

University of Miami Law Review

Volume 20 | Number 1

Article 9

10-1-1965

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Barry Kutun

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Recommended Citation

Barry Kutun, *Insurance Against the Assessment of Punitive Damages*, 20 U. Miami L. Rev. 192 (1965)
Available at: <https://repository.law.miami.edu/umlr/vol20/iss1/9>

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CASES NOTED

INSURANCE AGAINST THE ASSESSMENT OF PUNITIVE DAMAGES

Plaintiff obtained a 15,000 dollar judgment against the insured. Of this amount, 12,000 dollars was awarded as compensatory damages and 3,000 dollars was for punitive damages. The insurer paid the compensatory damages, but refused to pay the amount awarded for punitive damages, contending that the insurance contract did not cover liability for punitive damages. The plaintiff brought an action for a declaratory decree seeking a construction of the insurance contract.¹ The lower court granted the insurance company's motion for a summary final decree. On appeal to the Second District Court of Appeals, *held*, affirmed: it is violative of the public policy of Florida to require an insurer to pay punitive damages awarded against its insured. *Nicholson v. American Fire & Cas. Ins. Co.*, 177 So.2d 52 (Fla. 2d Dist. 1965).

Compensatory damages, as distinguished from punitive damages, are awarded in both intentional and unintentional tort actions.² The assessment of punitive damages, on the other hand, has been limited primarily to intentional tort actions.³ However, courts are assessing punitive damages in an increasing number of instances where the defendant's conduct amounts to something more than mere negligence.⁴

The ordinary automobile liability insurance policy covers an insured

1. The court observed that the policy in question provided generally that the insurer was to pay "all sums which the insured shall legally become obligated to pay as damages." *Nicholson v. American Fire & Cas. Ins. Co.*, 177 So.2d 52, 53 (Fla. 2d Dist. 1965).

The standard automobile liability policy provides as follows: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, . . . caused by accident . . . arising out of the . . . use of the automobile." 7 APPLEMAN, INSURANCE LAW AND PRACTICE § 4311 (1962).

2. Since compensatory damages are "to put the injured party in the same position (condition) in which he would have been if the tort had not been committed . . .," OLECK, DAMAGES TO PERSONS AND PROPERTY § 80 (1961), it necessarily follows that compensatory damages are properly awarded in both intentional and unintentional torts.

3. The reason for this limited application is that the wrongful act complained of must be accompanied by circumstances of aggravation, such as wantonness, maliciousness or wilfulness, and such circumstances occur with more frequency in the intentional tort area. The basis for this conclusion can be found by an examination of the torts in which punitive damages are most often assessed. Punitive damages are awarded frequently in such actions as false arrest or imprisonment, fraud and deceit, libel or slander and seduction, all of which are considered intentional torts. See generally 22 AM. JUR. 2d, DAMAGES § 243 (1965).

4. Professor Appelman supports this conclusion by stating:

When so many states have guest statutes in which the test of liability is made to depend upon wilful and wanton conduct, or when courts, in an effort to get away from contributory negligence of the plaintiff, permit a jury to find a defendant guilty of wilful and wanton conduct where the acts would clearly not fall within the common law definition of those terms 7 APPLEMAN, INSURANCE LAW AND PRACTICE § 4312 (1962).

for damages assessed against him as a result of *unintentional* conduct.⁵ *Intentional* conduct is almost always excluded from the coverage of the insurance contract. This exclusion of intentional conduct may either be the result of an express clause in the policy,⁶ or it may follow from a construction of the standard contract term "caused by accident" as not extending coverage to damages assessed for intentionally inflicted injuries.⁷

A problem arises, as in the instant case, when punitive damages are awarded in that "grey area" of gross, wanton or reckless negligence which borders on, but is generally considered to be less than,⁸ intentional conduct. Although there has been some criticism⁹ of this position, almost all jurisdictions allow the assessment of punitive damages in this class of cases.¹⁰ Professor McCormick has appropriately expressed the dominant view in these words: "Exemplary damages are assessed for the avowed purpose of visiting a punishment upon the defendant and not as a measure of any loss or detriment of the plaintiff."¹¹ Consistent with this position, most legal writers have advocated that public policy requires exclusion of punitive damages from liability insurance coverage when they are awarded against the tortfeasor responsible for the damage—otherwise, the wrongdoer is not punished.¹²

The majority of jurisdictions which have been confronted with this problem have been able to avoid the public policy question by resting

5. *Rothman v. Metropolitan Cas. Ins. Co.*, 134 Ohio St. 241, 16 N.E.2d 417 (1938).

The standard automobile liability policy term "accident" has been held to be a more comprehensive term than "negligence." The policy extends coverage to claims based on the aggravated forms of negligence, such as gross negligence, recklessness, or wantonness. *E.g.*, *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935); *Sheehan v. Goriensky*, 321 Mass. 200, 72 N.E.2d 538 (1947). See generally annot., 173 A.L.R. 503 (1948).

6. *Hill v. Standard Mut. Cas. Co.*, 110 F.2d 1001 (7th Cir. 1940).

7. *E.g.*, *Huntington Cab Co. v. American Fid. & Cas. Co.*, 155 F.2d 117 (4th Cir. 1946); *Sontag v. Galer*, 279 Mass. 309, 181 N.E. 182 (1932); *Weis v. State Farm Mut. Auto. Ins. Co.*, 242 Minn. 141, 64 N.W.2d 366 (1954); *Messersmith v. American Fid. Co.*, 232 N.Y. 161, 133 N.E. 432 (1921); *Anton v. Fidelity & Cas. Co.*, 117 Vt. 300, 91 A.2d 697 (1952).

8. For a general discussion, see Comment, *Insurer's Liability for Punitive Damages*, 14 Mo. L. Rev. 175 (1949), wherein the author discusses some of the problems attendant upon this area of the law.

9. There is, of course, much controversy over the merits and constitutionality of the existence of "civil punishment" in our legal system. The argument is that civil damages should indemnify the plaintiff and not punish the defendant. See *Morris*, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931); *Aldridge*, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945); Comment, 7 MIAMI L.Q. 517 (1953).

10. *McCORMICK*, DAMAGES § 78 (1935). *But see* *Boot Mills v. Boston & M.R.R.*, 218 Mass. 582, 106 N.E. 680 (1914) (However, punitive damages are allowed under the Massachusetts wrongful death statute.); *Vincent v. Morgan's La. & Tex. R.R. & Steamship Co.*, 140 La. 1027, 74 So. 541 (1917); *Riewe v. McCormick*, 11 Neb. 261, 9 N.W. 88 (1881); *Wilson v. Sun Pub. Co.*, 85 Wash. 503, 148 Pac. 774 (1915).

11. *McCORMICK*, DAMAGES § 77 (1935).

12. See *OLECK*, DAMAGES TO PERSONS AND PROPERTY § 275 (1961); 36 U. COLO. L. REV. 285 (1964); *Logan*, *Punitive Damages in Automobile Cases*, 1961 INS. L.J. 27; *contra*, 63 COLUM. L. REV. 944 (1963).

their decisions on other grounds.¹³ Some of these cases involved factual situations in which the insured himself was not the tortfeasor.¹⁴ When this occurs, the courts are able to allow recovery for punitive damages assessed against the insured since the insured's conduct was not the wrongful act on which the punitive damages were predicated. In still other cases, the *ratio decidendi* was predicated not upon the public policy question, but rather upon the construction of local statutory provisions.¹⁵

Some jurisdictions do not require that the damages awarded against a defendant be designated as either punitive or compensatory; a "lump-sum" judgment is allowed.¹⁶ Insurance companies have attempted to challenge these "lump-sum" judgments by contending that whatever portion may be an award for punitive damages is not recoverable against the insurer. However, the courts have failed to disturb such awards, even though they are primarily composed of punitive damages.

The more recent decisions that have considered the problem of indemnification by the insurer for punitive damages assessed against the insured for his unintentional torts, have all been based on public policy rationales, but have reached apparent dichotomous results.¹⁷ Those courts which deny recovery from the insurer have adopted the theory that it would be against "public policy" to allow indemnification for such

13. *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *General Cas. Co. v. Woodby*, 238 F.2d 452 (6th Cir. 1956); *New Amsterdam Cas. Co. v. Jones*, 135 F.2d 191 (6th Cir. 1943); *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935); *Capital Motor Lines v. Loring*, 238 Ala. 260, 189 So. 897 (1939); *American Fid. & Cas. Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935); *Tedesco v. Maryland Cas. Co.*, 127 Conn. 533, 18 A.2d 357 (1941).

14. *General Cas. Co. v. Woodby*, 238 F.2d 452 (6th Cir. 1956); *New Amsterdam Cas. Co. v. Jones*, 135 F.2d 191 (6th Cir. 1943); *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935).

15. For instance, in the leading case of *Tedesco v. Maryland Cas. Co.*, 127 Conn. 533, 18 A.2d 357 (1941), the Connecticut statute involved authorized double or treble damages in cases of willful violations of the motor vehicle law. The court construed this statute to be a penalty in nature and distinguished "punitive damages" from such a penalty. The court denied recovery of the penalty from the insurer, but indicated that if it were punitive damages, recovery would be granted.

In two Alabama cases decided under the Alabama wrongful death statute, the insurer was held liable for the full amount assessed, notwithstanding the fact that the statute spoke in terms of punitive damages. Neither of the cases predicated their holdings upon public policy because punitive damages under the statute are viewed as compensatory in nature. *American Fid. & Cas. Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935); *Capital Motor Lines v. Loring*, 238 Ala. 260, 189 So. 897 (1939). *But see* *Employers Ins. Co. v. Brock*, 233 Ala. 551, 172 So. 671 (1937) (recovery allowed against the insurer, but not under the Alabama wrongful death statute).

16. *Pennsylvania Threshermen & Farmer's Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *Morrell v. LaLonde*, 45 R.I. 112, 120 Atl. 435 (1923).

17. *Allowing recovery*: *Carroway v. Johnson*, 139 S.E.2d 908 (S.C. 1965); *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964). *Denying recovery*: *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *Crull v. Gleb*, 382 S.W.2d 17 (Mo. 1964).

conduct.¹⁸ The leading case supporting this position is *Northwestern Nat'l Cas. Co. v. McNulty*.¹⁹

The majority in *McNulty* specifically recognized that none of the prior cases dealing with the question of indemnification by an insurer for the assessment of punitive damages against its insured had discussed the "more important . . . question of public policy."²⁰ After concluding that Florida's position relative to the purpose of punitive damages was consistent with the majority of jurisdictions, *i.e.*, to punish,²¹ the federal court applied the Florida law and stated:

It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.²²

Discussing the underlying public policy objection to insurance against punishment, Judge Wisdom poignantly stated:

The argument that insurance against punitive damages would contravene public policy is sometimes said to rest on the doctrine that 'no one shall be permitted to take advantage of his own wrong.' . . . In such cases the public policy against coverage is not so much to prevent encouragement of wrong-doing by obstructing the hopes of profit; it is rather to make effective the discouragement of wrong-doing by the imposition of punishment. Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct.²³

The court's holding was reached without considering the terms of the insurance contract, but, the court stated that even if punitive damages were specifically provided for in the contract, the provision for such damages would be void.²⁴

Exemplary of those courts which reach a result diametrically opposed to *McNulty*, by allowing indemnification for the assessment of punitive damages, is *Lazenby v. Universal Underwriters Ins. Co.*²⁵ In *Lazenby*,

18. *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *Crull v. Gleb*, 382 S.W.2d 17 (Mo. 1964).

19. 307 F.2d 432 (5th Cir. 1962) (applying Florida law).

20. *Id.* at 436.

21. *Ibid.*

22. *Id.* at 440.

23. *Ibid.*

24. *Id.* at 434.

25. *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964). The South Carolina Supreme Court recently adopted the view that it was not against the public policy of that state to insure against punitive damages and that to construe the policy in any other way would be violative of the parties' rights under a voluntary contractual relationship. *Carroway v. Johnson*, 139 S.E.2d 908 (S.C. 1965).

the court was confronted with an almost identical set of facts. The court recognized that the penal nature of the doctrine of punitive damages in Tennessee is similar to that of Florida, but stated that "We . . . are not able to agree [that] the closing of the insurance market, on the payment of punitive damages, to such drivers would necessarily accomplish the result of deterring them in their wrongful conduct."²⁶

The *Lazenby* court clearly recognized and accepted the punishment purpose of punitive damages.²⁷ However, *Lazenby* attempted to support its result on the basis that the deterrent aspect of punitive damages is in fact nonexistent.²⁸ The inconsistency of this reasoning is evidenced in part, by what this writer believes was the real holding of the case. In *Lazenby* the court departed from the merits of the problem and issued a mandate, implicit in its result, to insurance companies to the effect that:

If change is to be made in the provisions of this standard policy and the coverage afforded thereby, it should be made in the office of the Commissioner and not by the Court.²⁹

In this respect, the dichotomous position between *McNulty* and *Lazenby* may be illusory, although the language of the majority of the *Lazenby* court obscured the holding by stating that "the average policy holder reading . . . [the standard liability policy] would expect to be protected against all claims, not intentionally inflicted."³⁰

In the instant case,³¹ the Second District Court of Appeals, after considering the Fifth Circuit's application of Florida law in *McNulty*, agreed "that as a matter of public policy punitive damages in this state are based on a theory inconsistent with their coverage by liability insurance."³² Punitive damages had been previously defined by the Florida Supreme Court as those damages which "blend together the interests of society and of the aggrieved individual, and are not only a recompense to the sufferer but a punishment to the offender and an example to the community."³³ In construing this definition, the court stated: "While this definition may seem to lend credence to the belief that punitive damages also compensate plaintiff for his injuries, we find their overriding purpose to be punishment."³⁴ After basing its decision on "public policy," the court concluded that a construction of the insurance contract would not

26. *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1, 5 (Tenn. 1964).

27. *Ibid.*

28. *Ibid.* No other conclusion can be drawn by this writer based on the court's language, which is to the effect that punitive damages would not deter socially irresponsible drivers from reckless conduct.

29. *Id.* at 8 (concurring opinion).

30. *Id.* at 5.

31. *Nicholson v. American Fire & Cas. Ins. Co.*, 177 So.2d 52 (Fla. 2d Dist. 1965).

32. *Id.* at 53.

33. *Smith v. Bagwell*, 19 Fla. 117, 121 (1882).

34. *Nicholson v. American Fire & Cas. Ins. Co.*, 177 So.2d 52, 54 (Fla. 2d Dist. 1965).

be necessary and in closing remarked: "We believe that a person has no right to expect the law to allow him to place responsibility for his reckless and wanton actions on someone else."³⁵

The soundness of the decision in the instant case was enhanced by the analysis of Judge Shannon, who perceptively distinguished those decisions in which insurance companies have been held liable for punitive damages. He stated:

In these cases, the courts have construed the contracts against the drafting party and found the wording broad enough to encompass punitive damages. We base our decision on public policy, and therefore the question of interpretation is not reached.³⁶

It is submitted that Judge Shannon's approach to the problem settles the question. His reconciliation of *Lazenby* upon contract grounds removes *Lazenby* from a position in direct opposition to the majority. Such a result clearly comports with both the public policy surrounding punitive damages and the possibilities of indemnification for those damages.

BARRY KUTUN

RIGHT TO ASSISTANCE OF COUNSEL DURING POLICE INTERROGATION

The defendant was arrested in connection with the murder of a store-keeper. After police investigators interrogated him for several hours at a police station, he admitted complicity in the murder. He made no request for the assistance of counsel at any time during police questioning. The trial court allowed the incriminating statements to be introduced into evidence over the defendant's objection that such introduction would result in a denial of due process of law because he was interrogated without benefit of the advice of counsel.¹ On direct appeal to the Supreme Court of Florida, *held*, affirmed: the sixth amendment to the federal constitution, as made obligatory upon the states by the fourteenth amend-

35. *Ibid.*

36. *Ibid.*

1. The defendant raised the issue of the fifth amendment right against self-incrimination. However, this note will be confined to the sixth amendment right-to-counsel clause as it applies to the states through the fourteenth amendment because the Supreme Court of the United States has recently based its holdings in confession cases on that clause rather than upon consideration of whether a confession can be voluntarily made when a suspect is not advised of his right to remain silent.

For a cogent argument that the fifth amendment is the only appropriate clause to be applied to confessions, see Elsen & Enker, *Counsel for the Suspect: Massiah v. United States & Escobedo v. Illinois*, 49 MINN. L. REV. 47, 57-58 (1965).