. Our codal article requires an additional showing that the accident resulting in injury was caused by the voluntary intoxication of a defendant;

McDaniel v. DeJean, 556 So. 2d 1336, 1340 (La. Ct. App. 3d Cir. 1990) (“[The defendant] acted with a wanton or reckless disregard for the rights and safety of others by getting intoxicated and driving We find the evidence preponderates that his intoxication was a cause in fact of the accident; therefore, the exemplary damage award was proper”).

144. See *Bourgeois*, 562 So. 2d at 1182 (a defendant’s gross negligence will be presumed upon a showing that the defendant was intoxicated and that his intoxication was a cause in fact of the plaintiffs’ injuries).

Louisiana Civil Code article 2315.4 allows a plaintiff to recover punitive damages upon showing that his injuries were caused by the defendant's gross negligence in operating a vehicle while intoxicated.¹⁴⁵ The text of the article requires that the plaintiff prove the defendant was grossly negligent; however, in *Bourgeois v. State Farm*, the Louisiana Fourth Circuit stated that some Louisiana courts would presume recklessness upon a showing that the plaintiff's injuries were caused by the defendant's intoxication.¹⁴⁶

After consideration of the statutory requirements of 2315.4, the *Bourgeois* court broke the article down into the three elements that a plaintiff must establish in order to recover punitive damages.¹⁴⁷ These elements are: 1) that the defendant was intoxicated or had a "sufficient quantity of intoxicants to make him lose normal control of his mental and physical facilities;" 2) that the drinking was a cause in fact of the accident; and 3) that the injuries were caused by a wanton and reckless disregard for the rights and safety of others.¹⁴⁸ The court focused on the third element necessary for recovery—proof that the plaintiff's injuries were caused by the defendant's grossly negligent conduct.¹⁴⁹ The court noted that many Louisiana courts employ a presumption of gross negligence if the intoxication of the defendant was a cause in fact of the plaintiff's injuries.¹⁵⁰ The court concluded that, while the Fourth Circuit generally required a separate showing of wanton and reckless disregard, most Louisiana courts would assume gross

145. LA. CIV. CODE ANN. art. 2315.4 (2010):

In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries.

146. *Bourgeois*, 562 So. 2d at 1179–80.

147. *Id.*

148. *Id.* at 1180.

149. *Id.*

150. *Id.* at 1182.

negligence upon a showing that the defendant's intoxication was to blame for the plaintiff's injuries.¹⁵¹

Following *Bourgeois*, the circuit courts split on what a plaintiff was required to prove to recover punitive damages under article 2315.4.¹⁵² Some circuits maintained that a plaintiff was required to establish not only that the defendant was intoxicated and his intoxication was a cause in fact of his injuries, but also that the injuries were caused by the defendant's wanton and reckless disregard for the safety of others. Other circuits believed that by proving that the defendant was intoxicated and his intoxication was the cause in fact of the injuries, the plaintiff had satisfied his burden. By taking the latter approach, courts have removed the burden on the plaintiff that required him to prove the defendant was grossly negligent when seeking punitive damages. The award of punitive damages is not truly predicated upon gross negligence in circumstances where there is obviously voluntary intoxication.

2. *Gross Negligence and Louisiana Civil Code Article 2315.7*

The legislature enacted Louisiana Civil Code article 2315.7 to provide for damages suffered as a result of criminal sexual activity occurring while the victim was a minor and for "related matters."¹⁵³ Article 2315.7 allows for an award of punitive damages upon a showing that the plaintiff's injuries were caused by a "wanton and reckless disregard for the rights and safety" of the plaintiff through criminal sexual conduct, which occurred while the plaintiff was seventeen years old or younger.¹⁵⁴

151. *Id.* at 1184.

152. deGravelles, *supra* note 49, at 595.

153. 1993 La. Acts no. 831.

154. LA. CIV. CODE ANN. art. 2315.7 (2010):

In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through criminal sexual activity which occurred when the victim was seventeen years old or younger, regardless of whether the

Louisiana state courts have had limited opportunity to interpret and apply article 2315.7. However, a federal court in Louisiana applied the article in *Capdeboscq v. Francis*.¹⁵⁵ In *Capdeboscq*, the plaintiffs alleged that they had voluntarily posed topless for a photo after the defendants assured them that they would not appear in a *Girls Gone Wild* video.¹⁵⁶ The plaintiffs complained that, even after they were assured they “had nothing to worry about,” they were featured on the cover of *Girls Gone Wild: Doggy Style*.¹⁵⁷

The plaintiffs sought punitive damages under article 2315.7.¹⁵⁸ The court, however, found that the plaintiffs had failed to state a basis upon which their claim could be predicated.¹⁵⁹ The court held that, because the plaintiffs had failed to allege a violation of an applicable criminal statute, there was no basis for recovery under article 2315.7.¹⁶⁰ The *Capdeboscq* court’s brief analysis provides little guidance on what constitutes gross negligence and grounds for recovery under the article.¹⁶¹ However, the court indicated that violation of a criminal statute dealing with sexual misconduct was necessary to allow a plaintiff to recover under article 2315.7.¹⁶²

If liability is predicated upon violation of a criminal statute, then recklessness will likely be presumed upon a showing that the defendant’s conduct violated the applicable criminal law. If this is true, then the plaintiff will not be required to make a separate showing of gross negligence to recover punitive damages.

3. Gross Negligence and Louisiana Civil Code Article 2315.3

defendant was prosecuted for his or her acts. The provisions of this Article shall be applicable only to criminal sexual activity.

155. *Capdeboscq v. Francis*, CIV.A.03-0556, 2004 WL 463316 (E.D. La. Mar. 10, 2004).

156. *Id.* at 1.

157. *Id.*

158. *Capdeboscq v. Francis*, CIV.A. 03-0556, 2003 WL 21418499 (E.D. La. June 16, 2003).

159. *Id.*

160. *Id.*

161. *See id.*

162. *See id.*

Louisiana Civil Code article 2315.3 allows for recovery of punitive damages if the plaintiff can establish that his injuries were caused by the defendant's "wanton and reckless disregard . . . through an act of pornography involving juveniles as defined by R.S. 18:81.1."¹⁶³ The Louisiana legislature enacted article 2315.3 in 2009 to allow the recovery of punitive damages by victims of child pornography, even if the person responsible for the damages was never criminally prosecuted.¹⁶⁴ Louisiana courts have not yet had occasion to apply article 2315.3. Because the courts have not addressed punitive damages within the context of the child pornography article, there is no indication of whether this article will be interpreted to require a showing of gross negligence or if it will be presumed upon a showing that the defendant violated the state's child pornography statute.¹⁶⁵ However, given the construction of the article, it seems likely that to constitute wanton or reckless conduct, the defendant's actions must, at the very least, violate the state's juvenile pornography statute.¹⁶⁶

*4. A Final Look at Louisiana's Law on Gross Negligence and Punitive Damages*¹⁶⁷

163. LA. CIV. CODE ANN. art. 2315.3 (2010):

In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through an act of pornography involving juveniles, as defined by R.S. 14:81.1, regardless of whether the defendant was prosecuted for his acts.

164. 2009 La. Acts no. 382.

165. LA. REV. STAT. ANN. § 14:81.1 (2012).

166. *See id.*

167. Louisiana also employs the Louisiana's Drug Dealer Liability Act, which is the fourth and final punitive damages statute in use. The purpose of the Louisiana Drug Dealer Liability Act is to provide a civil remedy for damages to persons in a community injured by an individual's use of illegal drugs by establishing a cause of action against drug dealers for monetary, noneconomic, and physical losses. The idea was to shift the cost of the damage caused by the marketing of illegal drugs to those who profit from the market, while at the same time deterring others from entering the market. The act allows certain categories of persons, injured by an individual's use of an illegal controlled substance, to recover punitive damages. The statute allows for any persons injured as a result

Louisiana has chosen to severely curtail the availability of punitive damages under state law by restricting their availability to circumstances in which they are specifically authorized by statute, all of which require some form of criminal conduct. However, each provision authorizing punitive damages predicates recovery upon a finding that the defendant was grossly negligent. In many instances, the courts have interpreted these articles in such a way as to relieve the plaintiff of the burden of actually proving that the defendant was grossly negligent, voluntary criminal conduct presuming that the action was based on a wanton and reckless disregard for the victim's safety or interest. This creates a situation similar to *res ipsa loquitur* where the court will presume negligence even without conclusive proof where justified by the circumstances.¹⁶⁸

B. Gross Negligence and Contributory Fault in Louisiana

Prior to 1980, Louisiana employed a contributory negligence scheme¹⁶⁹ similar to that in effect in the common law.¹⁷⁰ Under this standard, any conduct on the part of the plaintiff that was a legally contributing factor to his injuries was sufficient to bar recovery.¹⁷¹ Louisiana adopted this system in *Fleytas v. Pontchartrain Railroad Co.*, before there was an organized body of civilian doctrine on comparative fault.¹⁷² In 1980, the legislature

of the individual user's gross negligence to recover punitive damages. The plaintiff must establish by a preponderance of the evidence that their injuries were caused by the use of illegal drugs; however, no further showing of gross negligence is necessary for recovery. *See* LA. REV. STAT. ANN. § 9:2800.61 (2009); LA. REV. STAT. ANN. § 9:2800.63 (2009); *Kemp v. Metabolife Int'l., Inc.*, 2003 U.S. Dist. LEXIS 17770 (E.D. La. 2003).

168. *See* MARAIST, *supra* note 7, at § 8.06.

169. *See* *Dumas v. State*, 828 So.2d 530, 532-33 (La. 2002).

170. *Id.* *See also* discussion *supra*, Part III.B (on the common law rule of contributory fault as a bar to a plaintiff's recovery).

171. *Dumas*, 828 So. 2d at 533.

172. *Id.*, citing *Fleytas v. Pontchartrain R. Co.*, 18 La. 339 (1841); *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 169 (La. 1985).

amended Louisiana Civil Code article 2323 to replace contributory negligence with a pure comparative fault scheme.¹⁷³ Article 2323 states that:

If a person suffers injury, death, or loss as the result partly of his own negligence and partly of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.¹⁷⁴

The legislature chose to adopt a comparative standard to mitigate the harshness of the contributory negligence doctrine.¹⁷⁵ Rather than denying recovery outright if the plaintiff contributed to his injuries at all, the legislature adopted a pure comparative fault scheme that apportions liability in direct proportion to fault.¹⁷⁶ Under this scheme, if the plaintiff is ninety percent at fault in causing his or her injuries, he or she may still recover ten percent of the damages, the portion sustained due to the defendant's fault.¹⁷⁷ When Louisiana shifted from a contributory negligence to a comparative fault scheme, the application of the gross negligence standard within this context was severally curtailed because plaintiffs were no longer required to overcome contributory negligence as a bar to recovery.

C. Gross Negligence and Immunities in Louisiana

Immunities represent the predominant use of gross negligence in Louisiana. As in the common law, immunity statutes are intended to protect certain actors from liability when the legislature determines that their conduct is so beneficial to society that the value of their actions outweighs other societal interests that dictate

173. *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1132 (La. 1988).

174. LA. CIV. CODE ANN. art. 2323 (2010).

175. *Id.*

176. *See* discussion *supra*, Part III.B.

177. *See* discussion *supra*, Part III.B.

tortfeasors should compensate their victims.¹⁷⁸ Louisiana adopted traditional immunity statutes including: governmental immunity; automotive guest statutes; recreational activity statutes; and Good Samaritan legislation.¹⁷⁹ However, Louisiana also has immunity statutes that reflect its unique culture, including a statute limiting the liability of Mardi Gras krewes.¹⁸⁰ In all, Louisiana has more than forty immunity statutes that cover a wide range of actors and generally raise the level of liability from negligence to gross negligence.¹⁸¹

In Louisiana, immunity statutes are an affirmative defense to be pled by the actor after the tort has occurred.¹⁸² If the actor's conduct is covered by the statute, he will escape liability where it would otherwise be imposed.¹⁸³ Louisiana applies immunity statutes in essentially the same fashion as common law jurisdictions.¹⁸⁴ The distinction, if any, lies in the actors that Louisiana chooses to protect and the number of immunities that have been enacted.¹⁸⁵

The immunity for Mardi Gras krewes is unique to Louisiana.¹⁸⁶ Mardi Gras parades are an important part of Louisiana's culture and a major element of the state's tourism industry. The legislature recognized the potential liability facing parade participants and

178. MARAIST, *supra* note 7, at § 11.01; *see also* discussion *supra*, Part III.B.

179. *See* CRAWFORD, *supra* note 24, at 833–37.

180. *Id.*; LA. REV. STAT. ANN. § 9:2796 (Supp. 2011).

181. *See* CRAWFORD, *supra* note 24, at 833–37.

182. MARAIST, *supra* note 7, at § 11.01.

183. *Id.*

184. *See* discussion *supra* Part III.C (Common law jurisdictions employ immunity statutes to protect actors whose conduct is seen as so beneficial to society that the societal interest in protecting the actor is greater than the societal interest in having a tortfeasor make his victim whole. Louisiana follows the same approach. In both the common law and Louisiana, immunities represent an affirmative defense that often raises the threshold of liability from negligence to gross negligence and allows an actor to escape liability).

185. *See* CRAWFORD, *supra* note 24, at 833–37 (Louisiana has over 40 immunity statutes covering a span of actors from charities and money managers to Mardi Gras krewes).

186. *See* LA. REV. STAT. ANN. § 9:2796 (Supp. 2011).

enacted Louisiana Revised Statute Section 9:2796, which limits the liability of parade participants to gross negligence.¹⁸⁷

With this plethora of immunity statutes, gross negligence is very much alive in Louisiana. It allows a plaintiff to override the defense of immunity when proving the defendant's gross negligence.

V. COMPARING GROSS NEGLIGENCE IN LOUISIANA AND THE COMMON LAW

Gross negligence can be used by plaintiffs to recover punitive damages and, when necessary, to overcome contributory negligence as a bar to recovery. It is also used in conjunction with immunity statutes to limit the scope of the defense to cases of simple negligence.¹⁸⁸ Louisiana makes a nominal use of gross negligence in the context of punitive damages,¹⁸⁹ and continues to employ the concept when dealing with immunities.¹⁹⁰

Louisiana and the common law diverge in the context of punitive damages. The common law will generally allow recovery of punitive damages in circumstances where the defendant was grossly negligent. In Louisiana, if the actor is negligent, the plaintiff will recover compensatory damages but nothing more, no matter how egregious the actor's behavior, unless one of the state's limited punitive damages provisions apply, requesting recklessness, though gross negligence can be presumed as these are situations of intentional criminal conduct. These divergent applications can lead to dramatically different results.

187. *Id.*

188. *See supra* Part III.C.

189. *See supra* Part IV.A (Louisiana has limited punitive damage awards to circumstances expressly outlined by the legislature through statute or code article. These statutes, as interpreted by the Louisiana judiciary, generally do not require a true showing of gross negligence. In many circumstances, the requisite mindset can be presumed upon proof of causation).

190. *See supra* Part IV.C (discussion of Louisiana's use of gross negligence in conjunction with immunity statutes).

Louisiana's decision to change from the traditional common law application of punitive damages was based largely on the state's civilian heritage.¹⁹¹ Punitive damages were, and remain, largely rejected by the civilian jurisdictions of continental Europe.¹⁹² The refusal by the German Supreme Court to enforce in Germany an American court's decision awarding a juvenile \$400,000 in punitive damages on the basis that it was against public order is illustrative of the general European perspective.¹⁹³ Dr. Koziol discussed the general European distaste for punitive damages in his 2008 article, *Punitive Damages—A European Perspective*.¹⁹⁴ Dr. Koziol's discussion illuminates a number of the prevailing arguments against the award of punitive damages.¹⁹⁵ The primary concern is that the private law is neither geared towards nor equipped to punish actors for their wrongdoing.¹⁹⁶ Rather than stretching private law beyond its intended bounds, criminal law should be improved to meet any outstanding needs.¹⁹⁷

A number of American scholars have joined in the criticism of punitive damages.¹⁹⁸ Consider Anthony Sebok's attack of punitive

191. See, e.g., *Dirmeyer v. O'Hern*, 3 So. 132, 134 (La. 1887) (Where the Louisiana Supreme Court recognized the discrepancy between Louisiana's approach to the application of punitive damages and traditional Civilian theory); *Vincent v. Morgan's Louisiana*, 74 So. 541 (La. 1917) (where the Louisiana Supreme Court made the decision to limit the award of punitive damages to situations where they had been specifically authorized by statute); discussion *supra* Part IV.

192. Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741, 751 (2008).

193. *Id.* at 742.

194. *Id.*

195. *Id.* at 751–58.

196. *Id.* at 751–52, 763 (Dr. Koziol argues that the private law fails at adequately punishing and deterring blameworthy behavior because there is no corresponding relationship between the injury suffered by the plaintiff and the amount of recovery. He argues that punishing the defendant with punitive damages allows a windfall for the plaintiff who has suffered no corresponding injury. He goes on to say that, if the defendant is going to be held liable for punitive damages, the only way to justify their award is to place the damages that go beyond compensation into a public fund in such a way that they amount more to a fine than extra compensatory damages).

197. *Id.*

198. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007); Thomas B. Colby, *Beyond the Multiple Punishment*

damages in his article, *Punitive Damages: From Myth to Theory*.¹⁹⁹ Professor Sebok concedes that punitive damages must have some deterrent effects, but argues that they fail as a mechanism of efficient deterrence because research suggests that juries produce awards that are neither certain nor likely to bear a reasonable relationship to the amount of money that incentivizes investment in appropriate safety measures.²⁰⁰ Yet another scholar, Dan B. Dobbs, argues that punitive damages are not subject to accurate measurement and therefore not subject to effective limits.²⁰¹ Professor Dobbs goes on to discuss a number of other criticisms.²⁰² In particular he argues that punishment should be reserved for criminal law and that allowing punitive damages could lead to an unfair application that may over-deter some conduct while under-detering other conduct.²⁰³

While it is true there are a number of arguments against punitive damages, they do serve an invaluable gap filling function in American law. Reconsider the factual scenario from the beginning of this article in which the seventy-seven year old man was allowed to suffer from an extremely painful condition while his caregivers took little to no action to alleviate his pain.²⁰⁴ Under the American legal regime, the caregivers' actions fall outside the scope of criminal law, thus the only available remedy is in tort. Given the caregivers' recognition of the condition, their failure to treat the condition, and their choice to allow the condition to progress to such a life-threatening level, it seems reasonable to

Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 MINN. L. REV. 583 (2003); Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425 (2003); Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831 (1988).

199. *Id.*

200. *Id.* at 984.

201. Dobbs, *supra* note 198, at 834.

202. *Id.* at 837-39.

203. *Id.*

204. *See supra* Part I.

conclude that the caregivers were grossly negligent.²⁰⁵ Because the actors were grossly negligent, the damages awarded to the patient depend upon the jurisdiction in which the suit is brought. Under the prevailing common law approach, the caregivers' grossly negligent actions would allow the plaintiff to recover punitive damages.²⁰⁶ Had this case been brought before a court in Louisiana, no punitive damages would have been awarded because the factual scenario is not expressly provided for by the legislature. Under Louisiana law, the conduct would go undeterred and the defendants would escape any form of punishment.²⁰⁷

The caregivers' behavior was extremely blameworthy. They recognized that the patient was suffering from a minor bedsore that could have been easily treated; but rather than following the proper procedure to treat the condition, they allowed the bedsore to progress to a serious, life threatening condition.²⁰⁸ Is it right for these actors to escape punishment simply because their conduct falls through a gap between private and criminal law? Is this not the type of behavior that a state has a legitimate interest in deterring?

The flexibility afforded by allowing the award of punitive damages upon a showing of gross negligence is what makes the common law approach so appealing. Under the common law system, punitive damages serve as a "gap-filler" that allows for the punishment and deterrence of blameworthy behavior, without

205. Gross negligence is an extreme departure from the ordinary standard of care. *See supra* Part I.

206. *See id.* This fact pattern was presented to a Texas Appellate Court in *Convalescent Services, Inc. v. Schultz*, 921 S.W.2d, 739-40 (Tex. App. 1996) (the Texas court determined that the caregivers' actions were grossly negligent and upheld the trial court's award of punitive damages).

207. *See* MARAIST, *supra* note 7, at § 7.02 ("Compensatory damages are divided into two broad categories: special and general damages." Special damages are those that have a quantifiable value, general damages are those which are speculative in nature and include pain and suffering, mental anguish, and loss of enjoyment of life).

208. *See* *Convalescent Services*, 921 S.W.2d at 733.

requiring the legislature to pass specific legislation covering every conceivable scenario.

The United States Supreme Court has declared that punitive damages are civil penalties intended to punish actors for extraordinarily blameworthy behavior and deter similar actions in the future, and that they are justified by a state's legitimate interest in protecting its citizenry from extraordinarily blameworthy behavior.²⁰⁹ The Louisiana legislature recognized the value of civil punishment with its adoption of limited punitive damages statutes. However, because the legislature must enact a statute specifically authorizing punitive damages before they can be awarded, many actors whose behavior should be punished will escape retribution unless the legislature has expressly provided otherwise.

The benefit of having punitive damages available to punish grossly negligent conduct is that they provide an extra tool for courts to employ when the circumstances merit punishment but fall outside the scope of criminal law. Louisiana should enact legislation allowing courts to grant punitive damages in case of gross negligence, similar to most common law sister states. Doing so places the responsibility of monitoring awards of punitive damages in the hands of the state's judiciary, who would be responsible for gauging the blameworthiness of a defendant's behavior and making a determination of whether his conduct is grossly negligent and merits punishment. Giving courts this ability would allow for punishment as merited by the circumstances without forcing the legislature to predict every possible scenario.

VI. CONCLUSION

The common law applies a relatively balanced approach to its application of gross negligence, both in the context of punitive damages and immunities. Louisiana has essentially abandoned the component of gross negligence in the context of punitive damages,

209. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996).

but maintains its application in the context of immunities. Louisiana does not allow punitive damages for a showing of gross negligence unless specifically authorized by statute, Civil Code provisions to this effect being limited to cases of intentional criminal conduct. Louisiana's approach to gross negligence and punitive damages leaves a gap between criminal and private law. By requiring the legislature to pre-legislate punitive damages recovery, Louisiana has eliminated the flexibility that makes the common law system so attractive. Allowing courts to impose punishment for grossly negligent behavior fills the void left between criminal law and private law. It allows the court to punish, and thereby deter, egregious behavior as it arises, rather than requiring the legislature to pass specific statutes governing every sort of action. It is impossible for the legislature to preconceive every blameworthy action before it occurs. The common law approach of allowing the judiciary leeway to assess punitive damages for grossly negligent behavior insures that blameworthy behavior is subject to some form of punishment, even if it is outside the scope of criminal law. Even European opponents to punitive damages, including Dr. Koziol, have recognized that European criminal law covers a broader swath of activity than the American counterpart,²¹⁰ and therefore punitive damages may be necessary to fill voids in the law.

Louisiana is a hybrid jurisdiction that employs a distinct version of the civil law, like few other legal systems in the world. This offers an opportunity to administer justice and punish grossly negligent actors who are guilty of conduct that goes far beyond the pale of reasonableness, while preventing the miscarriage of justice associated with grossly disproportionate punitive damage awards. The legislature could adopt a statutory scheme that allows the judiciary more freedom in applying punitive damages for grossly

210. Koziol, *supra* note 192, at 760 (Dr. Koziol points out that, in many situations, circumstances that would merit punitive damages under American law are punishable by criminal law in many European systems).

negligent actions, but which maintains a narrow enough scope to prevent the miscarriage of justice associated with disproportionate exemplary damage awards.