

1999 SENATE JUDICIARY

SB 2319

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2319

Senate Judiciary Committee

Conference Committee

Hearing Date February 2, 1999

Tape Number	Side A	Side B	Meter #
1	X		0 - 1280
Committee Clerk Signature <i>Jackie Hollman</i>			

Minutes:

SB2319 relates to exemplary damages for accidents involving motor vehicle operators under the influence of alcohol or a controlled substance.

SENATOR STENEHJEM opened the hearing on SB2319 at 8:30 a.m.

All were present.

SENATOR LYSON testified to introduce SB2319. I am introducing this for an attorney.

AL WOLF, North Dakota Trial Lawyers Association, testified in support of SB2319. This is to allow a court or jury, to assess exemplary damages arising out of an accident involving alcohol or a controlled substance where personal injuries occurred. Also where the person has had a DUI for the second time or more. This bill will allow the court to consider punitive damages or exemplary damages. Exemplary damages are to be made to set an example.

PAUL JOHNSON sent written testimony for the Committee to consider. Testimony attached.

Page 2

Senate Judiciary Committee

Bill/Resolution Number SB2319

Hearing Date February 2, 1999

SENATOR STENEHJEM CLOSED the hearing on SB2319.

SENATOR WATNE made a motion for DO PASS, SENATOR NELSON seconded. Motion carried.

SENATOR LYSON will carry the bill.

5 - 0 - 1

Date: 2-2-99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SAB319

Senate Judiciary Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do PASS

Motion Made By Watne Seconded By Nelson

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor					
Senator Dennis Bercier	X				
Senator Caroloyne Nelson	X				

Total (Yes) 5 No 0

Absent 1

Floor Assignment Senator Lyson

REPORT OF STANDING COMMITTEE (410)
February 2, 1999 12:30 p.m.

Module No: SR-21-1682
Carrier: Lyson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2319: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends DO PASS
(5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2319 was placed on the
Eleventh order on the calendar.

1999 HOUSE JUDICIARY

SB 2319


1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. :2319

House Judiciary Committee

Conference Committee

Hearing Date : March 9, 1999

Tape Number	Side A	Side B	Meter #
2	X		5.3
Committee Clerk Signature 			

Minutes:

JERRY KEMMET (BCI) This bill will allow a court to take DUI into account when awarding damages for an accident, and in considering punitive damages. The purpose we are aiming for is to get at the habitual DUI drivers. Now, they get their losses paid by the insurance company and the accident doesn't cost them anything. Most insurance policies don't cover punitive damages and the driver would have to pay that himself.

ALBERT WOLF (NDTLA) Presented prepared testimony, a copy of which is attached. Mr. Wolf also presented written testimony for PAUL JOHNSON (ATLA), a copy of which is attached. Subsequent to the hearing but before the committee took action Mr. Wolf wrote the Chairman outlying suggested amendments.

COMMITTEE ACTION: March 15, 1999

Page 2

House Judiciary Committee

Bill/Resolution Number 2319

Hearing Date : March 9, 1999

REP. KLEMIN moved that the bill be amended; Rep. Koppelman seconded and the motion passed on a unanimous voice vote.

REP. MAHONEY moved that the bill be further amended; Rep. Koppelman seconded and the motion passed on a unanimous voice vote.

REP. MAHONEY moved that the committee recommend that the bill DO PASS AS

AMENDED. Rep. Gunter seconded and the motion was passed on a roll call vote with 14 ayes,

0 nays and 1 absent. Rep. Mahoney was assigned to carry the bill on the floor.

PROPOSED AMENDMENTS TO SENATE BILL 2319

Page 1, line 8, after "damages" insert "against the driver under the motion procedures provided in subsection 1"

Page 1, line 10, delete "for a second time in five years, was operating or" and insert "within five years prior to the accident, was adjudicated in a civil or criminal proceeding as having operated or being"

Re-number accordingly.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2319

Page 1, line 8, replace the second "the" with "clear and convincing"

Page 1, line 9, remove "preponderance of the"

Page 1, line 10, replace ", for a second time in" with "within the" and replace the second comma with "immediately preceding the accident has been convicted twice for violation of section 39-08-01 and who"

Page 1, line 14, after the semicolon insert "or"

Page 1, line 16, remove "; or"

Page 1, remove lines 17 and 18

Page 1, line 19, remove "impair the person's ability to drive or operate a motor vehicle"

Page 1, remove line 20

Page 1, line 21, remove "damages under this section."

Renumber accordingly

Date: 3.15.99
 Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 2319

House JUDICIARY Committee

Subcommittee on _____
 or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken accept the amendment

Motion Made By Mahoney Seconded By Koppelman

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY			REP. KELSH		
REP. CLEARY			REP. KLEMIN		
REP. DELMORE			REP. KOPPELMAN		
REP. DISRUD			REP. MAHONEY		
REP. FAIRFIELD			REP. MARAGOS		
REP. GORDER			REP. MEYER		
REP. GUNTER			REP. SVEEN		
REP. HAWKEN					

Total Yes _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

voice carries

PROPOSED AMENDMENTS TO SENATE BILL 2319

Page 1, line 8, after "damages" insert "against the driver under the
procedures provided in subsection 1"

Page 1, line 10, delete "for a second time in five years, was operating or"
and insert "within five years prior to the accident, was adjudicated in
a civil or criminal proceeding as having operated or being"

Renumber accordingly.

VJR
3/15/99

...HOUSE AMENDMENTS TO SENATE BILL NO. 2319 JUD 3-16-99

Page 1, line 8, after "damages" insert "against the driver under the motion procedures provided in subsection 1" and replace the second "the" with "clear and convincing"

Page 1, line 9, remove "preponderance of the"

Page 1, line 10, replace ", for a second time in" with "within the" and replace the second comma with "immediately preceding the accident has been convicted twice for violation of section 39-08-01 and who"

Page 1, line 14, after the semicolon insert "or"

Page 1, line 16, replace "; or" with a period

Page 1, remove lines 17 through 20

Page 1, line 21, remove "damages under this section."

Renumber accordingly

Date: 3.15.99
 Roll Call Vote #: 2

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 2319

House JUDICIARY Committee

Subcommittee on _____
 or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken to accept the 1st Wolf amend.

Motion Made By Klemin Seconded By Koppelman

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY			REP. KELSH		
REP. CLEARY			REP. KLEMIN		
REP. DELMORE			REP. KOPPELMAN		
REP. DISRUD			REP. MAHONEY		
REP. FAIRFIELD			REP. MARAGOS		
REP. GORDER			REP. MEYER		
REP. GUNTER			REP. SVEEN		
REP. HAWKEN					

Total Yes _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Voice carried

Date: 3.15.99
Roll Call Vote #: 3

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2319

House JUDICIARY Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass As Amended

Motion Made By Mahoney Seconded By Gunter

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY	✓		REP. KELSH	✓	
REP. CLEARY	✓		REP. KLEMIN	✓	
REP. DELMORE	✓		REP. KOPPELMAN	✓	
REP. DISRUD	✓		REP. MAHONEY	✓	
REP. FAIRFIELD	✓		REP. MARAGOS	✓	
REP. GORDER	✓		REP. MEYER	✓	
REP. GUNTER	✓		REP. SVEEN		
REP. HAWKEN	✓				

Total Yes 14 No 0

Absent 1

Floor Assignment Mahoney

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2319: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2319 was placed on the Sixth order on the calendar.

Page 1, line 8, after "damages" insert "against the driver under the motion procedures provided in subsection 1" and replace the second "the" with "clear and convincing"

Page 1, line 9, remove "preponderance of the"

Page 1, line 10, replace ", for a second time in" with "within the" and replace the second comma with "immediately preceding the accident has been convicted twice for violation of section 39-08-01 and who"

Page 1, line 14, after the semicolon insert "or"

Page 1, line 16, replace "; or" with a period

Page 1, remove lines 17 through 20

Page 1, line 21, remove "damages under this section."

Renumber accordingly

1999 SENATE JUDICIARY

SB 2319

CONFERENCE COMMITTEE

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2319

Senate Judiciary Committee

Conference Committee

Hearing Date March 29, 1999

Tape Number	Side A	Side B	Meter #
1	x		0 - 2700
4-6-99 1	x		0 - 385
Committee Clerk Signature <i>Jackie Follman</i>			

Minutes:

SENATOR STENEHJEM opened the Conference Committee hearing on SB2319.

Senator Stenehjem, Senator Lyson, Senator Nelson, Representative Koppelman, Representative Klemin and Representative Mahoney were present.

REPRESENTATIVE MAHONEY explained the original bill did not have convictions on it.

Representative Klemin brought up the clear and convincing evidence.

SENATOR STENEHJEM stated the part about giving the person 2 free rides is a problem with us. I am thinking in cases where there was a charge and the person may have gotten out on a technicality.

SENATOR NELSON asked why did you delete knowingly under significant influence of medication or other substance. The House deleted that whole section.

REPRESENTATIVE KLEMIN stated that we are talking about a situation where you had a DUI the first time and the doctor prescribed medication for you, this is in the same classification as a DUI.

SENATOR STENEHJEM stated that if a person had been convicted one time, the next time they are too on notice. You don't want a mix and match, DUI or medication.

REPRESENTATIVE MAHONEY asked about the second time, where will we limit the second offense.

REPRESENTATIVE KLEMIN stated what about if we just took out the word twice on line 11.

REPRESENTATIVE KOPPELMAN asked what is the difference between a controlled substance and some of the things we are talking about.

SENATOR STENEHJEM stated controlled substances is anything in the statute. Some of the volatile chemicals that the kyds are getting into are not on that list.

REPRESENTATIVE MAHONEY asked how about drugs, alcohol or other intoxicants and exclude under properly prescribed medication. Inhalants are actually intoxicants.

SENATOR STENEHJEM stated we will refer to that section of the huffing bill and exclude this does not apply to persons taking a lawfully prescribed medication and following the recommendation of the physician who prescribed it.

REPRESENTATIVE MAHONEY asked if we are putting the exclusionary clause on the prescribed medication and inclusion of all intoxicants and drugs.

SENATOR STENEHJEM stated that we will refer to that schedule of possible huffing bill.

Matt will work on the amendments.

SENATOR LYSON asked if we could put under b. with controlled substance or inhalants.

SENATOR STENEHJEM stated that if we just said inhalants, glue is not an intoxicant.
Flouorocarbons may not be either.

REPRESENTATIVE KLEMIN suggested we put in as d. under the influence of an inhalant as defined in that section of volatile chemicals.

REPRESENTATIVE MAHONEY asked if we would have controlled substance under b. with an exclusion of proper us of prescription drugs.

SENATOR STENEHJEM stated we will have to meet again after the amendments are worked out.

APRIL 6, 1999 TAPE 1, SIDE A

SENATOR STENEHJEM opened the Conference Committee hearing on SB2319.

All were present.

SENATOR STENEHJEM proposed amendments. This is how it will read.

In a civil action involving a motor vehicle accident resulting in bodily injury, it is sufficient for the trier of fact to consider an award of exemplary damages against the driver under the motion of procedures provided in subsection 1 if clear and convincing evidence indicates that the accident was caused by a driver who within the five years immediately preceding the accident has been convicted of a violation of section 39-08-01 and who was operating or in physical control of a motor vehicle:

a. With an alcohol concentration of at least ten one-hundredths of one percent by weight;

4-6-99

- b. Under the influence of a controlled substance unless a drug that was predominantly caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed drugs to the driver;
- c. Under the influence of alcohol and refused to take a test required under Chapter 39-20; or
- d. Under the influence of a volatile chemical as listed in Section 12.1-31-06.

At the trial in an action in which the trier of the fact will consider an award of exemplary damages, evidence that a driver has been convicted of violating section 39-08-01 or an equivalent statute or ordinance is admissible into evidence.

REPRESENTATIVE MAHONEY made a motion for the House to recede from its amendments and adopt amendments, SENATOR LYSON seconded. Discussion. Motion carried.

6 - 0 - 0

SENATOR LYSON will carry the bill.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2319

That the House recede from its amendments as printed on page 768 of the Senate Journal and page 845 of the House Journal and that Senate Bill No. 2319 be amended as follows:

Page 1, line 8, after "damages" insert "against the driver under the motion procedures provided in subsection 1" and replace the second "the" with "clear and convincing"

Page 1, line 9, remove "preponderance of the"

Page 1, line 10, replace ", for a second time in" with "within the" and replace the second comma with "immediately preceding the accident has been convicted for violation of section 39-08-01 and who"

Page 1, line 14, after "substance" insert "unless a drug that predominantly caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to the driver"

Page 1, line 17, replace "Knowingly under significant" with "Under the" and replace "medication or other substance that" with "volatile chemical as listed in section 12.1-31-06."

Page 1, remove lines 18 through 20

Page 1, line 21, remove "damages under this section."

Renumber accordingly

~~Ver~~

(Bill Number) SB 2319 (, as (re)engrossed):

Your Conference Committee

For the Senate:

For the House:

Senator W. Stenebjerg Y
Senator Lyson Y
Senator C. Nelson Y

Representative Koppelman Y
Representative Klemm Y
Representative Mahoney Y

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)
723/724 725/726 S724/H726 S723/H725
the (Senate/House) amendments on (SJ/HJ) page(s) 768 - _____

and place _____ on the Seventh order.
727

, adopt (further) amendments as follows, and place
SB 2319 on the Seventh order:

having been unable to agree, recommends that the committee be discharged
and a new committee be appointed. 690/515

((Re)Engrossed) SB 2319 was placed on the Seventh order of business on the
calendar.

DATE: 4/16/99
CARRIER: Lyson
LC NO. _____ of amendment
LC NO. _____ of engrossment
Emergency clause added or deleted _____
Statement of purpose of amendment _____

(1) LC (2) LC (3) DESK (4) COMM.

REPORT OF CONFERENCE COMMITTEE

SB 2319: Your conference committee (Sens. W. Stenehjem, Lyson, C. Nelson and Reps. Koppelman, Klemin, Mahoney) recommends that the **HOUSE RECEDE** from the House amendments on SJ page 768, adopt amendments as follows, and place SB 2319 on the Seventh order:

That the House recede from its amendments as printed on page 768 of the Senate Journal and page 845 of the House Journal and that Senate Bill No. 2319 be amended as follows:

Page 1, line 8, after "damages" insert "against the driver under the motion procedures provided in subsection 1" and replace the second "the" with "clear and convincing"

Page 1, line 9, remove "preponderance of the"

Page 1, line 10, replace ", for a second time in" with "within the" and replace the second comma with "immediately preceding the accident has been convicted for violation of section 39-08-01 and who"

Page 1, line 14, after "substance" insert "unless a drug that predominantly caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to the driver"

Page 1, line 17, replace "Knowingly under significant" with "Under the" and replace "medication or other substance that" with "volatile chemical as listed in section 12.1-31-06."

Page 1, remove lines 18 through 20

Page 1, line 21, remove "damages under this section."

Renumber accordingly

SB 2319 was placed on the Seventh order of business on the calendar.

1999 TESTIMONY

SB 2319

February 2, 1999

SENATE JUDICIARY COMMITTEE

SB 2139

2319

CHAIRMAN STENEHJEM AND COMMITTEE MEMBERS:

My name is Paul Johnson. I'm an attorney in Fargo. I serve on the Board of Governors for the North Dakota Trial Lawyers, and I am registered as a lobbyist for them. I'm presenting this testimony today not only for the North Dakota Trial Lawyers, but also on behalf of the people I represent, and have represented, who have been injured by drunk drivers. I am here to present testimony in favor of SB 2139 which would allow punitive damages in civil actions arising out of car accidents involving persons who operated cars while intoxicated or under the influence of controlled substances.

Over the last several years North Dakota's legislature has recognized the need for increased criminal penalties in cases of drunk driving and driving under the influence of controlled substances. The legislature has, with an eye towards getting drunk drivers off our roads and streets, passed laws requiring mandatory minimum sentences that impose higher fines, laws that impose mandatory jail sentences in some instances, and laws requiring driver education, etc.

The need for stronger laws has been necessary in order that people get the message that drunk driving and driving under the influence of controlled substances is a danger that cannot be ignored or tolerated. Progress has been made. Senate Bill 2139 seeks to continue what the legislature has begun by recognizing that in addition to increased criminal penalties, increased civil penalties are needed in some instances to deter people from driving drunk.

Presently, punitive damage awards are rare in North Dakota. They are rare because they are reserved for a certain type of behavior. This bill does not seek to change the rule that punitive damages are reserved for behavior that demonstrates a wanton disregard for the rights and the safety of others. Nor does it seek to make punitive damage awards commonplace. SB 2139 seeks only to make it possible for juries or judges, in appropriate cases, to award, in addition to compensatory damages, punitive damages to deter drunk driving.

You may wonder why a separate statute is necessary for drunk driving offenses when there is already a statute allowing punitive damages. There are three reasons. **First**, in spite of the legislature's efforts, drunk driving is still frighteningly common. Many still have not gotten the message. **Second**, the potential for serious injury or death to completely innocent victims is high. Combine those two and what you have is an activity that many people still think is acceptable, but which has the very real potential of, in the blink of an eye, destroying the lives of all those involved; the innocent victims, the drunk drivers, and families on both sides.

A separate statute is necessary because drunk driving is a persistent and unique problem. It is unlike other kinds of behavior that might justify punitive damages, i.e. assault, murder, rape, etc. Those are terrible crimes, but they are, thankfully, not commonplace in North Dakota. Drunk driving is all too common, and for that reason must be singled out for special attention. Many more people in this state are injured and killed each year by drunk driving than by assaults, rapes and murders.

The **third** reason a specific statute is required is because courts fall victim to the same attitudes we all do. Courts are not necessarily willing, despite the existence of our general statute on punitive damages, to allow juries to consider the issue of punishment in civil cases involving drunk driving cases. That leads to a great disparity between one court and another. One judge may believe the conduct is potentially deserving of punitive damages, while another simply believes drunk driving, while wrong, is not that bad.

I am not suggesting that every time a person drinks and drives he/she should be subjected to punitive damages. Not all people who drink and drive need or deserve the additional punishment punitive damages allows. This bill recognizes and allows for those situations. It does not require that punitive damages be awarded. It does not even require that punitive damages be sought in every case. It simply allows the jury, in the proper case, to consider the issue, and to make a decision as to whether this additional penalty is needed. Let me give you an example from my own experience that illustrates the need for this legislation.

I represented a young man named Michael Penn. Michael is in his

I represented a young man named Michael Penn. Michael is in his twenties. He is originally from Thompson, but now lives and works in Pembina. On August 24, 1993, Michael was in Grand Forks where he lived at the time. He was out driving around on his motorcycle with a friend on the back when he was run into at a stop light by a drunk driver. When Michael was hit, his passenger flew off the back of the motorcycle and landed on the hood of the car. She then fell off the car onto the pavement. Michael was thrown out into the intersection. Both were injured. Michael's passenger suffered a back injury. Michael has been diagnosed by his doctors as having suffered a brain injury that resulted from his brain crashing against the inside of the skull when his body and head were thrown back and forth. This case would not be particularly unique were it not for what we know about the man who ran into him.

This accident happened at approximately 11:00 p.m. During the approximately five-hour period of time before the collision, the driver of the car that struck Michael had been in two different bars drinking. He has given sworn testimony that during that five-hour period of time he had only three drinks. He swears he was sober when he ran into Michael. Nevertheless, at the scene of the accident he got out of the car and was seen to stagger. He slurred his words. After talking to Michael and his passenger, and after finding out one or both were injured, he got back into his car and fled the scene.

Thankfully, a witness saw him drive away and followed him to his house. The witness called police on his cell phone, and police arrived at the house just as he pulled into his garage. The drunk driver got out of his car, and along with a passenger who was with him went into his house. Both over the next several minutes ignored the police officers who were pounding on the door and yelling for one or the other to come to the door. The police went to the back door of the house and called for the people inside to open the door, all the while continuing to pound on the doors. The officers could see the driver and his passenger sitting in the house with all the lights off. Neither made any move to let the police in.

Finally, the passenger lost his nerve and opened the door. The police officers who arrested the driver filed reports and affidavits saying that he appeared to be extremely intoxicated. He appeared to have little knowledge or understanding of what was occurring. They observed that the driver staggered,

was very unsure on his feet, and there was a strong odor of alcohol on his breath. The most telltale sign, however, that this man, who under oath swears he only had three drinks was intoxicated, was that witnesses at the scene, and the police officers, all saw that he had urinated in his pants.

When taken to the police station he refused to submit to any blood alcohol testing. The police reports say that he told police he had not left his home all night, and that someone else had driven his car. Now he admits to driving, but denies he lied to police. Furthermore, he insists, under oath, he was sober, and in complete control of his car.

As if all this were not enough, there is more to this particular gentleman's story. This is not the first time he has been arrested for drunk driving. Its not even the first time he has run into someone when he was drunk.

According to court documents on file with the Grand Forks Municipal Court he has been arrested a total of 6 times for drunk driving in the period of time from 1979 to 1993. In August of 1990, he caused an accident in Grand Forks in which a young woman was injured. Blood alcohol testing after that accident showed his blood alcohol level at .25 or two and one-half times the legal limit. As a result of his drunk driving and run-ins with law enforcement, this man has been fined, his drivers license has been suspended, he has gone to the mandatory alcohol awareness courses, he has even been sued civilly.

Nothing has worked. Each time he has been able to easily pay the fine, and has gotten his license back. Several times he has been able to plead guilty to a lesser offense. And, when he was sued it really didn't matter, because his insurance company paid for the damages. One way that this driver might finally be convinced to stop drinking and driving, is to hit him where he lives; in his billfold.

As a brief aside, let me tell you how these types of cases are generally handled if they go to trial. You would think that a trial would scare the daylights out of a fellow like this, given all that you have heard. The opposite is true. People like this have very little fear of civil trials. First, the jury never hears about the drunk driving. Before the trial ever begins, and often the day before, the drunk driver admits that he/she was at fault for the accident. Because the driver admits fault, any evidence of intoxication is no longer relevant, since the only issue left is how badly was the innocent victim injured.

Even that, however, is of little consequence, because the driver's insurance company will be responsible for those damages. In order to make the civil process more of a deterrent to drunk drivers, like this gentleman, this bill is needed.

Let me conclude by telling you just a bit more about Michael's case. I have made a motion to the court under our present statute asking that the judge allow us to ask the jury for punitive damages. We are asking to be allowed to tell a jury of North Dakotans what I have just told you, and let them decide whether punitive damages should be awarded. I cannot think of a case I have ever handled where they were more richly deserved. Unfortunately, given the present statute, and the persistent attitudes about drunk driving, this driver may yet again slip by. There is nothing I can do to ensure he will be subjected to the one penalty that might finally deter him. He is already back driving. He has already paid his fines. He has insurance to pay for any compensatory damages a jury may award Michael. That is simply not right.

I urge you, if you agree that drivers like this, and there are many others, should be made to pay, then please support SB 2139.

Thank you for your time and the opportunity to present this to you.

EXEMPLARY DAMAGES

You may, in your discretion, award exemplary or punitive damages if you find by clear and convincing evidence that the Defendant has been guilty of [oppression], [fraud], [or] [actual malice] [malice] as defined in these instructions. These damages are distinguished from damages that compensate for the detriment caused and which are called actual or compensatory damages. You may award the injured party any reasonable sum as an example to others and to punish the wrongdoer as you consider just.

In order to recover exemplary damages, you must find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following:

- 1) whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the Defendant's conduct as well as the harm that actually has occurred; and
- 2) the degree of reprehensibility of the Defendant's conduct and the duration of that conduct.

[3) You may also consider any of the following factors:

- a) the Defendant's awareness of and any concealment of the conduct; and
- b) the profitability to the Defendant of the wrongful conduct and the desirability of removing

that profit and of having the Defendant also sustain a loss; and

c) criminal sanctions imposed on the Defendant for the same conduct that is the basis for the exemplary damage claim are to be taken into account if offered in mitigation of the exemplary damage award.]

* * * * *

Use appropriate bracketed language.

N.D.C.C. 32-03.2-11(5)

NOTE: This instruction applies to claims arising on or after July 1, 1993. After that date, but before August 1, 1995, "presumed" malice is sufficient. Exemplary damages for claims arising after August 1, 1995 require "actual malice."

NOTE: A specific finding is required. Napoleon Livestock Auction, Inc. v. Rohrich, 406 N.W.2d 346 (N.D. 1987).

See also NDJI-CIVIL 1265(a), Exemplary Damages - Compensatory Damages Required; NDJI-CIVIL 1265(b), Exemplary Damages (Not Allowed); NDJI-CIVIL 1265(c), Exemplary Damages (Principal/Agent); NDJI-CIVIL 1267, Oppression; NDJI-CIVIL 1268, Fraud; and NDJI-CIVIL 1269, Malice.

TESTIMONY BY ALBERT A. WOLF
ON BEHALF OF
NORTH DAKOTA TRIAL LAWYERS ASSN.
BEFORE
SENATE JUDICIARY COMMITTEE
February 2, 1999

CORRECTED

SB 2319

Relating to exemplary damages while DUI

Chairman Stenehjem and members of the Committee.

SB 2319 was introduced to allow the court or jury to consider an award of exemplary damages if the evidence indicates that the action was caused by a driver who was under the influence of alcohol or controlled drugs arising out of a motor vehicle accident where personal injuries occurred for the second time in five years.

The purpose of this bill is to further help deter driving while under the influence of alcohol or drugs. At the hearing before the Senate Transportation Committee last session, the father of a youngster who was killed several years ago by a drunk driver testified that the driver had been charged with DUI on several occasions prior to that accident. Even in that accident, the case was settled by the insurance company for the driver and he was not required to make any payments for damages arising out of that wrongful death action.

Exemplary damages could be awarded in cases where the jury found that

the conduct of the driver was so calloused and indifferent towards the safety of others by his drinking and driving, particularly in cases where there had been prior DWIs by the same driver. It may not be proper that the plaintiff could seek or that a jury would award exemplary damages in a case where a person had an extra drink or two for the first time and did not have a history of driving while under the influence. However, this bill deals only with a driver who had one or more DUIs causing personal injury within five years.

In most cases the defendant drunk driver does not have to pay anything for damages for the injuries resulting from the accident since his insurance carder will cover that. But, exemplary damages would not be covered by insurance and the person liable for those damages would have the responsibility of paying those himself.

Also, the judgment for punitive damages would have to be satisfied by this driver before his driver's license could be reinstated. These have been severed bills introduced this Session to deal with the reported DUI driver. SB 2319 will pin financial responsibility on such drunk drivers and will help to deter repeated violations by keeping the driver off the road until he personally pays part of the damages he caused.

We urge a DO PASS of SB 2319.

32-03.2-11. When court or jury may give exemplary damages.

1. In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits or deposition testimony showing the factual basis for the claim. The party opposing the motion may respond with affidavit or deposition testimony. If the court finds, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

2. If either party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages. Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages. If an award of compensatory damages has been made, the trier of fact shall determine whether exemplary damages are to be awarded.

3. Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.

4. If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court.

5. In order for a party to recover exemplary damages, the finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors:

a. Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;

b. The degree of reprehensibility of the defendant's conduct and the duration of that conduct; and

c. Any of the following factors as to which evidence is presented:

(1) The defendant's awareness of and any concealment of the conduct;

(2) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; and

(3) Criminal sanctions imposed on the defendant for the same conduct that is the basis for the exemplary damage claim, these to be taken into account if offered in mitigation of the exemplary damage award.

6. Exemplary damages may not be awarded against a manufacturer or seller if the product's manufacture, design, formulation, inspection, testing, packaging, labeling, and warning complied with:

a. Federal statutes existing at the time the product was produced;

b. Administrative regulations existing at the time the product was produced that were adopted

by an agency of the federal government which had responsibility to regulate the safety of the product or to establish safety standards for the product pursuant to a federal statute; or

c. Premarket approval or certification by an agency of the federal government.

7. The defense in subsection 6 does not apply if the plaintiff proves by clear and convincing evidence that the product manufacturer or product seller:

a. Knowingly and in violation of applicable agency regulations withheld or misrepresented information required to be submitted to the agency, which information was material and relevant to the harm in question; or

b. Made an illegal payment to an official of the federal agency for the purpose of securing approval of the product.

8. Exemplary damages may be awarded against a principal because of an act by an agent only if at least one of the following is proved by clear and convincing evidence to be true:

a. The principal or a managerial agent authorized the doing and manner of the act;

b. The agent was unfit and the principal or a managerial agent was reckless in employing or retaining the agent;

c. The agent was employed in a managerial capacity and was acting in the scope of employment; or

d. The principal or managerial agent ratified or approved the doing and manner of the act.

Source: S.L. 1987, ch. 404, § 11; 1993, ch. 324, § 3; 1995, ch. 305, § 2; 1997, ch. 285, § 1.

TESTIMONY BY ALBERT A. WOLF
NORTH DAKOTA TRIAL LAWYERS ASSN.
HOUSE JUDICIARY COMMITTEE

SB 2319 - Exemplary damages in second DUI cases

Chairman DeKrey and members of the Committee.

SB 2319 was introduced to allow the court or jury to consider an award of exemplary or punitive damages in addition to actual compensatory damages, if the evidence indicates that the driver was under the influence of alcohol or controlled drugs and caused a motor vehicle accident where personal injuries occurred for the second time in five years.

The purpose of this bill is to further help deter driving while under the influence of alcohol or drugs. At the hearing before the Senate Transportation Committee last session, the father of a youngster who was killed several years ago by a drunk driver testified that the driver had been charged with DUI and convicted on several occasions prior to that accident. Even in that accident, the case was settled by the insurance company and the driver was not required to make any payments himself for damages arising out of that wrongful death action.

Exemplary damages could be awarded under current law in cases where the jury found that the conduct of the driver was calloused and indifferent towards the safety of others by his drinking and driving, but the Court's are reluctant to allow exemplary damages for a DUI without specific statutory authority. It may not

be proper that a jury could award exemplary damages in a case where a person had an extra drink or two for the first time and did not have a history of driving while under the influence. However, this bill deals with the repeat offender only, that is, a driver who had his second DUI causing personal injury within five years.

In most cases the defendant drunk driver does not have to pay anything for damages for the injuries resulting from the accident since his insurance carrier will cover that. But, exemplary damages would not be covered by insurance and the person liable for those damages would have the responsibility of paying that portion of the damages himself. Also, the judgment for punitive damages would have to be satisfied by this driver before his driver's license could be reinstated. SB 2319 will pin financial responsibility on such drunk drivers and will help to deter repeated violations by keeping the driver off the road until he personally pays at least part of the damages he has caused.

SB 2319 could not increase insurance rates since the exemplary damages are not payable by the insurance company. It should tend to decrease insurance rates, if anything, as it will keep the repeater DUI driver off the road for a longer period of time.

We urge a DO PASS of SB 2319.

HOUSE JUDICIARY COMMITTEE

SB 2139 - Exemplary damages in second DUI injury case.

2319
CHAIRMAN DeKREY AND COMMITTEE MEMBERS:

My name is Paul Johnson. I'm an attorney in Fargo. I serve on the Board of Governors for the North Dakota Trial Lawyers, and I am registered as a lobbyist for them. I'm presenting this testimony today through the North Dakota Trial Lawyers on behalf of the people I represent, and have represented, who have been injured by drunk drivers. I am here to present testimony in favor of SB 2139 which would allow punitive damages in civil actions arising out of car accidents involving persons who operated cars a second time in 5 years while intoxicated or under the influence of controlled substances and thereby causing injury.

Over the last several years and in this Session the North legislature has recognized the need for increased criminal penalties in cases of drunk driving and driving under the influence of controlled substances. With an eye towards getting drunk drivers off our roads and streets, the Legislature has passed laws requiring mandatory minimum sentences that impose higher fines, laws that impose mandatory jail sentences in some instances, laws requiring driver education, and laws that deal with driver's licenses.

The need for stronger laws has been necessary in order that people get the message that drunk driving and driving under the influence of controlled substances is a danger that cannot be ignored or tolerated. Progress has been made. Senate Bill 2139 seeks to continue what the legislature has begun by recognizing that, in addition to increased criminal penalties, increased civil penalties are needed in some instances to deter people from driving drunk.

Presently, punitive damage awards are rare in North Dakota. They are rare because they are reserved for a certain type of behavior. This bill does not seek to change the rule that punitive damages are reserved for behavior that demonstrates a wanton disregard for the rights and the safety of others. Nor does this bill seek to make punitive damage awards commonplace. SB 2139 seeks only to make it possible for juries or judges, in these repeater DUI cases, to award, in addition to compensatory damages, punitive damages.

There are three reasons why a separate statute is necessary for drunk driving offenses. **First**, in spite of the legislature's efforts, drunk driving is still frighteningly common. Many still have not gotten the message. **Second**, the potential for serious injury or death to completely innocent victims is high. Combine those two and you have an activity that many people still think is acceptable, but which has the very real potential of destroying the lives of all those involved.

A separate statute is necessary because drunk driving is unlike other kinds of behavior that might justify punitive damages, i.e. assault, murder, rape, etc. Those are terrible crimes, but they are, thankfully, not commonplace in North Dakota. Drunk driving is all too common, and for that reason must be singled out for special attention. Many more people in this state are injured and killed each year by drunk driving than by assaults, rapes and murders.

Third, a specific statute is required because courts are not necessarily willing, despite the existence of our general statute on punitive damages, to allow juries to consider the issue of punishment in civil cases involving drunk driving cases. That leads to a great disparity between one court and another. One judge may believe the conduct is potentially deserving of punitive damages, while another simply believes drunk driving should not be the basis for punitive damages, all because there is no specific statute.

I am not suggesting that every time a person drinks and drives he/she should be subjected to punitive damages. Not all people who drink and drive need or deserve the additional punishment of punitive damages. This bill recognizes and allows for those situations. It would not require that punitive damages be awarded. It would simply allow the jury, in the proper case, to consider the issue, for a repeat offender.

As an example, I represented a young man named who now lives and works in Pembina. On August 24, 1993, Michael was in Grand Forks where he lived at the time. He was out driving around on his motorcycle with a friend on the back when he was run into at a stop light by a drunk driver. When Michael was hit, his passenger flew off the back of the motorcycle and landed on the hood of the car. She then fell off the car onto the pavement. Michael was thrown out into the intersection. Both were injured. Michael's passenger suffered a back injury. Michael has been diagnosed by his doctors as having

suffered a brain injury that resulted from his brain crashing against the inside of the skull when his body and head were thrown back and forth. This case would not be particularly unique were it not for what we know about the man who ran into him.

This was not the first time he has been arrested for drunk driving. Its not even the first time he has run into someone when he was drunk. According to court documents on file with the Grand Forks Municipal Court he has been arrested a total of 6 times for drunk driving in the period of time from 1979 to 1993. In August of 1990, he caused an accident in Grand Forks in which a young woman was injured. Blood alcohol testing after that accident showed his blood alcohol level at .25 or two and one-half times the legal limit. As a result of his drunk driving and run-ins with law enforcement, this man has been fined, his drivers license has been suspended, he has gone to the mandatory alcohol awareness courses, he has even been sued civilly.

Nothing has worked. Each time he easily pays the fine, and has gotten his license back. When he was sued it really didn't matter, because his insurance company paid for the damages. One way that this driver might finally be convinced to stop drinking and driving, is to hit him with a judgment that he must pay off himself before he can get his license back to drive.

As a brief aside, let me tell you how these types of cases are generally handled if they go to trial. The jury seldom hears about the drunk driving. Before the trial ever begins, and often the day before, the drunk driver admits that he/she was at fault for the accident. Because the driver admits fault, any evidence of intoxication is no longer relevant, since the only issue left is how badly was the innocent victim injured. Even that, however, is of little consequence, because the driver's insurance company will be responsible for those damages. In order to make the civil process more of a deterrent to drunk drivers, like this gentleman, this bill is needed. We ask support for SB 2139.

WHEELER WOLF

ATTORNEYS

Albert A. Wolf
Jack McDonald
Gregory C. Larson
Steven L. Latham
Sarah Vogel

Arnold V. Fleck
Michael L. Wagner
Melissa Hauer
Courtney Koebele

Legal Assistants
Dianne M. Taix, CLAS
Char J. Jacober, CLA

220 NORTH FOURTH STREET · P.O. BOX 2056 · BISMARCK, ND 58502-2056 · (701) 223-5300 · FAX (701) 223-5366

March 10, 1999

Representative DeKrey
and Members of the
House Judiciary Committee
State Capitol
Bismarck, ND 58505

RE: SB 2319

Dear Representative DeKrey and Members of the Committee:

Although I believe that the language of the Bill now covers all the concerns brought up during the Committee hearing, I prefer to have the members of the Committee as comfortable as possible with the language and therefore I am submitting some proposed amendments that would deal with the concerns expressed during the hearing. Since this Bill would create a new subsection to Section 32-03.2-11 of the North Dakota Century Code, I believed that subsection 1 would apply to the implementation of the exemplary damages called for in the Bill but the amendment will specifically reference the subsection 1, motion procedures. A copy of that subsection is attached.

Secondly, there was concern expressed about whether exemplary damages could be awarded to an employer or owner of the vehicle driven by a second DUI offender so the language inserted in line 8 will limit that to the driver specifically, although I believe it was implied in the language of the Bill.

Thirdly, there was some concern expressed about a "prior occasion" of a DUI without a charge or adjudication and the language inserted in line 10 will clarify that intent as well.

If I can be any further help, please advise. I would appreciate being notified when the Committee will be discussing this Bill.

Sincerely,

WHEELER WOLF LAW FIRM


Albert A. Wolf
AAW:ko