Reflections on Willful, Wanton, Reckless, and Gross Negligence

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COMMENTS

REFLECTIONS ON WILLFUL, WANTON, RECKLESS, AND GROSS NEGLIGENCE

INTRODUCTION

The terms "willful," "wanton," "reckless," and "gross negligence" are all frequently used in the law to describe certain types of conduct, but it is difficult to articulate clearly what those types of conduct are. Sometimes these words are given the same meaning and are grouped under a single "recklessness" classification, while at other times they are treated as though they refer to separate standards of conduct. One court, dismayed over the difficulty involved in the interpretation and application of these terms, has aptly observed that they do little more than to establish a "twilight zone which exists somewhere between ordinary negligence and intentional injury." Nevertheless, lawmakers nationwide appear content to live in this "twilight zone," for they continue to use these terms despite their vagueness. The Louisiana Legislature, no exception to this general rule, has in several recent pieces of legislation used various combinations of the terms "willful," "wanton," "reckless," and "gross negligence" to define standards applicable to exceptions to tort immunity statutes, to solidary liability, and to the award of exemplary damages.

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1. Throughout this comment, the term "reckless" is used as an equivalent of the words "willful," "wanton," "reckless," and "grossly negligent." This scheme is utilized by the Restatement (Second) of Torts § 500 (1965). The comments to § 500 indicate that "wanton" and "willful" are included in the "recklessness" category, and courts have indicated that "gross negligence" is also included. See, e.g., Williamson v. McKenna, 223 Or. 366, 345 P.2d 56, 66 (1960).


In all three types of statutes, the legislature has chosen various combinations of these terms for the apparent purpose of establishing a standard of care of a degree higher than ordinary negligence. Beyond this, however, it is not at all clear what significance, if any, the legislature intended that the courts should attach to these terms. Because the statutes contain assorted combinations of these terms, in each of which the terms are separated by different conjunctives and disjunctives, it is arguable that the legislature meant to create a different standard in each statute, with each term representing a distinct “level” of conduct. There are, however, other possibilities. Perhaps the legislature intended to draw upon the traditional common law interpretation of these terms, an interpretation that places primary reliance upon the actor’s consciousness in determining whether conduct falls into such categories as “willful,” “wanton,” or “reckless.” Still another possibility, of course, is that the legislature employed these terms in the various statutes somewhat indiscriminately and without careful consideration of their meaning or of the ambiguities to which they inevitably give rise. At any rate, the legislature clearly has provided the courts with only minimal guidance in the difficult task of interpreting this new statutory language.

The purpose of this paper is to explore the problem of how Louisiana’s courts should interpret these statutes. As an initial step in this exploration, it will be necessary to consider briefly the language within the statutes that has resulted, and will continue to result, in the problems of interpretation. This will be done in section one. In section two, various sources that might provide some assistance in developing an appropriate interpretative approach to these statutes will be examined. These sources include the scant Louisiana jurisprudence interpreting these statutes, other statutes outside the realm of tort law that employ similar language, and the common law approach to the analysis of such language. Section three will propose a framework on the basis of which the courts might interpret the statutes and, therefore, identify conduct that satisfies the various legislative classifications. In the final section, this proposed framework will be applied to each of the three types of statutes at issue.
INTO THE TWILIGHT ZONE: STATUTORY LANGUAGE LEADING TO CONFUSION

Until recently, such terms as "willful," "wanton," and "reckless" were unknown to Louisiana's tort law. However, beginning with the enactment of certain tort immunity statutes, that situation changed dramatically. Generally speaking, an immunity statute relieves the tort liability burdens of some selected individual, group, or institution by lowering the level of care that must be exercised. Thus, liability lies only if the tortfeasor's conduct is great enough to meet the particular language set forth in the statute. Examples of such language drawn from Louisiana's immunity statutes include "intentional act or gross negligence," "willful or malicious failure to warn," and "willful or wanton" misconduct.

A few years after the advent of the immunity statutes, the legislature again turned to the terms "reckless" and "wanton" to describe conduct

9. "The common-law distinctions between willful acts resulting in injury and simple negligence are not recognized in the Civil Law, which requires only acts constituting 'fault' to give rise to a cause of action." Moses v. Butts, 70 So. 2d 203, 206 (La. App. 1st Cir. 1954). See Comment, Rights and Duties of Riders in Private Automobiles, 22 La. L. Rev. 474 (1962). Savoie v. Walker, 183 So. 530, 533 (La. App. 1st Cir. 1938) provides that "[t]his fault that causes the damage, or accompanies the act causing the damage, may be deliberate, willful and intentional (in which case it may be a criminal offense) or it may be an act arising from mere negligence." The breach of the duty owed to trespassers has traditionally been considered "willful, wanton, and reckless" conduct, both in Louisiana and at common law. An analysis that emphasizes the "status" of the injured party has been judicially dismissed on the ground that a duty to exercise reasonable care is owed to all people. The status of the individual, however, is still a relevant factor, and it is often considered. See, e.g., Cates v. Beauregard, 328 So. 2d 367 (La. 1976), cert. denied, 429 U.S. 833, 97 S. Ct. 97 (1976).

Plaintiffs have frequently alleged "gross negligence" in their complaints even though the exclusive delictual remedy under Louisiana law has, until recently, been based upon ordinary negligence. See La. Civ. Code art. 2315. Further, the phrase "gross negligence" has occasionally crept into the opinions of Louisiana courts. In Prosser v. Crawford, 383 So. 2d 1363, 1364-65 (La. App. 3d Cir. 1980), for example, the trial court found that the defendant's running of a stop sign was "gross negligence." On appeal the majority stated that La. Civ. Code art. 2315 was sufficient, but a concurring opinion expressed concern that the treatment of "inadvertence" in this case (the majority did not disturb the "gross negligence" language of the trial court's ruling) would open the door to hold "gross, willful, and wanton negligence" in all stop sign cases. This case demonstrates both the reason why these standards are not used much and the fact that the terms "gross, willful, and wanton" are interchangeable. But see Service Fire Ins. Co. v. Suezy, 77 So. 2d 110, 112 (La. App. 1st Cir. 1954) (turning left without looking for cars passing from behind is "gross negligence"); and Laird v. Travelers Ins. Co., 263 La. 199, 202, 267 So. 2d 714, 716 (1972) (failure to keep proper lookout constitutes "gross negligence").


that warrants the award of exemplary damages. Currently, such damages are authorized in two (2) contexts. First, where an intoxicated driver, acting with "wanton or reckless" disregard for others, causes injury, exemplary damages may be assessed against him.\(^\text{13}\) Second, exemplary damages are appropriate where one handling hazardous or toxic substances acts in a "wanton or reckless" manner and causes injury to another.\(^\text{14}\)

Still more recently, the legislature has employed such language in describing the circumstances under which joint tortfeasors will be held solidarily liable. Under this new legislation, which marked a sharp break with the longstanding principles of Louisiana tort law concerning solidary liability, there is, in effect, a "presumption" that joint tortfeasors will be held jointly liable. There are two exceptions. First, when solidarity is necessary for the plaintiff to recover fifty percent of his damages, then the tortfeasors will be held solidarily liable to that extent. Second, and more importantly for purposes of this paper, tortfeasors will be held to full solidarity if their conduct is "intentional or willful."

As this brief survey of the three types of statutes in which such terms as "wantonness" or "recklessness" appear reveals, the legislature's use of those terms has been extensive. It also reveals that the legislature has combined those terms in a multitude of different ways. Throughout the statutes, the following combinations can be found:

"conspires . . . to commit an intentional or willful act,"\(^\text{15}\)
"intentional act or gross negligence,"\(^\text{16}\)
"deliberate and willful or malicious injury,"\(^\text{17}\)
"willful or malicious failure to warn,"\(^\text{18}\)
"deliberate and wanton act or gross negligence,"\(^\text{19}\)
"willful or wanton misconduct,"\(^\text{20}\)
"wanton or reckless disregard,"\(^\text{21}\)
"reckless disregard,"\(^\text{22}\)
"gross negligence,"\(^\text{23}\)

\(^{13}\) La. Civ. Code art. 2315.4.
\(^{14}\) La. Civ. Code art. 2315.3.
\(^{15}\) La. Civ. Code art. 2324 (provides for full solidary liability for certain joint tortfeasors).
\(^{17}\) La. R.S. 9:2791 (1965).
\(^{19}\) La. R.S. 9:2796 (Supp. 1988).
\(^{21}\) La. Civ. Code arts. 2315.3 and 2315.4.
\(^{23}\) La. R.S. 9:2798 (Supp. 1988)
"criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct," 24

Linguistically, each of the eleven adjectives used in these statutes appears to describe a distinct standard of conduct. By using every combination of the words, fifty-five different standards could be defined, and by using conjunctives and disjunctives the legislature could provide even more. 25

Upon making a superficial examination of the above list, one might conclude that, by combining the troublesome terms "wanton," "reckless," and so forth, the legislature intended that each separate term refer to a distinct type of conduct and therefore that each phrase establish a different standard of care. Thus, each term would describe a separate kind of tort and would be accompanied by its own unique "operative principle" on the basis of which the conduct that satisfies the term could be consistently identified. For at least two reasons, however, it is doubtful that the legislature had such a scheme in mind.

First, it appears that the choice of words to describe the conduct in each statute was not done as part of any preconceived plan or scheme requiring that each adjective describe a different level of conduct. The list of combinations found in this legislation instead exhibits the complete absence of any scheme. The texts of several of the statutes lend further support to this inference. Consider, for example, the statute that provides immunity to landowners who open their lands for recreational use, immunity that is lost only if there is "willful or malicious failure to warn." The recreational activities covered under the statute include such things as "ice skating, sledding, snow mobiling" and "snow skiing." 26 Given Louisiana's notoriously warm climate, it is doubtful whether such activities could ever be conducted in this state. This fact suggests that the legislative draftsmen of the statute were not particularly careful or discerning in their selection of the activities that should be included in the statute, but rather simply adopted wholesale the list of activities found in a similar statute from some other state. The same inference might be drawn regarding the draftsmen's use of the phrase "willful or malicious failure to warn." If that inference is correct, then it is clear that the legislature did not contemplate any subtle differences between the terms used to describe landowner misconduct.

25. One Louisiana court's use of these terms is symptomatic of the resultant confusion. In Lipscomb v. News Star Publishing Co., the court commented that a driver "acted wantonly, willfully, and heedlessly, and that his negligence was of the grossest sort," and his conduct would "certainly have been willful and deliberate." Lipscomb v. News Star Publishing Corp., 5 So. 2d 41, 45 (La. App. 2d Cir. 1941).
Second, a scheme under which each of the terms represents a different level of conduct is unworkable as a practical matter. There is an operative principle which, when satisfied identifies "intentional" conduct, and an operative principal which describes "negligence." Each intermediate level of conduct requires its own operative principle for it to receive any consistent treatment. But the difficulties that surround any attempt to articulate an operative principle for "wantonness," "willfulness," "recklessness," and "gross negligence," even though there are an unlimited number of points on a line of unreasonable conduct which might correspond to these operative principles, make these standards impossible to apply. As one commentator has persuasively argued, "it is not difficult to understand that there are such things as major or minor departures from reasonable conduct; but the difficulty of . . . drawing satisfactory lines of demarcation, together with the unhappy history, justifies the rejection of the distinctions in most situations." 27 For example, if a multitude of levels was contemplated by these terms, possibly the most effective description of them would be that "gross negligence" is "gross," while "reckless" is very gross, "wanton" is very very gross, and "willful" is even more gross, and so forth. 28

That any scheme for neat division of tortious conduct is unworkable is demonstrated by People v. Calvaresi. 29 In that case, the Colorado Supreme Court found the state's manslaughter statute unconstitutionally vague. Manslaughter was defined in terms of a typical "conscious disregard" standard, while the crime of criminal negligence was defined as a "gross deviation from the standard of care that a reasonable person would observe in the situation." 30 This is typical of the two levels of conduct frequently recognized between ordinary negligence and intentional torts: "gross negligence" and "willful and wanton," but the court found that

the distinction between a gross deviation from, and a wanton and willful disregard of, a standard of care is not sufficiently

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27. Elliott, Degrees of Negligence, 6 S. Cal. L. Rev. 91 (1932).
28. One colorful and perhaps accurate description of the distinctions among negligence, gross negligence and recklessness was provided by Chief Justice Rugg. These categories, he remarked, draw "distinctions among a fool, a damned fool, and a God-damned fool." Harvard Law Record, April 16, 1959. W. Prosser, J. Wade, and V. Schwartz, Cases and Materials on Torts 204 (7th ed. 1982). Another equally effective illustration is that "slight negligence" means small or little negligence, while "gross negligence" means gross or great negligence, "that is negligence in a very high degree." Hambler v. Steckley, 148 Neb. 283, 289, 27 N.W.2d 178, 181 (1947). Consider also this description: "wantonness is a synonym for what is popularly known as cussedness." Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 573, 200 N.E. 843, 845 (1936).
30. Id. at 281, 534 P.2d at 318.
apparent to be intelligently and uniformly applied. The legislative attempt to distinguish between recklessness, and its purportedly less culpable counterpart, criminal negligence, constitutes a distinction without a sufficiently pragmatic difference. To base a conviction of a felony, rather than a misdemeanor, upon the shifting sands of these semantics does not constitute substantial justice.\textsuperscript{31}

This case clearly demonstrates the problems inherent in the application of levels of tortious conduct.

Because the legislature has taken words with no meaning and combined them with other words that have no meaning, using conjunctives and disjunctives to make the standards described even more cryptic, the guidance that it has attempted to provide has instead tied the court's shoes with Gordian knots. The task now facing the courts, as well as commentators, is to develop some approach that will enable the former to begin untying those knots.

\textbf{THE SEARCH FOR A WAY OUT OF THE TWILIGHT ZONE: POSSIBLE SOURCES OF GUIDANCE}

In attempting to discover or to design an appropriate interpretative framework for construing these statutes, the sensible place to start is with what might be considered the standard or obvious sources of interpretative guidance. These sources include both the limited Louisiana jurisprudence that has interpreted and applied these statutes and other Louisiana statutes, outside the realm of tort law, that use similar language and which might provide insight into what meanings the legislature associates with these terms. Furthermore, because such terms as "willful" and "wanton" have received extensive treatment by courts in other jurisdictions, jurisdictions that had statutes employing this language long before Louisiana (automobile guest passenger statutes, for example), that treatment should be considered as well.

\textit{Louisiana Authorities}

\textit{Jurisprudence}

Despite the fact that many of the statutes employing terms like "willful" and "wanton" have been in place for several years, there have been few cases in which courts have been called upon to analyze those terms. The analysis provided in that handful of cases provides

\textsuperscript{31} Id. at 282, 534 P.2d at 318-19.
the proper starting point for the interpretation of the statutory language in question.

One set of cases concerns the meaning of the phrase "deliberate and willful or malicious" as it is used in Louisiana Revised Statutes 9:2791, which provides limited tort immunity to landowners who allow others access to their land for recreational purposes. Under this statute, such landowners lose their immunity when, through "deliberate and willful or malicious conduct," they injure persons permitted onto their property.

The earliest of these decisions was *Rushing v. State*. A frog hunter was killed when his twelve foot "frog catcher" made contact with an uninsulated electric line that the state was responsible for maintaining. In the trial court, the plaintiffs, survivors of the hunter, contended that the conduct of the state was "deliberate and willful or malicious" and, therefore, that the state lost any claim to immunity which it otherwise might have enjoyed under the statute. The *Rushing* court split the standard into two parts, concluding that the statute was satisfied if the conduct was either (1) "deliberate and willful," or (2) "malicious." The court, in attempting to articulate what these terms mean, concluded that all three involve a "concept of some conscious design." The court cited with approval a source that defined "deliberate" as "[w]illful rather than merely intentional." The court also cited a definition of "malicious" as an act done "spitefully or wantonly."

In two later cases, other courts followed the *Rushing* court's interpretation of the phrase "deliberate and willful or malicious." In *LaCroix v. State, Through Department of Transportation*, the court found that the state was not guilty of "deliberate and willful or malicious" conduct in failing to warn a diver of a known submerged hazard, even though the state had "constructive notice" that the site was a popular swimming hole. In reaching this conclusion, the court stated that the term "willful" necessarily involves a "conscious design" to injure, a proposition at-

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34. 381 So. 2d 1250 (La. App. 1st Cir. 1980).
35. Id. at 1252-53.
36. Id. at 1252 (citing *Cole v. List & Weatherly Const. Co.*, 156 So. 88, 90 (La. App. 2d Cir. 1934)).
37. Id. at 1253 (citing the fourth edition of Black's Law Dictionary's definition of "malicious").
tributed to the *Rushing* opinion. In the other case, *Johnson v. Chicago Mill & Lumber Co.*, the court turned to the *Rushing* decision for assistance in construing the term “willful” as used in a plaintiff’s worker’s compensation claim. “Willful” conduct, the court concluded, means the same thing as “intentional.”

Subsequently to the passage of the two exemplary damages statutes, several courts have addressed the level of culpability that is described by “wanton or reckless,” a phrase that appears in both statutes. The fifth circuit in *Levet v. Calais & Sons, Inc.* assessed punitive damages against an employer after an intoxicated employee’s automobile accident. It is not clear from the opinion whether this liability was based upon vicarious liability, or on the employer’s own conduct, where a supervisor bought beer for the employee-driver even though the employee had previously told this supervisor that he had almost fallen to sleep when driving after long hours of work. The court’s interpretation of *2315.4* that would assess exemplary damages to the provider of the alcohol is difficult to justify under a strict reading of the statute, but the case also demonstrates the problems posed by the application of a “recklessness” test. The supervisor was “conscious” of the risk he exposed to others when he provided beer to a driver known to become tired after long hours of work, therefore he “consciously disregarded” that risk, and this behavior contributed to the accident, satisfying the cause in fact element of the statute.

In *Myres v. Nunsett,* the second circuit was called upon to determine whether a driver who had parked in a traveled portion of a street was guilty of “wanton or reckless” conduct. The intoxicated driver statute, Louisiana Civil Code article 2315.4, includes a requirement that the actor’s intoxication be “a cause in fact of the resulting injuries,” and the court avoided an analysis of the driver’s culpability by finding

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39. Id. at 1250-51.
40. 385 So. 2d 878 (La. App 2d Cir. 1980).
41. Id. at 880.
42. 514 So. 2d 153 (La. App. 5th Cir. 1987).
43. Id. at 158.
44. Based upon the language of the statute the intoxicated person appears to be the one who must have been “wanton or reckless.” The court in *Levet* said that “[w]e find Calais’ liability was justified on the basis of its own culpable behavior, which we believe contributed to this accident.” Id. at 158. La. Civ. Code art. 2315.4 provides: “[E]xemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or 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.”
45. 514 So. 2d at 158.
46. 511 So. 2d 1287, 1289 (La. App. 2d Cir. 1987).
that this requirement had not been met. It has been said that an analysis of causation should be a factual determination that "should be maintained utterly devoid of any policy overtones." 47 Under the "substantial factor" test for cause in fact 48 every consequence has innumerable causes, so that an intoxicated driver who has parked illegally might not have parked as dangerously had he not been intoxicated, so his intoxication could arguably be considered a cause in fact. 49 A reliance upon cause in fact allows courts to avoid an analysis of the actor's conduct, but because cause in fact is usually easily satisfied and does not examine relevant policies, it does not provide the court with much direction.

As this brief review of the cases arising under the immunity and exemplary damages statutes reveals, these cases exhibit a complete lack of meaningful analysis of the terms "willful," "wanton," and so forth. They will therefore provide other courts with little guidance in the future interpretation of these statutes.

Other Louisiana Statutes

The terms "willful," "wanton," reckless," and "gross negligence," or others very much like them, are found in two statutes outside the realm of the tort law: Louisiana Civil Code article 3556(13) and Louisiana Revised Statutes 14:12. These statutes and the jurisprudence interpreting them will be examined in an effort to determine what guidance, if any, they provide for understanding the troublesome terms at issue.

The definitional section of the Civil Code includes article 3556(13), which refers to the degrees of fault: "gross, slight, and very slight." The article defines "gross fault" as conduct that "[p]roceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud." 50 This article is peculiar because, unlike other definitions in that section of the code, no other articles utilize this language and therefore require a definition. But Sullivan v. Hartford Accident & Indemnity Co. 51 made reference to "gross fault" when defining the "reckless disregard for the safety of others" standard utilized in the emergency vehicle immunity statute. 52 With language typical of the confusion that accompanies these terms, the second circuit in Sullivan used "gross

49. Malone, supra note 47.
51. 155 So. 2d 432 (La. App. 2d Cir. 1963), writ denied, 245 La. 64, 156 So. 2d 604 (1963).
fault” to describe “reckless disregard,” and then clarified what “gross fault” involves with the statement that it “undoubtedly implies wanton or willful negligence.”

Criminal law legislation provides equally little guidance for courts applying a statute that utilizes these problem words. But the treatment of these terms by the criminal law at least suggests that courts should not attempt to draw fine distinctions between the particular words used in the statutes.

Criminal negligence is defined as the “gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.” The reporter’s comment to that statute indicates that the standard to be applied corresponds to the concept of “gross negligence” in tort law, referring to the Restatement of the Law of Torts § 500. Thus the Criminal Code provides that “gross negligence” is a “disregard of consequences” or “recklessness.” This statute is meant to require conduct that “calls for substantially more than the ordinary lack of care which may be the basis of tort liability and furnishes a more explicit statement of that lack of care which has been variously characterized in criminal statutes as ‘gross negligence’ and ‘reckless.’” These statements could be limited to criminal law but there are indications that the legislature has associated “gross negligence” with this definition. The intentional act exception to workers’ compensation employee immunity originally read “intentional or by gross negligence,” with the same “gross deviation” definition used in the criminal statute, but the version that was passed provided only the “intentional act” exception. Apparently, the legislators have assigned “gross negligence” the same meaning as the Restatement’s concept of “recklessness,” which includes gross negligence within its broad definition.

53. 155 So. 2d at 436.
55. La. R.S. 14:12, reporter’s comment (1986).

The definition of “Criminal Negligence” ... as requiring a “gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances” ... calls for substantially more than the ordinary lack of care which may be the basis of tort liability, and furnishes a more explicit statement of that lack of care which has been variously characterized in criminal statutes as “gross negligence” and “recklessness.”

Id. at 11.
58. Restatement (Second) of Torts § 500 (1966).
Common Law Authorities

Another source to which one might turn in attempting to develop an appropriate interpretative approach to such terms as “willful” and “wanton” is the jurisprudence of other jurisdictions. Those jurisdictions have for many years used these terms in guest passenger statutes and statutes authorizing punitive damages to define relevant standards of care. Because the terms have seen little use in Louisiana, it is likely that the Louisiana Legislature had this “common law” jurisprudence in mind when it employed the terms “willful,” “wanton,” and so on in the three types of statutes under consideration here. This creates other problems because there appear to be as many different definitions of these terms as there are statutes that use them.59

Common law courts and commentators use “willful, wanton and reckless” to describe a state of mind not present when an actor is merely negligent. Prosser and Keeton state that the terms, “according to taste as to the words used,” describe the conduct of an actor who “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 conscious indifference to the consequences.”60 The Restatement (Second) of Torts provides a similar definition, defining “reckless disregard of safety” as an act done “knowing or having reason to know of facts which would lead a reasonable man to realize . . . that such risk is substantially greater than that which is necessary to make his conduct negligent.”61

“Gross negligence” is synonymous with “recklessness” in some jurisdictions62 and is a distinct “level” of conduct in others,63 yet in

60. Prosser and Keeton, supra note 2, § 34, comment g at 213 (emphasis added).
61. The Restatement (Second) of Torts § 500 (1966).
62. Many states distinguish the conduct as two “levels,” but many do not, and define “gross negligence” in terms of “recklessness.” For example, Texas requires that the conduct, defined as “gross negligence,” exhibit “that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.” Missouri Pacific Railway Co. v. Shuford, 72 Tex. 165, 170, 10 S.W. 408, 411 (1888).
63. See Prosser and Keeton, supra note 2, § 34. Courts frequently use “degree” and “kind” distinctions to split negligence into three “levels”: ordinary negligence, gross negligence, (which differs from ordinary negligence only in degree) and “recklessness,” which differs from both ordinary and gross negligence in “kind.” “Gross negligence” is sometimes equated with the “last clear chance” doctrine, while “recklessness” is conduct that is more egregious. See, e.g., Thone v. Nicholson, 84 Mich. App. 538, 629 N.W.2d 665 (1978).
many instances the differences are merely semantic. For instance, what is frequently called "gross negligence" in one jurisdiction is actually the equivalent of "recklessness" in another. As "willful" misconduct represents a level of conduct more culpable than gross negligence in some jurisdictions, but is assigned a meaning indistinguishable from intent, while gross negligence is equated with "recklessness."
Obviously the label given to the conduct gives rise to much confusion. But despite the differences among the states regarding what courts and legislatures call the conduct, all courts must identify it. This task is accomplished by the use of a test that usually consists of several elements. One court admitted to the difficulties inherent in the application of these “tests,” but conceded that it knew of no alternative:

[T]here is no magical verbal formula which will describe with precision the difference between negligence and reckless conduct . . . [,] there [certainly] are differences in the gravity of the fault and the fact that the difference cannot be precisely stated should not preclude us from administering a scheme of liability which is based upon the seriousness of the actor’s misconduct.66

The elements of these tests typically include (1) the actor’s knowledge of the risk, (2) the magnitude of the risk, and (3) whether the actor is “conscious” of the risk he is exposing to others and therefore is “indifferent” to or acts in “conscious disregard” of the safety of others.67

Although the tests were formulated to help courts identify requisite conduct, they do little to guide the courts in practical application to current disputes. The knowledge of the risk element is used in conjunction with the “indifference” or “conscious disregard” element to distinguish the more culpable state of mind that has been said to accompany recklessness from ordinary negligence. Yet because the knowledge is inferred from the conduct, and presumed to accompany highly unreasonable conduct, the analysis is not of the actor’s state of mind at all but merely disguises the analysis that courts are really undertaking.68

The second element, that the risk is great, likewise provides little guidance. Language identifying this element commonly is that the risk is “probable as opposed to possible,”69 or that there exists a “clear and

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67. See Annotation, Test of Criterion of Gross Negligence or Other Misconduct that Will Support Recovery of Exemplary Damages for Bodily Injury or Death Unintentionally Inflicted, 98 A.L.R. 267 (1935).
68. Some tests require “constructive” knowledge of the specific peril that should have been avoided. DeElena v. Southern Pac. Co., 121 Ariz. 563, 592 P.2d 759 (1979); see also Boyce v. Pi Kappa Alpha Holding Corp., 476 F.2d 447 (5th Cir. 1973). In Pettingell v. Moede, 129 Ca. 484, 271 P.2d 1038 (1954), the court stated that knowledge can be inferred from surrounding facts and circumstances. The court in Williams v. Carr, 68 Cal. 2d 579, 68 Cal. Rptr. 305, 440 P.2d 505 (1968), stated that the knowledge can either be express or implied. See also Harper, infra note 81, questioning the knowledge requirement.
present danger.” The final element is the actor’s “conscious disregard” of a risk or “indifference” to whether the injury occurs, which is meant to distinguish “recklessness” from “intent” as well as from gross negligence. This element is present where the actor uses no care at all, exercises only slight care, or, in some cases, “fail[s] to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.”

The actor’s awareness of the risk should always be an important consideration, but the tests appear to require this consciousness when in fact the type of risk supplies the true focus. The actor’s consciousness could be satisfied by an actor who is actually aware of a great risk, should have been aware of a great risk but was not, or merely was negligent in failing to discover that it involved a great risk. These three situations could be used to identify different levels of culpability, but again the “greatness” of the risk remains the distinguishing feature. Courts should find little guidance by distinguishing conduct based upon an actor’s not knowing when he “should have known” of a risk, rather than not knowing when he was negligent in not discovering the risk. The actor’s awareness is an important factor only if he had actual awareness of the risk, but if he did not appreciate the risk the analysis then focuses on the degree of unreasonableness that the conduct represents. Yet even if the actor knew how unreasonable his conduct was, courts must examine the degree of that risk to determine if the conduct is sufficiently culpable to be called “reckless.”

Because the courts apply an external and objective standard, the nature of the conduct, which depends upon the quantum of unreason-
ableness of the risk, determines the actors' culpability. It should not make any difference whether the actor was "filled with anxious solicitude ... [or an] utter indifference to the probable danger to others." At least one court admitted to the reality of the "knowledge" standard, as

"It was necessary to move up the scale of fault where there could be found a distinguishing feature which could serve as a point of division in describing serious culpability and which could be used in testing the defendant's conduct in a particular case. That feature was the defendant's mental state—the fault that is associated with a consciousness of danger and an election to encounter it." The court further provided that the actor's mental state is not in truth a factor, but that it "seems to be enough to afford us with language which can serve as a rally point for judgment." The use of consciousness as a reference point disguises what courts are in fact doing—making policy judgements under particular circumstances. It is analogous to the labels and buzz words which have made proximate cause such an elusive concept and which when removed force judges to do their jobs more effectively. The analysis should be a balancing of the same factors which made the conduct negligent, and judges should be applauded for being overt in this analysis. The concern is not that defendants will fail to satisfy the "consciousness" requirement despite having exposed some highly unreasonable risk to others, for an

75. Consider this remark of Justice Oliver Wendell Holmes:

"The words malice, intent, and negligence refer to an external standard. If the manifest probability of harm is very great, and harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that it is done negligently; if there is no apparent danger, we call it mischance."

Holmes, Collected Legal Papers at 117-18 (1920).


78. Id. at 67.

79. The use of "tests" to identify "reckless" conduct disguises the court's analysis in the same way that vacuous "proximate cause" language has. The most distinctive aspect of the duty-risk technique is the highlight it casts upon the creative character of the decisionmaking process. The judge who resorts to the technique becomes more aware of the wide breadth of the innovative power he commands. This consciousness of the wide range of his discretion proves extremely helpful to the judge whenever he undertakes to probe the breadth of protection afforded by law. He soon realizes that he is largely out on his own.

examination of caselaw reveals few such cases. But by purporting to rely upon consciousness, courts might call conduct "reckless" without properly analyzing the risks posed by the actor.

The traditional approach to the identification of conduct sufficiently culpable under both types of statutes seems to emphasize the actor's consciousness as the source of the actor's culpability, yet courts are in fact examining the conduct of the particular actor, regardless of his state of mind.

A WAY OUT OF THE TWILIGHT ZONE: A PROPOSED INTERPRETATIVE APPROACH

The Proposal

As the analysis undertaken in the previous section reveals, neither the Louisiana statutes and jurisprudence nor the common law's treatment of "recklessness" provides much guidance for one who is interested in developing an intelligent interpretative approach to such terms as "willful" and "wanton." That analysis does show, however, that courts forced to interpret those terms will encounter two distinct problems. The proposal presented here will address each of them. The first problem is that although there are an unlimited number of "levels" of culpability, there are no reference points to help courts distinguish these levels with any consistency. Therefore, it would be preferable for courts to abandon the effort to make such subtle distinctions and to consider the terms "wanton," "reckless," and so on as interchangeable signals that the contemplated conduct falls somewhere in the broad range which extends from mere negligence to intentional torts. Second, the common law approach to the interpretation of the terms in question, which relies heavily upon "conscious disregard," either directs analysis away from those factors that should be of central concern—the nature of the actor's conduct, evaluated in terms of the magnitude of the risk, the utility of the conduct, and the cost of the avoidance—or masks, under barren doctrinal discourse, a covert analysis of those factors. The courts, therefore, should abandon or suppress tests based upon consciousness and instead engage in an overt analysis of the risk and utility associated with the actor's conduct. Below, each element of this proposal will be discussed in turn.

81. There are few cases in which an actor who is not "conscious" but is doing some highly unreasonable activity escapes liability under a "recklessness" theory because he does not exhibit a "reckless" state of mind. See, e.g., Harper, supra note 76, § 16.15, at 522.
The first element of this proposal requires that courts and practitioners accept that all tortious conduct can be placed on a scale of unreasonableness, comprised of ordinary negligence, a middle tier of recklessness, and intentional conduct. Intentional conduct includes actual desire and presumed desire or that which is substantially certain to result. Recklessness and ordinary negligence are located at the opposite end of the spectrum from intent, far enough away that they can be called a different kind of conduct, although really only different in degree. Recklessness represents a broad zone along this spectrum from conduct that is not substantially certain to result in specific consequences, to ordinary negligence. The application of these statutes requires that courts distinguish what is substantially certain from what is not, and conduct that is ordinary negligence from what is more than ordinary negligence. It is impossible to clearly define exactly what courts must identify when making these determinations, but at least there are only three levels that need to be distinguished. A statute that utilizes "wanton" or "reckless" merely signals a reference to this middle tier. The problems which face courts attempting to apply a "recklessness" statute are eased if the courts realize that the legislature has indicated that ordinary negligence is not sufficient under the particular statute, but that some form of aggravated misconduct will be required, regardless of the word assigned to it. All of the terms used in the statutes can be placed into one of three broad "tiers" located along a "spectrum" of unreasonable conduct:

"Intent Group": Terms in this category, which include "willful" and "deliberate," should be assigned the same meaning as "intentional."

"Reckless Group": This category represents that broad range of tortious conduct that makes up the middle ground between intentional tort and ordinary negligence. The terms that should be assigned to this group include "malicious," "reckless," "wanton," and "gross negligence."

82. The difference between "recklessness" and "intent" is not difficult to articulate, and because Louisiana has distinguished intentional torts for exclusion from workers' compensation, in addition to intentional act exclusions in insurance contracts, the definition provided is quite narrow, and modeled from the Restatement (Second) of Torts § 8A (1965) "intended or substantially certain" of the consequences of the act, and not intending the act itself. See e.g., Bazely v. Tortorich, 397 So. 2d 475 (La. 1981) and Pique v. Saia, 450 So. 2d 654 (La. 1984), adopting the Restatement (Second) of Torts § 8A (1965). But cf. Caudle v. Betts, 512 So. 2d 389 (La. 1987), possibly broadening the scope of what is meant by "intentional." Much of the confusion that surrounds descriptions of "recklessness" stems from a requirement that the actor must "intend" to do the act, and therefore has "intended" to breach the duty owed to the injured party, if the duty was obvious enough that a court can "presume" that the actor "knew" of the duty. This
"Negligence Group": This category designates conduct that falls short of the standard duty of reasonable care. The only terms included here is "negligence."

Once the language used in a statute can be identified as referring to one of these broad tiers of unreasonable conduct, the particular statute should be examined to provide additional guidance for movement up or down within each level of conduct. The simplicity of a three "tiered" scheme of conduct should provide courts the flexibility to overtly examine the nature of the risk without relying upon a vacuous "should have known" or "recklessly failed to discover" standard. The conduct represents a greater degree of unreasonableness based on the same inquiries that courts use when determining if conduct represents ordinary negligence. An actor who is guilty of ordinary negligence "should have known" not to engage in the conduct, and a "reckless" actor had even more reason to know. But because actual awareness is not required, what he "should have known" should be determined by reference to the same policy considerations as those that are applicable in a negligence analysis.

If a reference to this middle tier has been made by a statute's use of one of these "recklessness" terms, the court applying the statute must then examine the actor's conduct instead of relying upon his state of mind to distinguish the conduct from ordinary negligence. Just as negligence is determined by an analysis of the probability of harm, the severity of that harm, and the utility of the actor's conduct or the burden of not engaging in the particular act, 83 "recklessness" should not an analysis of knowledge, but of the type of activity that should have provided reasonable men with knowledge of the high degree of unreasonableness that their conduct posed to others. Many employees attempt to circumvent the "intentional act" exclusion to worker's compensation's exclusive remedy by alleging that conduct is "intentional" when it involves only the "intentional" violation of some safety regulation or other egregious conduct, but that clearly does not involve an "intent" to achieve consequences-injure an employee. See cases cited in Johnson, Developments in the Law 1980-81, Workers' Compensation, 42 La. L. Rev. 620 at 633-34 n.43 (1982). "Most of the cases presented facts which could have constituted 'gross negligence' (whatever that means) rather than 'intentional' acts in the traditional definition." Id. at 630. Louisiana's "intentional act" exception has withstood these attempts to place "gross negligence" outside of worker's compensation immunity, but Professor Johnson would also classify the conduct in Bazley as "basically an ordinary negligence case in which the court of appeal characterized the conduct as 'intentional.'" Id. at 630 n.36. Professor Johnson also provides that "substantial certainty" is not an alternative to intent, but a method of proving it. Id. at 633. Other states have defined similar "intentional" provisions to include "recklessness" because they involve conduct so unreasonable that although not "intended" in traditional sense, for policy reasons they should not be treated as accidents. See Note, Worker's Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct, 58 Notre Dame L. Rev. 890 (1983).

be subjected to the same analysis. "Recklessness," as opposed to mere negligence, should be found when one or more of these factors is exaggerated—the gravity of the conduct excessively outweighs the utility of the conduct (or the burden of not doing the activity) or the probability of injury is so great that it outweighs the utility of the conduct. Under this approach, the actor's actual knowledge of the risk remains highly relevant. As the actor's awareness of the risk of harm increases, the "cost" of avoiding the harm decreases.

In performing this negligence-type balancing analysis, courts should be careful not to place too much emphasis on any one factor. For example, the chance of an accident occurring because a driver is intoxicated is minimal, yet the social value is so low that courts should have little trouble calling it "reckless." In such a case, the proper inquiry is whether the cost, risk, and utility are such that the conduct is grossly out of line with what is expected of a reasonable man. However, the voluntary encounter of even a seriously unreasonable risk should not by itself constitute "reckless" conduct. For example, a driver who voluntarily drives at an excessive speed exposes to other drivers the risk of serious bodily injury, just as a driver who drinks before driving also "consciously" encounters a known risk. Yet neither driver should be called "reckless" by these facts alone. Instead, the magnitude of the particular risks and relative value of the conduct should be examined by the factfinder in each instance, without the reassurance of any test that must be satisfied before the conduct is called "reckless." Just as in a negligence analysis, the actor's knowledge of the risk is a factor that must be included in the analysis.

Application of the Proposal

The proposal developed in section three requires that a court identify the type of conduct described by a particular statute, that is, determine to which of the three tiers of misconduct the statute refers, and then, assuming that the middle tier is signaled, examine the cost of avoiding the harm, the severity and likelihood of the harm, and the social utility of the actor's conduct to determine whether the conduct reaches this intermediate zone. Critical in an analysis of social utility is a consideration of the legislative policies and purposes underlying the particular statute. This section will examine the three types of statutes at issue in light of the proposal developed above.

Immunity Statutes

Legislation includes four types of immunity statutes that provide an upper limit of applicable conduct. These statutes provide limited immunity to board members of nonprofit organizations,85 public entities and their officers,86 landowners who allow gratuitous access to their lands for recreational purposes,87 and certain other "volunteers," including providers of gratuitous emergency care,88 coaches and team physicians,89 and coconut throwers aboard Mardi Gras floats.90 Immunity is also provided to owners of "farm land and forest land" for torts against "unlawful entrants."91

When faced with a statute containing one of these problem words, courts should (1) determine which tier is described, and then (2) examine the actor's conduct. The court in Rushing v. State92 examined the language "deliberate and willful or malicious" and concluded that the use of "malicious" was a signal that the conduct must fall within the intermediate zone of conduct, defining "malicious" as an act done "spitefully or wantonly."93 This determination is in keeping with the policies underlying the statute.94 Once a level has been identified the conduct must then be examined in light of the presumed policies that the statute was designed to address. When performing an analysis of the risk and utility of the actor's conduct, one should consider the policy that is advanced by the statute in connection with the social utility of the conduct and the knowledge of the actor in connection with the cost of avoidance.

The policies promoted by statutes providing immunity to landowners who allow public access for recreational purposes are identified easily.

85. La. R.S. 9:2792-2792.2 and 2792.4 (Supp. 1988) (conduct must be in good faith and not "willful or wanton").
86. La. R.S. 9:2798.1 (Supp. 1988) (conduct must not be "acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct").
87. La. R.S. 9:2791 (1965) (requires "deliberate and willful or malicious injury"); La. R.S. 9:2795 (Supp. 1988) (requires "willful or malicious failure to warn").
88. La. R.S. 9:2793 (Supp. 1988) (requires that injury be done "intentionally or by grossly negligent acts").
89. La. R.S. 9:2798 (Supp. 1988) (requires "gross negligence").
90. La. R.S. 9:2796 (Supp. 1988) (requires a "deliberate and wanton act or gross negligence").
91. La. R.S. 9:2800.4 (Supp. 1988) (requires "gross negligence").
92. 381 So. 2d 1250 (La. App. 1st Cir. 1980). See supra text accompanying notes 34-37.
93. Id. at 1253.
94. See Note, Liability of Landowner to Persons Entering for Recreational Purposes, 1964 Wis. L. Rev. 705, 711 (1964) ("willful or malicious failure to warn" should describe gross negligence, but policies satisfied also with an "intentional" interpretation).
The presumed purpose of these statutes is to encourage public access to undeveloped land by relieving landowners of the duty generally owed at common law to licensees, which includes persons given express or implied permission to enter another’s property. This includes the duty to disclose any hazards on the land involving an unreasonable risk of harm if the licensee would have had no reason to know of the condition or appreciate its dangers. The recreational use statutes are therefore intended to relieve landowners of fear of liability in order to encourage the opening of undeveloped lands for recreational purposes and so should be aimed at providing landowners with immunity from the liability that they ordinarily encounter.

Another important element of the risk-utility analysis is the actor’s knowledge of the risks he has exposed to others. This element is critical because as the amount of knowledge possessed by the actor increases, the cost of avoiding the accident decreases. At some point the degree of unreasonableness becomes so exaggerated that the landowner's conduct goes beyond that which the legislature sought to protect through the statute. For example, if in Rushing catching frogs with a twelve foot metal “gig” beneath a low power line was a highly foreseeable activity, the determination that a failure to raise the line or post a warning was conduct that falls within the twilight zone should not depend entirely upon the actor's conscious disregard of the risk. Instead the burden of avoiding the accident decreases with the amount of knowledge, and the level of culpability increases.

Another statute protects public entities and their officers from liability for injuries arising out of discretionary acts, unless those acts can be described as “criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.” Despite the use of eight adjectives, the statute provides courts with little guidance. Most of the terms indicate an intent—fraudulent, intentional, and willful. But others describe the intermediate level of conduct—criminal, malicious, outrageous, reckless, and flagrant. The legislature clearly intended to require a showing of the intermediate level of conduct. The second part of the proposal examines the actor’s conduct. A factor which is critical in the determination of whether conduct is in the intermediate level is the policy that led to the passage of the statute in the first place. The policy that underlies the statute granting immunity to public entities and their officers is to provide such officers with a broad range of discretion in the exercise of their duties. Therefore, the statute leaves public officials

free to perform their duties quickly and efficiently, without fear of liability for breaching a duty of reasonable care. In light of the strong public policies underlying this statute courts should be sensitive to the need to leave public officials with this broad range of discretion. Arguably, then, the level of unreasonableness required before courts classify conduct as "reckless" under this statute should be high.

An analysis of the first element of the interpretative approach proposed here is not always necessary, however, for some statutes clearly describe conduct within the middle "zone." Providers of gratuitous emergency care, 97 farmers, 98 and certain state employees 99 are provided immunity unless their conduct is "intentional or gross[ly] negligent." This phrase shows clearly that conduct short of intentional, but more serious than merely negligent, behavior will be sufficient to remove the actor from the realm of liability provided by the statute. Determining what general level of tortious conduct is contemplated, however, is only the first step in the interpretation and application of the statutory language. In order to determine whether the actions of a particular defendant in fact amount to the prohibited middle tier conduct, the court, as has been noted, must give careful attention to the defendant's actual knowledge of the risk and to the degree of unreasonableness of the conduct, that is, the extent to which the social utility of the conduct is outweighed by its costs.

Consider, for example, the potential liability of a volunteer coach who forces his athletes to practice their sport in the middle of a busy street. Under Louisiana Revised Statutes 9:2798, volunteer coaches enjoy immunity from suit by their athletes unless their conduct amounts to "gross negligence." 100 With this statute, there is no question but that the level of tortious conduct contemplated is somewhere within the middle tier. The question then becomes whether the behavior of this particular coach falls within that middle tier, and so, gives rise to liability. First, the coach's state of mind must be considered. Reliance upon some doctrinal test that focuses upon the consciousness of the coach would really provide little guidance to the court in its task of classifying the coach's conduct, for under such tests an actor's consciousness of the risk is constructive, that is, it depends on what a reasonable person would have been aware of. But the actual knowledge of this coach would be extremely important in determining recklessness, regardless of what a reasonable coach would have known. The burden or cost of avoidance of the injury is extremely low when the actor has knowledge

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100. La. R.S. 9:2798 (Supp. 1988).
of the nature and seriousness of a particular risk. The risk-utility analysis should also include as a factor the strong policy represented by the statute—the encouragement of volunteer coaching. When placed within the analysis this strong policy might require a larger degree of risk or a lower cost of avoidance before the conduct is considered gross. Courts should pay particular attention to the impact upon potential volunteers when conduct is only slightly more serious than conduct which might be considered ordinary negligence.

The interpretative approach proposed here might also be profitably applied in construing Louisiana Revised Statute 9:2800.4, which extends to owners of farm and timber land immunity from suit by unlawful entrants unless the owners' conduct is "intentional" or "gross[ly] negligent." The first question, again, is what general level or levels of tortious conduct this language describes. The term "intentional" obviously refers to the first tier, while the term "gross negligence" presumably refers to something less serious. Beyond that, however, the term "gross negligence" cannot be defined with any greater precision; it merely signals that the legislature contemplated conduct falling somewhere on the broad range of misconduct that runs between ordinary negligence and intentional tort.

Having made this determination, the next question becomes whether the particular conduct at issue in the case at least satisfies the statute's middle tier standard. Once again, the inquiry requires an examination of the farm or timber landowner's knowledge of the condition that resulted in the harm. But the analysis cannot stop there. The court must also consider the degree of unreasonableness of the owner's act or failure to act. In making this determination, the court must of course be especially sensitive to the social utility of that act or failure to act and to the policies that underlie the grant of immunity to farm and timber landowners. The difficulty here is that it is not immediately apparent what legitimate social policies are advanced by this grant of immunity. That fact alone suggests that, in determining what level of misconduct by such landowners will amount to "gross negligence," the courts should err on the side of liability, that is, set the "gross negligence" standard only slightly above that of ordinary negligence.  

102. The absence of any clear justification for the grant of immunity to owners of farm and timber lands also raises the possibility that the statutes granting such immunity are constitutionally defective. A constitutional analysis is beyond the scope of this comment, but the argument should be similar to the equal protection arguments that have led to the repeal of automobile guest statutes in all but a few states. The rationale for those statutes is "hospitality protection," as the statutes apply to gratuitous guests, and preventing possible collusion between driver and guest at loss to insurer. Both of these
Solidary Liability

The legislature limited solidary liability to cases where actors "conspired" to commit an "intentional or willful act." The "willful act" provision could indicate an intent by the legislature to provide plaintiff with deep pockets recovery when conduct would not be considered intentional. As was discussed previously, many common law courts consider "willful" to be synonymous with "reckless." This would give courts great flexibility, enabling them to allow solidary liability for any conduct that reaches the intermediate level. However, the requirement that the actors conspire could indicate a meaning synonymous with intent. Because the legislature could have used many terms to indicate conduct that is not intentional, and included a requirement that the actors "conspire," courts should refrain from the temptation to assign "willful" a non-intentional meaning.

Exemplary Damages

Exemplary damages are authorized in Louisiana for only two types of conduct: conduct which involves a "wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication was a cause in fact of the resulting injuries" and conduct which involves a "wanton or reckless disregard for public safety in the storage, handling or transportation of hazardous or toxic substances." Many jurisdictions authorize punitive damages for any intentional or reckless conduct. Among those jurisdictions most require similar conduct, although the labels used to describe those standards differ widely and are a potential source of confusion.

Common law courts and commentators state that a "conscious indifference to harmful consequences" is necessary to satisfy the policies behind punitive or exemplary damages. Because punitive damages are meant to deter highly culpable conduct of the defendant as well as of other parties, and to punish this actor, "negligence," it is said, would not satisfy the policies behind punitive damages. Rather, there must

106. See Annotation, Test or Criterion of Gross Negligence or Other Misconduct that will Support Recovery of Exemplary Damages for Bodily Injury or Death Unintentionally Inflicted, 98 A.L.R. 267, 268 (1935).
107. Id.
exist some positive element of conscious wrongdoing, either by showing that the defendant acted with evil intent or that he was so wanton or reckless as to disclose a conscious disregard of the rights of others.\textsuperscript{110} But because courts do not require actual knowledge of the unreasonable risk the actor has chosen to expose to others, the vacuous language of these tests really only disguises what courts must determine—whether this defendant’s conduct represents such a “gross deviation” from acceptable conduct that the conduct demands the serious consequences of exemplary damages.

Unfortunately, the Louisiana courts that have so far considered the exemplary damages statutes have shown no desire to part with these common law tests. The court in \textit{Myres v. Nunsett} stated that intoxication by itself satisfies the requirements of “recklessness” under the tests that most jurisdictions apply to the award of punitive damages, but then proceeded to limit its analysis to cause in fact.\textsuperscript{111} Likewise the court in \textit{Levet v. Calais & Sons, Inc.}\textsuperscript{112} provides no significant guidance. There the court stated that “it need not be shown that he [the driver] was drunk, but only that he had a sufficient quantity of intoxicants to make him lose normal control of his mental and physical faculties.”\textsuperscript{113} This test-based approach, as it is submitted, is inadequate. Instead of relying upon such broad statements courts should examine the conduct to determine if it represents extremely unreasonable conduct.

The court should overtly examine the degree of unreasonableness of the actor’s conduct rather than rely upon the “conscious disregard” test used by the common law. To do this, the court must carefully consider the utility of the conduct, the magnitude of the risk, and the cost of avoidance. Relevant to this last factor, and of particular significance in the exemplary damages context, is the actor’s knowledge of risk. For example, the consumption of a small amount of alcohol before driving might not by itself be considered reckless, but if the actor knew of his tendency to fall asleep even after consuming even small doses of alcohol, then the evaluation of the burden of avoiding the accident would be significantly affected. As the knowledge of a possible accident increases, the burden of avoiding the accident decreases.

\textbf{Conclusion}

Whenever a court is faced with a statute that employs such terms as “willful,” “wanton,” “reckless,” or “gross negligence,” it should

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\textsuperscript{110} Id. \\
\textsuperscript{111} 511 So. 2d 1287, 1289 (La. App. 2d Cir. 1987). See supra text accompanying notes 46-49. \\
\textsuperscript{112} 514 So. 2d 153 (La. App. 5th Cir. 1987). See supra text accompanying notes 42-45. \\
\textsuperscript{113} 514 So. 2d at 159. 
\end{tabular}
be careful not to place too much significance on these terms. The court certainly should avoid efforts to assign these and other terms determinate ranks on the scale of tortious conduct, for such efforts are bound to end in frustration and confusion. At best these expressions are useful only in determining into which of the three basic divisions, or tiers, of misconduct the action contemplated by the legislature falls: (1) intentional torts, (2) ordinary negligence, or (3) the broad range in between. Often, which of these three levels the term signals will be clear. For example, the phrase "intentional or willful" usually suggests a requirement that there be an intent to injure, while such terms as "wanton" and "reckless" ordinarily point to the intermediate level of misconduct. In other cases, however, the level intended by the legislature will not be clear. The court must then give special attention to the history and purposes of the legislation in determining what general level of misconduct was contemplated.

If the court determines that the terms used signal the intermediate tier of misconduct, as will usually be the case, it should then proceed to consider whether the defendant's conduct is grossly in excess of what is expected of reasonable men. In order to make this determination, the court must undertake a negligence-type balancing analysis, an analysis that focuses on the social utility of the actor's conduct, the magnitude of the risk, and the cost of avoiding the harm. Just as the court would identify negligence without the use of any formal "test" that indicates whether conduct is unreasonable, it should not rely on some abstract reference point, such as the actor's "consciousness of" or "indifference to" a risk in identifying "reckless" behavior. Such a standard provides little guidance and only clouds the analysis that should be performed.

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