

5-1-1987

## A Sobering Ride Home: Obremski v. Henderson

Frank M. Calvert

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

---

### Suggested Citation

Frank M. Calvert, Note, A Sobering Ride Home: Obremski v. Henderson, 7 N. Ill. U. L. Rev. 279 (1987).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact [jschumacher@niu.edu](mailto:jschumacher@niu.edu).

## CASENOTE

# A Sobering Ride Home: *Obremski v. Henderson*

### I. INTRODUCTION

A woman and three children dressed in black peer down at the camera in a new television commercial. There is no narrator's voice, no explanations. The camera slowly descends into a narrow and deep space, whose walls grow larger while the family continues to look sorrowfully into the camera. Suddenly, the viewers realize they are looking up at the family from the bottom of a grave. A disembodied TV voice begins talking about drinking and how to prevent your family from looking down into a similar grave.<sup>1</sup>

This powerful and melodramatic message is but one sign of the nation's vibrant response in recent years to the destruction of life and property caused by intoxicated drivers.<sup>2</sup> The response suggests a major change in society's attitude toward alcohol. There is evidence that the American public is re-examining its drinking practices and questioning the nation's values and behaviors concerning the use, and abuse, of alcohol.<sup>3</sup>

---

1. McNulty, *Alcoholism Treatment Has Abuses Of Its Own*, Chicago Tribune, Nov. 21, 1986, at 1, col. 2. The author graphically describes a nationally televised commercial which depicts the dangers of alcohol.

2. Intoxication has been defined as when "an individual does not have the normal use of his physical or mental facilities, thus rendering him incapable of acting in the manner in which an ordinary prudent and cautious man, in full possession of his faculties, using reasonable care, would act under like circumstances." BLACK'S LAW DICTIONARY 738 (5th ed. 1979).

For the purpose of this Note, a drunk driver may be defined as one who is intoxicated to the extent that their blood-alcohol level is sufficient to warrant their arrest in the jurisdiction where the accident occurred. Normally, a blood-alcohol concentration (BAC) level of .10% is sufficient. See, e.g., IND. CODE ANN. § 9-11-1-7 (West Supp. 1986); ILL. REV. STAT. ch. 95 1/2, § 11-501 (1985); WIS. STAT. ANN. § 346.63 (West Supp. 1986).

3. A considerable amount of attention has been focused in recent years on drunk driving. This is largely due to the efforts of such anti-drunk organizations as Mothers Against Drunk Driving (MADD), Students Against Drunk Driving (SADD), Citizens for Safe Drivers Against Drunk Driving (CSD), Remove Intoxicated Drivers (RID), and Boost Alcohol Consciousness Concerning the Health of University

It seems to happen every day of every year: hundreds of thousands of Americans drink alcoholic beverages and then slip behind the wheel of a motor vehicle. Study after study has established the direct correlation between driving while intoxicated and the occurrence of traffic accidents, with resulting property damage and possible personal injury or death to both the drunk driver and innocent victims.<sup>4</sup> Intoxicated drivers cause over fifty percent of all traffic deaths, nearly 670,000 serious injuries and some 1,200,000 alcohol-related property damage accidents each year.<sup>5</sup> As reported by the Governor's Task Force to Reduce Drunk Driving, 223 Indiana citizens died in alcohol-involved accidents in 1984, and more than 8,200 citizens were injured.<sup>6</sup> This resulted in about 23 injuries each day.<sup>7</sup>

---

Students (BACCHUS). All of these groups are spokesmen for the "If you drink, don't drive" message.

The issue of drunk driving received national attention in 1982 with the establishment of the Presidential Commission on Drunk Driving and the enactment of legislation providing incentive grants to states "which adopt and implement effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol." (Added by Pub. L. No. 97-364, title I, § 101(a), Oct. 25, 1982, 96 Stat. 1738, current version at 23 U.S.C. § 408 (1985)). See *The New Hope of Solution: Presidential Commission on Drunk Driving, Final Report* (Nov. 1985).

4. See *Burg v. Municipal Court for Santa Clara Judicial District*, 35 Cal. 3d 257, 673 P.2d 732, 198 Cal. Rptr. 145 (1983), cert. denied, 466 U.S. 967 (1984). The court noted that the United States Department of Transportation reported traffic deaths in the United States exceed 50,000 annually, and almost one-half of those fatalities are alcohol-related. *Burg*, 673 P.2d at 734, 198 Cal. Rptr. at 146.

See also *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979). The court quoted the Secretary of the U.S. Dept. of Health, Education and Welfare from the Third Special Report to the U.S. Congress on Alcohol and Health (1978): "Traffic accidents are the greatest cause of violent death in the United States, and approximately one-third of the ensuing injuries and one-half of the fatalities are alcohol related." *Taylor*, 598 P.2d at 858, 157 Cal. Rptr. at 698.

As observed in *Breithaupt v. Abram*, 352 U.S. 432 (1957), "the increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." *Id.* at 439.

5. *National Minimum Drinking Age: Hearings on S. 98-1155 Before the Subcomm. on Alcoholism and Drug Abuse of the Senate Comm. on Labor and Human Resources*, 98th Cong., 2nd Sess. 9-10 (1984) (testimony of Jim Burnett, Chairman, Nat. Trans. Safety Bd., regarding the continuance of drunk driving despite increased legislative and counter measure activity). See also *Measures to Combat Drunk Driving: Hearings on S. 98-917 Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, Science and Transp.*, 98th Cong., 2nd Sess. 1 (1984).

6. *The Governor's Task Force to Reduce Drunk Driving: Indiana Drunk Driving Fact Sheet* (1985).

7. *Id.* These statistics have not gone unnoticed by the Indiana Supreme Court.

As a result of the high incidence of alcohol-related automobile collisions, many legislatures are taking greater steps to protect the public.<sup>8</sup> Most commonly, these steps involve an increase in public awareness programs, modification of law enforcement techniques to facilitate the apprehension of drinking drivers, and increasingly severe criminal sanctions against those convicted of driving while intoxicated.<sup>9</sup> In addition, a growing number of courts are now permitting the recovery of exemplary damages in civil actions brought against the intoxicated driver.<sup>10</sup> It is the expansion of civil liability with which this article deals.

---

In *Williams v. Crist*, 484 N.E.2d 576 (Ind. 1985), the court noted that the "drunken driver is a major source of property damage and personal injury in the United States today. The drunken driver kills more citizens each year than any other group of criminals." *Id.* at 578.

8. Many states are reacting to the increase in alcohol-related automobile accidents by increasing fines, lengthening sentences and revoking driver's licenses. Winter, *States Get Tougher on Drunk Drivers*, 68 A.B.A. J. 140 (1982); Misner, *Severe Penalties for Driving Offenses: A Deterrence Analysis*, 1975 ARIZ. ST. L.J. 677.

9. See generally *The New Hope of Solution: Presidential Commission on Drunk Driving, Final Report* (Nov. 1983). Recommendations include: programs to increase public awareness of the danger of drunk driving; increased training of police and prosecutors; use of roadblocks; elimination of plea bargaining; mandatory sentencing; and increased availability of rehabilitation programs.

As an example of increased criminal sanctions, the Indiana legislature enacted reform measures that became effective in September of 1983:

Operating a vehicle while intoxicated is now a Class A misdemeanor, bringing a penalty of up to one year and a fine of up to \$5000. Previously, the penalty was five days to six months, and/or a fine of \$25 to \$500. IND. CODE ANN. § 9-11-2-2 (West Supp. 1986), as added by Pub. L. No. 143-1983, § 1; IND. CODE ANN. § 35-50-3-2 (West 1986).

A repeat offender commits a Class D felony with a prison term of one to four years and a fine of up to \$10,000. Formerly, a second conviction resulted in a term of five days to one year, and a fine of \$250 to \$1000. IND. CODE ANN. § 9-11-2-3 (West Supp. 1986), as added by Pub. L. No. 143-1983, § 1; IND. CODE ANN. § 35-5-2-7 (West 1986).

10. 22 AM. JUR. 2D *Damages* § 238 (1965). See also Annot., 65 A.L.R.3d 656 (1975). See e.g., Illinois: *Madison v. Wigal*, 18 Ill. App. 564, 153 N.E.2d 90 (1958) (the assessment of punitive damages against an intoxicated driver is proper); Iowa: *Sebastian v. Wood*, 246 Iowa 94, 66 N.W.2d 841 (1954) (exemplary damages were awarded when defendant drove his automobile while intoxicated); Wisconsin: *Ayala v. Farmers Mut. Auto. Ins. Co.*, 272 Wis. 629, 76 N.W.2d 563 (1956) (the assessment of exemplary damages was allowed for gross negligence in driving while intoxicated).

"Exemplary" and "punitive" are terms most commonly applied to this class

This Note will discuss the development of exemplary damages by focusing on the Indiana decision of *Obremski v. Henderson*,<sup>11</sup> which for the first time extended the award of treble damages and attorney fees against an intoxicated driver who caused property damage in an automobile collision.<sup>12</sup> The majority's decision in *Obremski* has, in recognizing the similar aims of the criminal mischief and civil recovery statutes, made it more practical to bring civil suits for moderate property damage claims.<sup>13</sup>

## II. HISTORY OF EXEMPLARY DAMAGES

Exemplary damages are money damages awarded in civil actions beyond what is needed to compensate the plaintiff for the harm inflicted by the defendant.<sup>14</sup> The concept originated under English law, not as a separate and recognized element of damage, but rather as an attempt by English courts to justify jury money awards in excess of the plaintiff's actual loss.<sup>15</sup> Exemplary damages were later used when damages awarded in tort at common law became restricted to the pecuniary loss and did not include such elements as mental suffering, injury to reputation, and humiliation.<sup>16</sup>

In the early case of *Stuart v. Western Union Tel. Co.*,<sup>17</sup> the plaintiff sought damages for mental anguish suffered when the telegraph company failed to deliver a message as to a family death. In

---

of money damages in excess of the plaintiff's actual loss. Throughout this Note, these damages will be referred to as exemplary damages.

Exemplary damages are distinguished from compensatory damages in that an award of the latter is merely intended to make the plaintiff whole, replacing the loss caused by the wrong or injury. Exemplary damages transcend actual damages and are inflicted not because of any special merit in the injured party's case, but rather to punish the defendant and to make an example for similar wrongdoers. See W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 2 (5th ed. 1984).

11. 487 N.E.2d 827 (Ind. App.), *aff'd*, 497 N.E.2d 909 (Ind. 1986).

12. *Obremski v. Henderson*, 497 N.E.2d 909, 911.

13. *Auto Accidents: Drunk Driving*, 29 ATLA L. REP. 441 (Dec. 1986).

14. See Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517-518-19 (1967).

15. *Id.* The case generally cited as establishing the theory of exemplary damages is *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763). In *Huckle*, Lord Camden upheld a large money jury award despite the fact that plaintiff's actual damages were only slight. The court reasoned that the defendant's onerous conduct gave the jury ample justification to award exemplary damages. *Id.* at 769.

16. See Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 15 (1982); Note, *Punitive Damages for Crime Victims: New Possibilities for Recovery in Indiana*, 18 IND. L. REV. 655, 655 (1985).

17. 66 Tex. 580, 18 S.W. 351 (1855).

holding that the injury was compensable, the court stated that the consistent failure to recognize that such injuries as mental anguish could enter into an assessment of compensatory damages, has forced the creation of a new source of damages for these injuries - the doctrine of exemplary damages.<sup>18</sup>

During the 19th century, there was a shift in the underlying theory of exemplary damages from compensation to punishment and deterrence.<sup>19</sup> A majority of the states now impose exemplary damages with the intent of punishing the wrongdoer.<sup>20</sup> Commentators, however, have expressed doubts as to the appropriateness of using exemplary damages in this manner.<sup>21</sup> Exemplary damages, as a form of punishment, have been challenged as an effective imposition of double jeopardy.<sup>22</sup> Indiana sustained this argument and refused to award exemplary damages when the defendant was also subject to criminal sanctions.<sup>23</sup>

Thereafter, Indiana carved out various exceptions to this theory. Initially, exemplary damages were allowed in a civil action provided the statute of limitations had run as to any criminal prosecution arising out of the same conduct.<sup>24</sup> Indiana later enacted a treble damage statute which provided that a person, suffering a pecuniary loss occasioned by a violation of specific criminal statutes, could bring

---

18. *Id.* at 580, 18 S.W. at 351. See also *Reese v. Western Union Tel. Co.*, 193 Ind. 294, 24 N.E. 163 (1890).

19. Ellis, *supra* note 16, at 3.

20. See *supra* note 10.

21. See, e.g., Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431, 434 (1976). The author states that the award of exemplary damages is "contrary to the purposes of civil law, which is intended to be compensatory, as distinct from criminal law, in which punishment is a traditional function."

22. As early as 1851, the doctrine of punitive damages was challenged unsuccessfully as unconstitutional. See *Day v. Worth*, 54 U.S. (13 How.) 363, 370-71 (1851). Since such damages serve a purpose so similar to that of the criminal law, that of punishment, it has been argued that the civil defendant, facing possible exemplary damages, should be granted the procedural due process guarantees afforded one accused on criminal conduct.

23. *Tabor v. Hutson*, 5 Ind. 322 (1854); *Koerner v. Oberly*, 56 Ind. 284 (1877); In 1978, the court in *Glissman v. Kutt*, 175 Ind. App. 493, 372 N.E.2d 1188 (1978), reaffirmed the rule first announced by the Indiana Supreme Court in *Taber*. The court found that it would be "contrary to the basic concerns of punitive damages . . . [to] permit both criminal prosecution and the sanction of punitive damages where the defendant's conduct merely exhibits a 'heedless disregard of the consequences' to his victim." *Glissman*, 372 N.E.2d at 1191.

24. *Cohen v. Peoples*, 140 Ind. App. 353, 220 N.E.2d 665 (1966) (where punitive damages were allowed providing the statute of limitations had run on the assault and battery charge).

a claim for an amount equal to three times his actual damages.<sup>25</sup> Then in 1984, Indiana enacted a new recovery statute, reversing a long standing precedent that a defendant subject to criminal prosecution could not be subject to a punitive damages suit.<sup>26</sup> The Indiana legislature's decision to allow the recovery of punitive damages, a position taken by a prevailing number of states,<sup>27</sup> will increase the plaintiffs' opportunities for the recovery of damages.<sup>28</sup> Plaintiffs now have a choice between a claim for punitive or treble damages.

The operation of a motor vehicle while voluntarily intoxicated presents a good example of the type of conduct for which exemplary damages would be awarded: "Conduct which the defendant knows, or should have reason to know, not only creates an unreasonable risk of harm but a strong probability that the harm will result, yet as to which the defendant proceeds in reckless or conscious disregard of the consequences."<sup>29</sup>

Some jurisdictions view driving while intoxicated as sufficient in itself to warrant the imposition of exemplary damages.<sup>30</sup> An emphasis is placed on the fact that the defendant knew, or should have known, that his consumption of alcohol would seriously effect his ability to drive, and that this impaired ability would pose a danger to those persons the defendant would encounter on the highway.<sup>31</sup> Thus, the

25. See *infra* note 36. An amount "equal to" has been amended to read an amount "not to exceed" three times the actual damages (Act of Feb. 29, 1984, Pub. L. No. 172 § 1, 1984 Ind. Acts 1462, amending IND. CODE § 34-4-30-1 (1982)).

26. Act of Feb. 29, 1984, Pub. L. No. 172, § 1, 1984 Ind. Acts 1462 (codified at IND. CODE ANN. § 34-4-30-2 (West Supp. 1986)):

It is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action. However, a person may not recover both:

- (1) punitive damages; and
- (2) the amounts provided for under [treble damages,] section 1 of this chapter.

27. See Note, *Punitive Damages in Drunk Driving Cases: A Call for a Strict Standard and Legislative Action*, 19 SUFFOLK U.L. REV. 607, 615-16 (Fall 1985) (citing cases from 32 states); See also *supra* note 10.

28. See Note, *Punitive Damages for Crime Victims: New Possibilities for Recovery in Indiana*, 18 IND. L. REV. 655, 656 (1985).

29. J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW & PRACTICE § 5.03, at 15 (1986).

30. W. PROSSER & W. KEETON, *supra* note 10, § 2, at 9-10.

31. See, e.g., *Taylor v. Superior Court of Los Angeles*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (where defendants display a conscious disregard for safety of others when they voluntarily consume alcohol to the point of intoxication knowing they will be driving); *Ingram v. Pepit*, 340 So.2d 922 (Fla. 1976) (where

defendant's choice to drink to the point of intoxication, knowing he must later operate a motor vehicle, is viewed as sufficiently reckless conduct to justify the award of exemplary damages.

Other jurisdictions, however, have held that the mere proof that the defendant operated a motor vehicle after voluntary intoxication, standing alone, would not justify the imposition of exemplary damages.<sup>32</sup> Evidence of intoxication may be offered to show the negligence of the driver, but in the absence of other evidence justifying the award of exemplary damages, it may not be used to enlarge the award of damages beyond that necessary to compensate the plaintiff.<sup>33</sup>

One principal use of exemplary damages has been for the punishment of wrongs that would otherwise rarely be prosecuted.<sup>34</sup> Exemplary damages are well suited for those wrongs which are theoretically punishable, but which actually go unnoticed or are ignored by prosecutors preoccupied with more serious or lucrative claims.<sup>35</sup> The Indiana legislature, in enacting Ind. Code § 34-4-30-1, has provided an incentive to bring suit in nominal damage cases.<sup>36</sup>

---

individuals who voluntarily drive while intoxicated display, without more, a sufficiently reckless attitude); *Allers v. Willis*, 197 Mont. 499, 643 P.2d 592 (1982) (where individuals who voluntarily drink to a point of intoxication knowing they will be driving are liable for punitive damages); *Svejcara v. Whitman*, 82 N.M. 739, 487 P.2d 167 (1971) (where intoxication alone is sufficient to find willful and wanton conduct).

32. W. PROSSER & W. KEETON, *supra* note 10, § 2, at 9-10.

33. *See, e.g., Baker v. Marcus*, 201 Va. 905, 114 S.E.2d 617 (1960) (where absent proof of misconduct, other than just intoxication, exemplary damages will not be awarded); *Ayala v. Farmer's Mut. Auto. Ins. Co.*, 272 Wis. 629, 76 N.W. 2d 563 (1956) (where intoxication alone does not constitute gross negligence); *Focht v. Rabada*, 217 Pa. Super. 35, 268 A.2d 157 (1970) (where driving while intoxicated may under certain circumstances be deemed outrageous); *Harrel v. Ames*, 265 Or. 183, 508 P.2d 211 (1973) (where driving while under the influence is not by itself a sufficient basis for exemplary damages).

34. While it may be argued that the large compensatory awards that many drunk drivers may be held liable for a sufficient incentive alone, there could be instances where actual damages are minimal, and in those instances exemplary damages would prove a viable incentive. W. PROSSER & W. KEETON, *supra* note 10, § 2, at 11-12.

35. *Id.* *See also* Comment, *Punitive Damages and the Drunken Driver*, 8 PEPPERDINE L. REV. 117, 129 (1980).

36. IND. CODE ANN. § 34-4-30-1 (West Supp. 1986). The statute provides that: If a person suffers a pecuniary loss as a result of a violation of I.C. § 35-43 [§§ 35-43-1-1 to 35-43-5-5] he may bring a civil action against the person who caused the loss for:

- (1) An amount not to exceed three (3) times his actual damages;
- (2) The cost of the action; and



Until recently, property damage as a result of drunk driving was not as diligently prosecuted as accidents involving serious injury or death.<sup>37</sup> However, *Obremski v. Henderson*<sup>38</sup> should now provide a would-be plaintiff with an incentive to bring suit for the recovery of only nominal property damage. What was once an insignificant accident may now result in serious financial punishment to a drunk driver.

### III. OBREMSKI V. HENDERSON

#### A. FACTS OF THE CASE

The plaintiff, Russell Obremski, brought this action against the defendant, Charles Henderson, seeking to recover for property damage alleged to have resulted from an automobile accident.<sup>39</sup> The plaintiff charged that the collision, and the resulting damage to his car, was the proximate result of the defendant's negligence and carelessness, and, in addition, alleged the extreme intoxication of the defendant.<sup>40</sup>

Obremski was driving his car on the evening of April 14, 1983, in the city of New Albany, Indiana, when he observed the Henderson car traveling toward him in his lane.<sup>41</sup> Obremski reportedly blew his horn several times and proceeded to stop.<sup>42</sup> The Henderson car failed to stop or return to its own lane and the resulting collision caused damages of approximately \$2,900.00 to Obremski's car.<sup>43</sup> At the time

---

(3) A reasonable attorney's fee.

See *American Leasing, Inc. v. Maple*, (Ind. App. 1980) (where a check was given in payment of an account and the check was subsequently dishonored); *Lemert Eng'g Co. v. Monroe Auto Equip. Co.*, 444 N.E.2d 859 (Ind. App. 1983) (where a postdated check was twice dishonored); *McMahon Food Co. v. Call*, 406 N.E. 2d 1206 (Ind. App. 1980) (where court reversed the trial court's refusal to award treble damages resulting from dishonored checks).

37. See generally Note, *Punitive Damages from Crime Victims: New Possibilities for Recovery in Indiana*, 18 IND. L. REV. 655 (1985).

38. 487 N.E.2d 827 (Ind. App.), *aff'd*, 497 N.E.2d 909 (Ind. 1986).

39. Brief for Appellee at 3, *Obremski v. Henderson*, 487 N.E.2d 827 (Ind. App.), *aff'd*, 497 N.E.2d 909 (Ind. 1986).

40. *Obremski*, 497 N.E.2d at 910.

41. Brief for Appellant at 7, *Obremski v. Henderson*, 487 N.E.2d 827 (Ind. App.), *aff'd*, 497 N.E.2d 909 (Ind. 1986).

42. *Id.*

43. Brief for Appellee, *supra* note 39, at 3.

of the accident, Henderson was reported to be intoxicated.<sup>44</sup>

Obremski's complaint alleged that the collision was caused by Henderson's negligent driving while very intoxicated, and sought damages for the estimated cost of repairs to his car.<sup>45</sup> Also, by reason of Henderson's intoxication, Obremski asserted that he was entitled to treble damages and attorney fees pursuant to § 34 of the Indiana Code,<sup>46</sup> on the grounds that Henderson's alleged acts constituted criminal mischief.<sup>47</sup>

The trial court granted Henderson's motion to dismiss the criminal mischief complaint,<sup>48</sup> for failure to state a claim upon which relief may be granted.<sup>49</sup> The Court of Appeals reversed the trial court's judgment, stating that proof of a driver's intoxication at the time of a collision allows a trier of fact to infer that the driver was acting "recklessly," thereby permitting the recovery of treble damages and attorney fees.<sup>50</sup> Henderson's petition for rehearing was denied.<sup>51</sup> The Indiana Supreme Court granted Henderson's petition to transfer the cause for review as a certified question.<sup>52</sup>

## B. ANALYSIS

### 1. *Obremski I: Indiana Court of Appeals*

Before entering into an analysis of the Indiana Supreme Court's decision it is necessary to first discuss the holding of the state appellate court. The Indiana Court of Appeals reasoned that proof of a driver's intoxication at the time of the collision would allow the inference that

---

44. Police Report No. 18-18044, New Albany Police Depart., New Albany, Indiana (Aug. 14, 1983).

It should be noted that the police report was not admissible into evidence. The trial court struck certain language of the complaint which originally made reference to statements in the police report regarding the intoxicated condition of the defendant.

45. *Obremski*, 497 N.E.2d at 910.

46. *See supra* note 36.

47. IND. CODE ANN. § 35-43-1-2(a)(1) (West 1986). Criminal mischief is committed when a person "recklessly, knowingly, or intentionally damages property of another without his consent."

48. *Obremski*, 497 N.E.2d at 910.

49. FED. R. CIV. P. 12(B)(6). The defendant did not amend his complaint as of right pursuant to Trial Rule 12 (B), but instead waived his right to amend the Order of Dismissal of count two so as to make the same a final appealable order and judgment pursuant to FED. R. CIV. P. 54(B).

50. *Obremski*, 487 N.E.2d at 828.

51. *Id.* at 827.

52. *Obremski*, 497 N.E.2d at 909.

the driver was acting recklessly, and thereby permit the recovery of treble damages caused by criminal mischief.<sup>53</sup> The Court of Appeals concluded that driving while intoxicated is "reckless per se."<sup>54</sup> This questionable approach is the result of the court's interpretation of the decision in *Williams v. Crist*.<sup>55</sup>

*Williams v. Crist*, an Indiana Supreme Court plurality opinion, held that evidence of driving while intoxicated was sufficient to establish willful and wanton misconduct per se.<sup>56</sup> The plurality opinion of the five justice court overruled prior precedent which held that before intoxication could be characterized as willful and wanton conduct under the guest statute, it must be accompanied with some other misconduct.<sup>57</sup> The concurring opinion, however, written by Justice Shepard in which Justice DeBruler concurred, established the same result based upon sufficient evidence of misconduct and stated that it would not overrule the prior authorities.<sup>58</sup> Justice Prentice

---

53. *Obremski*, 487 N.E.2d at 828.

54. *Id.* at 830.

55. 484 N.E.2d 576 (Ind. 1985). The facts of *Williams* indicate that Williams, the driver, had recently consumed five beers, a shot of bourbon and a mixed drink. While driving on a busy street, he made a wrong turn. Williams chose to correct his mistake by recrossing the highway, however he did not stop at the intersection. The resulting collision caused personal injuries to one of his passengers. A personal injury action was brought under the Indiana guest statute. *Williams*, 484 N.E.2d at 577.

56. *Williams*, 484 N.E.2d at 578.

57. *Roberts v. Chaney*, 465 N.E.2d 1154 (Ind. App. 1984). In *Roberts* the facts indicated no willful and wanton misconduct on the part of the driver, who drove off the road after falling asleep, striking a utility pole and injuring a passenger. Although Chaney had been drinking there was no evidence showing intoxication. The court stated that even if there had been evidence of intoxication, in the absence of any evidence of abnormal behavior by the driver either before or after the accident, or of evidence of excessive speed or unusual driving maneuvers, there was no willful and wanton misconduct. *Roberts*, 465 N.E.2d at 1155.

See also *Andert v. Fuchs*, 271 Ind. 627, 394 N.E.2d 931 (1979). The court, in *Andert*, held that although the motorist was driving on a snowy night while intoxicated, he was driving at a reduced speed and obeying all traffic laws. The fact that the accident occurred when the vehicle unexpectedly went out of control demonstrated that he was not guilty of the wanton and willful conduct required for recovery under the guest statute. *Andert*, 394 N.E.2d at 932.

In *Keck v. Kerbs*, 182 Ind. App. 530, 395 N.E.2d 845 (1979), the court used a combination of factors to possibly indicate wanton and willful misconduct. Evidence of alcohol consumption shortly before the accident, under-age drinking, excessive speed, and the police officer's observations at the scene of the accident were sufficient to raise at least a factual question as to wanton misconduct. *Keck*, 395 N.E.2d at 846.

58. *Williams*, 484 N.E.2d at 579.

dissented as to the result, as well as to the overruling of prior precedent.<sup>59</sup>

The Court of Appeals in *Obremski I* recognized the questionable precedential value of *Williams*, but nevertheless chose to follow the ideals expressed by the plurality opinion.<sup>60</sup> The appeals court found that there was no difference between the definition of willful and wanton conduct and reckless conduct; both willful and wanton behavior and reckless behavior imply the same disregard for the safety of another.<sup>61</sup> Therefore, relying upon *Williams*, the appeals court in *Obremski I* concluded that "if driving while intoxicated is willful and wanton per se, it is also reckless per se."<sup>62</sup>

## 2. *Obremski II: Indiana Supreme Court*

The essential question posed to the Indiana Supreme Court was whether an intoxicated driver, who causes a collision as a result of deficient driving, could be held liable through his reckless conduct for treble damages and attorney fees.<sup>63</sup> The majority answered this question affirmatively, holding that a case of criminal mischief could be made out by proof that the collision and the resulting property damage was caused by the reckless driving of an intoxicated driver.<sup>64</sup> The Indiana Supreme Court upheld the reversal of the trial court's dismissal of the criminal mischief complaint, but declined to follow the Indiana Court of Appeals' reasoning, instead finding that driving while intoxicated was not reckless per se.<sup>65</sup>

The Indiana Supreme Court began its analysis of *Obremski II* by examining the special legislative provisions allowing civil action recovery of property loss caused by a criminal act.<sup>66</sup> Among the offenses which would fall into this category is criminal mischief.<sup>67</sup> Criminal mischief is committed when a person "recklessly, knowingly, or intentionally damages property of another without his consent."<sup>68</sup>

---

59. *Id.*

60. *Obremski*, 487 N.E.2d at 831.

61. *Id.* at 830.

62. *Id.*

63. *Obremski*, 497 N.E.2d at 909-10.

64. *Id.* at 910.

65. *Id.*

66. *Id.* at 909. Liability is imposed for a violation of IND. CODE § 35-43 [§§ 35-43-1-1 to 35-43-5-5].

67. IND. CODE ANN. § 35-43-1-2 (West 1986).

68. *Id.*

The *Obremski II* court concentrated its discussion of culpability upon reckless conduct.<sup>69</sup> The code defines reckless in a general manner, stating that: "A person engages in conduct 'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct."<sup>70</sup> The defendant argued that the acts stated in the reckless driving statute were the exclusive enumeration of acts which would constitute reckless conduct in the operation of a motor vehicle in Indiana.<sup>71</sup> The defendant claimed that the code defined in a specific, detailed manner those acts which would subject a motorist to liability based upon his reckless behavior in the operation of a vehicle.<sup>72</sup>

The Indiana Supreme Court did not agree with the defendant's argument. Rather, the court chose to use the more general code definition of reckless.<sup>73</sup> The effect being not to limit the manner in which reckless conduct may be committed through the use of a motor

---

69. *Obremski*, 497 N.E.2d at 910.

70. IND. CODE ANN. § 35-41-2-2(c) (West 1986). Various parts of the Indiana Code "impose criminal responsibility upon one who acts 'recklessly'." *Slusher v. State*, 437 N.E.2d 97, 100 (Ind. App. 1982).

71. See IND. CODE ANN. § 9-4-1-56.1 (West Supp. 1986). One such portion of the Indiana Code is the reckless driving statute which reads:

A person operating a vehicle who recklessly:

- (1) drives at such an unreasonably high rate of speed, or at such an unreasonably low rate of speed, under the circumstances, as to endanger the safety of the property of others, or as to block the proper flow of traffic;
- (2) passes another vehicle from the rear while on a slope or on a curve where vision is obstructed for a distance of less than five hundred (500) feet ahead;
- (3) drives in and out of a line of traffic, except as otherwise permitted; or
- (4) speeds up or refuses to give one-half (1/2) of the roadway to a driver overtaking or desiring to pass;

Commits a class B misdemeanor; and, if the offense results in damage to the property of another person, the court shall recommend the suspension of the current driving license of the person for a fixed period of not less than thirty (30) days nor more than one (1) year.

72. Brief for Appellee, *supra* note 39, at 4. The defendant argued that the acts enumerated in the reckless driving statute were the exclusive recital of acts which would constitute reckless conduct in the operation of a motor vehicle in Indiana. The defendant did not argue that the reckless driving statute supplanted the general definition of recklessness, but rather that it specifically defined the term within the context of motor vehicle use.

73. *Obremski*, 497 N.E.2d at 910.

vehicle. The decision of determining reckless conduct will be left to the jury, to be considered on a case-by-case basis.<sup>74</sup>

The concept of reckless conduct that the court chose to apply, however, is not so easily understood. What must be proven is that the defendant consciously disregarded the acceptable standard of conduct and the harm which might occur;<sup>75</sup> essentially, that the driver must have disregarded the obligation to drive with the due care and attention expected of him.<sup>76</sup> The concept may be considered as follows:

Reckless driving is distinguishable from driving without due care and attention. A person doing his incompetent best may be guilty of driving without due care and attention but he cannot be guilty of reckless driving. Doing one's best is incompatible with a deliberate disregard of the obligation to drive with due care.<sup>77</sup>

A driver cannot be guilty of reckless driving when he is not consciously disregarding his obligation to drive carefully. This would be true of a person who drives dangerously as the result of a mistake of fact, such as driving in the wrong direction on a one-way street.<sup>78</sup> On the other hand, if the driver consciously departs from the acceptable standard of driving required by statute, it would be no defense to the charge that he did not consider himself to be taking an undue risk, and that he was confident in his ability to avoid an accident.<sup>79</sup> The obligation to drive within the acceptable standards of conduct is an objective standard.<sup>80</sup> If one drives in the dark without the use of lights, there is little doubt that he would be guilty of reckless conduct

---

74. *Id.* at 911.

75. *Id.* One is reckless or in conscious disregard of the rights and safety of others when he or she performs an act or fails to perform an act which he or she knows or has reason to know will unreasonably increase the risk of physical harm to another. RESTATEMENT (SECOND) OF TORTS § 501 (1977); W. Prosser & W. Keeton, *supra* note 10, § 34, at 213.

76. The standard of care required of an intoxicated driver is that of a reasonably prudent sober person. RESTATEMENT (SECOND) OF TORTS § 283 (1977); W. PROSSER & W. KEETON, *supra* note 10, § 32, at 178.

77. Comment, *Road Traffic*, CRIM. L. R. 309, 311 (1980).

78. *Stauffer v. Lothamer*, 419 N.E.2d 203 (Ind. App. 1981) (where an error in judgment or mistake in fact, standing alone, will not amount to wanton and willful misconduct).

79. *See Road Traffic*, *supra* note 77.

80. The court directs attention to the quality of the driving in fact, and all that is in issue is the degree to which the driver in question fell below the standard to be expected of a careful and competent driver in all the circumstances of the particular case. *Obremski*, 497 N.E.2d at 910.

in a conscious departure from the standard required of all drivers.<sup>81</sup>

The majority felt that to sustain liability, "a plaintiff must establish that the defendant's behavior fell below some established norm, and that this behavior was the proximate cause of the damage which occurred."<sup>82</sup> The court held that intoxication, in and of itself, cannot be the "reckless" cause of a collision.<sup>83</sup> If a driver's behavior on the road meets every norm and established standard of conduct, he will not be held liable for damages, for there is no breach of duty, and nothing in his behavior has been the proximate cause of the collision.<sup>84</sup> However, if a drunk driver falls below the acceptable standard of conduct for a competent motorist, and his breach was the cause in fact of the damage,<sup>85</sup> a jury might very well find reckless conduct and has done so.<sup>86</sup>

---

81. *Barry v. Tyler*, 171 Va. 381, 199 S.E. 496 (1938). The court, in *Barry*, found that the failure to have the headlights of the automobile burning was sufficient to charge the operator of the automobile with negligence, if such failure has a causal connection with the injury.

It should be noted, however, that the court in *Morgan v. Southern Farm Bureau Cas. Ins. Co.*, 223 F. Supp. 996 (1963), *aff'd*, 339 F.2d 755 (5th Cir. 1964), found that the failure to display proper lights upon a vehicle driven by the plaintiff would not bar recovery, if the streets were well lit or for some other reason the absence of lights on the plaintiff's vehicle was not the proximate cause of the accident.

82. *Obremski*, 497 N.E.2d at 910. "[I]ntoxication is not negligence in itself, and it must be shown to have caused the actor's behavior to have deviated from that of a reasonable person and to have caused the plaintiff's injury." W. PROSSER & W. KEETON *supra* note 10, § 32 at 178-79.

83. *Obremski*, 497 N.E.2d at 910. *See Focht at Rabada*, 217 Pa. Super. 35, 268 A.2d 157 (1970). The Supreme Court of Pennsylvania, in *Focht*, indicated some concern that evidence of intoxication alone would allow liability to be imposed. The court stated that "driving while under the influence of intoxicating liquor with its very great potential for harm and serious injury may under certain circumstances be deemed 'outrageous conduct' and a 'reckless indifference to the interest of others' sufficient to allow the imposition of punitive damages." Therefore, this court also recognized that despite the defendant's intoxication, circumstances would have to be present which would warrant an exemplary award. *Focht*, 268 A.2d at 160 (emphasis added); *See also Hubble v. Brown*, 227 Ind. 202, 84 N.E.2d 891 (1949) (where intoxication by itself may not be sufficient to warrant the conclusion of gross negligence or willful or wanton misconduct); *DeVaney v. State*, 259 Ind. 483, 288 N.E.2d 732 (1972) (where evidence of intoxication may be considered, but alone is not sufficient to constitute reckless conduct).

84. *Obremski*, 497 N.E.2d at 910. *See generally* W. PROSSER & W. KEETON, *supra* note 10, § 40 at 263 (providing a general discussion of proximate cause).

85. *Obremski*, 497 N.E.2d at 910; W. PROSSER & W. KEETON *supra* note 10, § 40 at 264.

86. *Obremski*, 497 N.E.2d at 911. *See Smith v. Chapman*, 115 Ariz. 211, 564

*Obremski II* directs attention to the quality of driving in fact, and not to the state of mind or intention of the driver.<sup>87</sup> All that is at issue and all that is required of the jury is to determine the degree to which the driver has fallen below the standard expected of a careful and competent driver.<sup>88</sup> If the conduct is characterized by recklessness, it would constitute gross negligence, while ordinary negligence would be characterized by want of ordinary care.<sup>89</sup> The jury must consider all the circumstances of the particular case and determine whether the conduct should be labeled reckless or merely negligent.<sup>90</sup> Once decided, the jury must then decide the issue of causation.

The *Obremski II* decision seems to suggest two possible avenues the court's decision could have taken regarding the issue of causation.<sup>91</sup> If the Indiana Supreme Court had intended that the presence of intoxication alone justified exemplary damages, then the traditional tort requirement of proximate cause would be discarded.<sup>92</sup> The Court

P.2d 900 (1977) (where seriously intoxicated and driving without headlights); *Miller v. Blanton*, 213 Ark. 246, 210 S.W.2d 293 (1948) (where intoxicated and driving on the wrong side of the road); *Infeld v. Sullivan*, 151 Conn. 506 199 A.2d 693 (1964) (where intoxicated, driving on the wrong side of the road, speeding, and swerving); *Pratt v. Duck*, 28 Tenn. App. 502, 191 S.W.2d 562 (1945) (where grossly drunk and vehicle zigzagging on the highway).

87. *Obremski*, 497 N.E.2d at 911.

88. *Id.* at 910. See W. PROSSER & W. KEETON *supra* note 10, § 45 at 320-21 (providing a general discussion of the function of the jury).

89. *Ayala v. Farmers Mut. Auto. Ins. Co.*, 272 Wis. 629, 76 N.W.2d 563, 568 (1956).

90. *Obremski*, 497 N.E.2d at 910-11.

91. *Id.* at 910-12.

92. A few jurisdictions presently allow the imposition of exemplary damages against drunk drivers upon proof of intoxication alone. The Florida decision of *Ingram v. Pepit*, 340 So. 2d 922 (Fla. 1976), best exemplifies this stance. The facts of the case indicate that Ingram's car was sitting in a well-lit intersection when it was hit from the rear by Pepit. Pepit's car had not been moving at an excessive rate of speed, or seen to swerve or veer outside the lane of traffic. In fact, except for conflicting evidence as to whether Pepit applied his brakes before his vehicle struck Ingram's, there was no indication that the operation of Pepit's car up to the time of the accident was no different than normal. *Id.* at 923.

The court held that an intoxicated driver could be held liable for exemplary damages:

[W]ithout regard to external proof of recklessness or abnormal driving . . . [w]e affirmatively hold that the voluntary act of driving 'while intoxicated' evinces, *without more* a sufficiently reckless attitude for a jury to be asked to provide an award of punitive damages if it determines liability exists for compensatory damages.

*Id.* at 924 (emphasis added). Justice Sunberg, in his dissent, stated "I suggest that



of Appeals decision that intoxication is "reckless per se" would have been applied. Seemingly, the jury could assess exemplary damages simply because the defendant happened to be intoxicated. Causation would automatically be imputed to the intoxication of a driver who is involved in an accident in that condition.<sup>93</sup>

The Indiana Supreme Court, however, did not follow the reasoning of the Court of Appeals. Instead, the court required a showing that the defendant's intoxicated behavior was the proximate cause of the damage which occurred.<sup>94</sup> It will be essential to establish a causal connection between the defendant's intoxication and the accident.<sup>95</sup> This will not necessarily be as easy to accomplish as may appear at first glance. It would be possible for a drunk driver to cause an accident in such a manner as to not indicate intoxication.<sup>96</sup> For example, a drunk driver could be well within the speed limit, drive a straight line and still have a rear-end collision with a car stopped at an intersection. Rear-end collisions are very common and mostly due to inattention and not intoxication. In such a situation, under *Obremski II*, it is unlikely one could get exemplary damages and it is arguable that one should not.<sup>97</sup>

*Obremski II* requires a showing that the defendant's intoxication caused the accident.<sup>98</sup> Intoxication as proximate cause seems to play a "substantial factor" in the evaluation of the circumstances.<sup>99</sup> Reckless conduct will be imposed only after establishing that the defendant's intoxication was a substantial factor in the cause of the accident.<sup>100</sup> It will be essential for the plaintiff to present a prima facie case, showing a causal connection between the defendant's intoxication and

---

the law of torts as it has carefully developed over the years permits an award of punitive damages in personal injury cases involving vehicles where reckless *conduct* is involved, not reckless *attitude*." *Id.* at 927 (emphasis added).

93. W. PROSSER & W. KEETON, *supra* note 10, § 36 at 229-30.

94. *Obremski*, 497 N.E.2d at 911.

95. W. PROSSER & W. KEETON, *supra* note 10, § 41 at 269.

96. *See Baker v. Marcus*, 201 Va. 905, 114 S.E.2d 617 (1960) (where evidence showed a typical rear-end collision as a result of simple lack of ordinary care and caution).

97. *Obremski*, 497 N.E.2d at 910.

98. *Id.*

99. The "conduct is a cause of the event if it was a material element and a substantial factor in bringing it about. Whether it was such a substantial factor is for the jury to determine, unless the issue is so clear that reasonable persons could not differ." W. PROSSER & W. KEETON, *supra* note 10, § 41 at 267-68.

100. *Id.*

the accident.<sup>101</sup> This will play a prominent role in those rare instances when a defendant's intoxication has a nominal, or completely immaterial, impact on the causation of the accident.

The Indiana Supreme Court in *Obremski II* stated that the jury, in reaching a conclusion, should consider the whole of the situation.<sup>102</sup> The jury should consider the decision to drive while intoxicated, along with the acts of driving which are alleged to be the proximate cause of the collision.<sup>103</sup> The majority felt that the decision to drive in an intoxicated state would certainly "involve a substantial deviation from acceptable standards of conduct."<sup>104</sup> But, the court emphasized the examination of the whole of the defendant's behavior in determining reckless conduct rather than the mere fact of intoxication.<sup>105</sup> Evidence of intoxication should be used as an element to prove the driver's misconduct rather than intoxication being *the only* element of the driver's misconduct.

The opinion concluded by addressing the appropriate standard of proof necessary to establish the plaintiff's right to recover treble damages.<sup>106</sup> Judge Ratliff pointed out in his concurring opinion in *Obremski I* that the appropriate standard of proof is a preponderance of the evidence, and not clear and convincing evidence.<sup>107</sup> The majority in *Obremski II* agreed with Judge Ratliff's opinion, finding that where

---

101. In *Ayala v. Farmers Mut. Ins. Co.*, 272 Wis. 629, 76 N.W.2d 563 (1956), the Wisconsin Supreme Court analyzed the balance that must be struck between evidence of intoxication and proof that such intoxication had a causal effect in producing a certain accident.

Intoxication, standing by itself does not constitute either gross negligence or ordinary negligence. While a person's driving of a motor vehicle when intoxicated, is prohibited by statute, and is a criminal offense, nevertheless, an intoxicated driver of a motor vehicle may become involved in a collision and yet be free from negligence, and therefore, not liable to respond in damages . . . However, when there is concurrence of intoxication and causal negligence as to items such as speed, management and control, position on the highway, lookout, etc., the same constitutes gross negligence.

*Ayala*, 76 N.W.2d at 570. According to this explanation, intoxication may become the basis for exemplary damages only if the evidence of intoxication additionally manifests itself circumstantially through the defendant's erratic or abnormal driving and is the proximate cause of the injury.

102. *Obremski*, 497 N.E.2d at 911.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Obremski*, 487 N.E.2d at 831.

the statutory prerequisites of the code are established by a preponderance of the evidence, treble damages and attorney fees are appropriate.<sup>108</sup> The majority distinguished the recovery of punitive damages, which requires a greater standard of proof at trial.<sup>109</sup>

Although different in form from criminal penalties, the consequences of civil liability are still penal in nature.<sup>110</sup> Despite this similarity in purpose, and the potential for a sizable exemplary award, the defendant in a civil action for treble damages is not afforded the same safeguards which accompany the criminal trial and protect the criminal defendant.<sup>111</sup> In criminal courts, the state is required to establish the defendant's guilt beyond a reasonable doubt,<sup>112</sup> while in civil action proceedings the plaintiff must prove his case by a preponderance of the evidence.<sup>113</sup> By changing the civil evidentiary rule to require proof by clear and convincing evidence in a punitive damages suit, the court has increased the plaintiff's burden of proof in accordance with the increase of possible consequences to the defendant. The majority in *Obremski II*, however, declined to raise the standard of proof required of the plaintiff in a treble damage suit.<sup>114</sup> To effectuate the recovery of treble damages and attorney fees, then it will only be

---

108. *Obremski*, 497 N.E.2d at 911. See IND. CODE ANN. § 34-4-30-2 (West Supp. 1986). See e.g., *Campins v. Capels*, 461 N.E.2d 712 (Ind. App. 1984) (where civil standard of review required proof of claim by a preponderance of the evidence); *James v. Brink & Erb, Inc.*, 452 N.E.2d 414 (Ind. App. 1983) (where a preponderance of evidence, rather than reasonable doubt, standard applied in action to recover treble damages).

109. *Obremski*, 497 N.E.2d at 911. See IND. CODE ANN. §§ 34-4-34-1, -2 (West Supp. 1986) which reads:

(1) This chapter applies to all cases in which a party requests the recovery of punitive damages in a civil action.

(2) Before a person may recover punitive damages in any civil action, that person must establish, by clear and convincing evidence, all of the facts that are relied upon by that person to support his recovery of punitive damages.

This higher standard of proof for punitive damages claims was first enunciated in *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982), where the court stated: "The stricter standard is utilized when fundamental rights are involved and the legal and social ramifications of the civil proceeding are serious." *Id.* at 362.

110. See Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 409-12 (1976).

111. *Id.* Despite the similarity in purpose, the effects of civil and criminal punishment are unequal. A exemplary damages award only invades the defendant's pocketbook, whereas criminal penalties often include a loss of freedom, warranting the protection of special procedural safeguards.

112. C. McCORMICK, EVIDENCE § 341, at 962 (3d ed. 1984).

113. *Id.* at 956.

114. *Obremski*, 497 N.E.2d at 911.

necessary to prove by a preponderance of the evidence that the defendant acted in conscious disregard of the acceptable standard of conduct, and the harm which might occur.<sup>115</sup>

## V. IMPLICATIONS

The object of the *Obremski II* decision is to prevent the increasing number of alcohol-related accidents on the public highways, and thereby protect persons and property from injury. The decision to impose liability on the intoxicated driver is a determination which will force the driver to consider the potential costs to the victimized motorist, and subsequently himself, if he chooses to drive under the influence of alcohol. The imposition of exemplary damages for the reckless acts of drunk drivers is intended to prevent victims from going uncompensated for those damages, and to deter the consumption of excessive amounts of alcohol by those persons who know they must later drive.

The *Obremski II* court chose to focus primarily on whether the totality of the defendant's conduct proved to be reckless.<sup>116</sup> It will be necessary to determine if the conduct of the defendant was negligent to such a degree so as to pose a high risk of harm to the foreseeable plaintiff; whether the lack of care was greater than that of ordinary negligence, and rose to the level of reckless conduct.<sup>117</sup> The intoxication of the driver will be one of the factors tending to prove recklessness, a finding of which is necessary to the imposition of criminal mischief and the recovery of treble damages.<sup>118</sup>

In effect, the court's decision will lead to a logical sequence of causation. Proof that the intoxication impaired the senses; the impaired senses led to irregular and dangerous driving; and the irregular and dangerous driving was the cause of the collision. This fundamentally sound logic will achieve two distinct objectives. First, it will force the plaintiff to present a prima facie case, which may or may not be easily accomplished.<sup>119</sup> Second, it serves to protect drunk drivers in those cases where they are innocent of any causal effect to the collision.<sup>120</sup> This will prevent the drunk driver from being strictly liable

---

115. *Id.*

116. *Id.* at 910-11.

117. *Id.* See also *Ayala v. Farmers Mut. Auto. Ins. Co.*, 272 Wis. 629, 76 N.W.2d 563 (1956).

118. *Obremski*, 497 N.E.2d at 910-11.

119. See *supra* note 96 and accompanying text.

120. See *supra* note 96 and accompanying text.

for a collision and having exemplary damages imposed upon him, simply because of intoxication.

*Obremski II* permits the imposition of exemplary damages upon a showing of some form of reckless conduct.<sup>121</sup> Alcohol usage is only one of the factors to be considered, and it is entirely possible that exemplary damages could be awarded even though the defendant was not intoxicated.<sup>122</sup> Otherwise, we could face the situation where two plaintiffs with identical injuries, from identical automobile accidents would be compensated differently. A plaintiff struck by an intoxicated driver would be compensated with exemplary damages whereas plaintiff struck by a sober driver would not have exemplary damages available as a remedy, regardless of the conduct of the defendant driver. Also, under *Obremski II*, it would seem probable that damages, for not only property damages, but also personal injury damages could be sought under the civil action treble damage statute.<sup>123</sup> This would allow the plaintiff who suffers extensive injuries as a result of a defendant's reckless conduct and drunk driving to claim treble damages for the "pecuniary loss" caused by the defendant's criminal mischief.

While many factors can influence the jury's verdict, once it hears the evidence of the defendant's intoxication, it will be difficult for trial counsel to convince the jury that exemplary damages are not appropriate. There may well be a highly prejudicial effect of revealing to the jury that the defendant had been drinking. It will be difficult for a jury to disassociate the fact of intoxication and items of misconduct, such as speed, management and control, and position on the highway. The concurrence of intoxication and causal negligence as to the items of misconduct will often lead the jury to a determination of gross negligence, even when the intoxication is not an actual cause of the injury.

The law of torts, however, does not permit such a sweeping inference. Intoxication plus negligent driving does not equal reckless conduct on the part of the defendant.<sup>124</sup> Such an inference would eliminate the necessity of showing proximate cause. A driver, who

---

121. *Obremski*, 497 N.E.2d at 911.

122. See, e.g., *Shirley v. Shirley*, 261 Ala. 100, 73 So. 2d 77 (1954) (where driving on a curving road at speed between 75 and 100 miles per hour supported an award of exemplary damages); *Wigginton's Adm'r v. Rickert*, 186 Ky. 650, 217 S.W. 933 (1920) (where evidence of intoxication, but excessive speed would have justified a finding of extreme misconduct and hence exemplary damages).

123. *Auto Accidents: Drunk Driving*, 29 ATLA L. REP. 441 (Dec. 1986).

124. *Obremski*, 497 N.E.2d at 910.

has been drinking prior to driving, would be strictly liable for exemplary damages, whether or not the consumption of alcohol has anything to do with the subsequent accident. To avoid this imposition of strict liability, it will be necessary to require the plaintiff to prove the traditional elements of the cause of action, such as proximate cause and an underlying award of compensatory damages.<sup>125</sup>

Several other practical considerations should be considered that directly result from the decision in *Obremski II*. Since there is no independent basis for exemplary damages, it is necessary to determine the actual damages sustained that are capable of being measured in terms of compensatory damages.<sup>126</sup> To the extent that a plaintiff must prove that he sustained actual harm or injury as a result of the wrongful conduct of the defendant, the inability to provide that proof would destroy the cause of action.<sup>127</sup> For without a finding of actual damages there is no cause of action at all, and nothing to support the exemplary award. The plaintiff must have sustained at least some nominal harm, capable of being measured in terms of compensatory damages.<sup>128</sup>

It will also be necessary for the plaintiff to make a choice of whether to bring a punitive or treble damage claim. There would seem to be nothing to prohibit a request for treble damages, or alternatively punitive damages, with demand for recovery being the greater of the two.<sup>129</sup> If the plaintiff chooses one form of relief over the other prior to final adjudication, certain factors should weigh in the selection. In certain cases, the recovery of treble damages will be less advantageous than a punitive damages award.<sup>130</sup> For example, in a suit where the

---

125. *Ingram v. Petit*, 340 So. 2d 922, 924 (Fla. 1976).

126. W. PROSSER & W. KEETON, *supra* note 10, § 2, at 14-15.

127. *Id.* See *Baker v. American States Ins. Co.*, 428 N.E.2d 1342 (Ind. App. 1981) (where compensatory damages were a prerequisite); *Newton v. Yates*, 170 Ind. App. 486, 353 N.E.2d 485 (1976) (where nominal damages were a prerequisite).

128. See, e.g., *Reynold v. Pegler*, 123 F. Supp. 36 (S.D.N.Y. 1954), *aff'd*, 223 F.2d 429 (2nd Cir. 1954), *cert. denied*, 350 U.S. 846 (where nominal damages supported \$175,000 in punitive damages); *Edwards v. Nulsen*, 347 Mo. 1077, 152 S.W.2d 28 (1941) (where the court awarded \$1 actual and \$25,000 punitive damages).

129. IND. R. TR. P. (8)A provides:

(A) *Claims for relief.* To state a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, a pleading must contain:

(1) A short and plain statement of the claim showing that the pleader is entitled to relief; and

(2) A demand for the relief to which he deems himself entitled.

Relief in the alternative or of several different types may be demanded.

130. See, e.g., *Price v. Ford Motor Credit Co.*, 530 S.W.2d 249 (Mo. App.

actual damages sustained are of minimal value, relief in the form of treble damages may be much lower than would a punitive damage award, as would be the punishment and deterrent value of the award which is designed to keep the defendant from repeating the same misconduct in the future. The plaintiff must also consider the difference in the burden of proof requirements under the treble and punitive damage claims.<sup>131</sup> The punitive damage action will require a standard of clear and convincing proof,<sup>132</sup> while the treble damage suit will only require the plaintiff to prove his case by a preponderance of the evidence.<sup>133</sup> This difference in the standard of proof may play a substantial part in the plaintiff's choice of claims.

Despite the potential for awards of treble damages and attorney fees under *Obremski II*, the biggest obstacle to the effectiveness of the decision may be the insolvency, or limited financial resources, of the majority of defendants who commit the criminal acts.<sup>134</sup> Winning the civil suit is only the first step; the difficulty lies in enforcing the judgement. Although the plaintiffs may now recover treble damages for conduct that is both tortious and criminal, the defendants in civil actions may very well be penniless.<sup>135</sup> The question for many plaintiffs will then be the ability to recover their awards from the defendants' insurance companies.

There is a split among jurisdictions regarding the issue of whether a tort-feasor can insure against exemplary damage liability.<sup>136</sup> Jurisdictions prohibiting insurance coverage for exemplary damages have done so with the view that exemplary damages are for punishment and deterrence, and that those purposes would be lost if a defendant were allowed to shift the burden to his insurance carrier.<sup>137</sup> Other

---

1975) (where court assessed \$25,000 in punitive damages with only \$600 in actual damages; the treble damage award would have been a fraction of the punitive relief actually given); *Malco, Inc. v. Midwest Aluminum Sales, Inc.*, 14 Wis. 2d 57, 109 N.W.2d 516 (1961) (where court found no arbitrary rule that punitive damages cannot be 15 times actual damages).

131. See Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 409-12 (1976).

132. IND. CODE ANN. § 34-4-30-2 (West Supp. 1986).

133. IND. CODE ANN. § 34-4-34-2 (West Supp. 1986).

134. Kiesel, *Crime and Punishment*, 70 A.B.A. J. 25-28 (Jan. 1984).

135. *Id.*

136. For a general analysis of the issue of insurability of exemplary damages, see J. GHIARDI & J. KIRCHER, *supra* note 29, at § 2.03; Young, *Insurability of Punitive Damages: A Revolution*, 28 HASTINGS L.J. 431 (1976).

137. The leading case prohibiting insurance coverage for exemplary damages is *Northwestern Nat. Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962). This drunk

jurisdictions permit insurance for exemplary damages on the theory that to prohibit insurability would not deter drivers from wrongful conduct in view of the fact that there are already a large number of criminal sanctions attached to such behavior, and sanctions have little deterrent effect.<sup>38</sup>

Essentially, there is little question that the insurer will defend the civil drunk driver case.<sup>139</sup> However, it would be advisable for the plaintiff to not only bring a claim for exemplary damages, but also to plead a cause of action for simple negligence. This will guard against dismissal if the jury finds that the defendant's conduct did not constitute anything more than negligence. Also, it should help to avoid the problem of an insurer initially seizing the opportunity to attempt to deny coverage.

As for the question of the insurer's obligation to indemnify the insured for liability, the compensatory portion of the judgment should be covered. The problem will arise as to the exemplary damages portion of the judgment. Depending on how a court characterizes the conscious disregard and reckless conduct of the defendant, it is conceivable that the conduct could be considered almost intentional, thereby possibly excluding it from coverage.<sup>140</sup> However, the defendant in a treble damage action should be covered for the exemplary damages, considering that the *Obremski II* decision specifically held that these are not punitive damages.<sup>141</sup> This is an issue that will be considered by the courts in future cases.

---

driving case involved intoxication, high speed driving, and hit and run on the part of the insured. The plaintiff, McNulty, who suffered extensive personal injuries, was awarded \$57,700 at trial, of which \$20,000 was punitive damages and not covered by the insurance company.

138. A majority of the courts held that exemplary damages are insurable. K. REDDEN, PUNITIVE DAMAGES § 9.3, at 685 (where the main issues concerning the insurability of exemplary damages are insurance policy language and public policy issues). See, e.g., *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964) (where the policy covered "all sums" for which the insured may become liable); *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972) (where the policy covered "all sums" for which the insured may become liable arising out of ownership, maintenance, or use of the car).

139. See, e.g., *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyds of London, England*, 56 Cal. App. 3d 791, 129 Cal. Rptr. 47 (1976) (where the court found that the duty to defend may be broader than the duty to indemnify).

140. Automobile insurance policies typically contain a liability exclusion for injury or property damage caused intentionally by or at the direction of the insured. See Comment, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 U. PA. L. REV. 734 (1966).

141. *Obremski*, 497 N.E.2d at 911.



## V. CONCLUSION

The *Obremski II* decision has clarified the basis upon which intoxicated drivers will be held liable for property damage resulting from reckless behavior. This case is another step against the notion that people should not be punished in a monetary fashion for an act which could subject them to criminal prosecution. The imposition of liability upon the drunk driver is intended not only to deter people from drinking and driving, but also to prevent injured victims from going uncompensated for harm inflicted by drunk drivers. Thus, the *Obremski II* decision will likely make drivers consider the potential costs of returning to the public highways after excessive consumption of alcohol.

FRANK M. CALVERT