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Insurance Company Liability For Exemplary Damages

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Interim and Final Reports represent a beginning that will eventually bear fruit in a positive and more successful approach to the problem than that which exists today. In the words of Judge Morris Plescowe, speaking for the Joint Committee: "strict law enforcement and severe penalties are therefore not the easy answers to the problems of drug addiction. We must look elsewhere for a rational drug control program for this country."[90]

JAMES P. MANAK

INSURANCE COMPANY LIABILITY FOR EXEMPLARY DAMAGES

In *Northwestern Casualty Co. v. McNulty* the Fifth Circuit U.S. Court of Appeals, applying Virginia and Florida law, held that an insurance company, although liable for $37,500 compensatory damages, was not liable for $20,000 punitive damages assessed against its insured. In the instant case insured, a drunken driver, attempted to pass the car driven by plaintiff, where such a maneuver was impossible, at a speed of 80 m.p.h. or higher, crashed into the rear of plaintiff's vehicle and then fled.[1]

Basing its holding on public policy and stressing the "criminal character" of this wrong, the court held that punitive damages in such circumstances are meant to punish a defendant and concluded that a defendant is not punished if he can shift the burden of punishment to an insurance company.[2] Noting that punitive damages are recoverable for wilful, wanton or reckless acts,[3] the court made the degree of irresponsibility and disregard of others the standard for recovery.[4] The label punitive or wanton will not alone make insurance companies immune from liability. Each case will be viewed individually.[5] The concurring opinion pointed out the vagueness of the term "punitive damages" and the hairline distinction which often separates wanton from ordinary negligence.[6]

The individual character of offenses for which punitive damages lay goes back to English Common Law. Intentional torts by officers of government were grounds for recovery in a 1763 case, *Huckle v. Money*.[7] There, plaintiff was falsely imprisoned by defendant under an illegal warrant. Although he was detained only six hours and very civilly treated, "with beef steaks and beer,"[8]

90. Joint Committee of the American Bar Association and the American Medical Association on Narcotic Drugs, *op. cit. supra* note 87, at 22.

1. Northwestern Nat. Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).
2. *Id.* at 442.
3. *Id.* at 433.
4. *Id.* at 442, n.20.
5. *Id.* at 442.
6. *Id.* at 443-44.
7. 2 Wils. 206, 95 Eng. Rep. 768 (K.B. 1763); *accord*, Chambers v. Robinson, 2 Str. 691, 93 Eng. Rep. 787 (1726).
8. Huckle v. Money, *supra* note 7.

he recovered a jury verdict fifteen times the amount the court felt necessary to compensate him. The verdict of 300 pounds was not set aside, because the liberty of the subject was the issue at stake.

Several important purposes were served by such verdicts. Wrongdoers were punished for flagrant acts; others were deterred; and society was vindicated. Further, plaintiffs, those who suffered directly from the wrong, were given something extra.[9] As McCormick in his treatise on damages points out: "The jingle of the guinea soothes the hurt that honor feels."[10]

In several states the term punitive damages is applied to recoveries not generally considered punitive in nature. For example, in Alabama punitive damages are given in actions for wrongful death.[11] In Connecticut three types of recovery are possible: compensatory damages, punitive damages as a form of compensation for plaintiff's "expenses of litigation," and lastly penalties for the express purpose of punishing defendant.[12] These developments will not be considered.

In the course of history parties against whom punitive damages might be assessed were extended from officers of government to persons with a public duty (*e.g.*, common carriers) and then to the general public. The type of wrongs for which such damages might be assessed was extended from intentional torts, such as assault, battery, false imprisonment, and false arrest, to wanton acts.[13]

Public policy in most states forbids recovery by an insured from his insurance company for his intentional acts.[14] This principle is based on the maxim that no one may profit from his own wrong.[15] Regarding conduct of a wanton type, sometimes termed wilful and wanton negligence, the problem is more difficult. Is such conduct a degree of negligence, or does it smack of intent with the result that the insured is barred from passing on the burden of liability to the insurance company?

Several jurisdictions distinguish the terms, wilful and wanton. Massachusetts, in *Sheehan v. Goriansky*, declared that "wilful conduct injuring a guest occupant is not within the coverage of the policy. Wilful means intentional. . . . The undoubted rule applicable to ordinary insurance is that an insurance policy indemnifying an insured against liability due to his wilful wrong is void as against public policy."[16] The court admits that in criminal prosecutions it has said wanton or reckless equals intentional conduct. The opinion continues:

9. Oleck, Damages to Persons and Property 560.1-0.5, § 275A (1961).
10. McCormick, Handbook of the Law of Damages 287 (1935).
11. American Fid. & Cas. Co. v. Werfel, 230 Ala. 552, 162 So. 103 (1935); Code of Ala. Tit. 7 § 123 at 135 (1960).
12. Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941); Doroszka v. Lavine, 111 Conn. 575, 150 Atl. 692 (1930).
13. 1 Clark, New York Law of Damages 82-136 (1925).
14. 7 Appleman, Insurance Law and Practice 129, § 4312 (2d ed. 1962).
15. Messersmith v. American Fid. Co., 232 N.Y. 161, 165, 133 N.E. 432, 433 (1921).
16. 321 Mass. 200, 203, 72 N.E.2d 538, 541 (1947).

> But wanton or reckless conduct, while the legal equivalent of intentional conduct, is substantially different. . . . "Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results."[17]

Therefore, a wanton act is within the coverage of insurance because the harm resulting from the act is not intended. An Eighth Circuit Court of Appeals decision, based on Missouri law, held wantonness to be a form of negligence; recovery from an insurance company was allowed.[18] An Ohio case distinguished wilful from wanton as did the Massachusetts court. It held that so long as no malice, intent or purpose to cause injury was involved, rceovery by plaintiff from defendant's insurance company was proper.[19]

A 1921 English case is important in this area. It formulated a standard for determining when insurance companies would be liable, and it was cited by Judge Cardozo in a New York Court of Appeals decision that same year. In the English case the court held the insurance company liable for all "accidents," which, it held, included all of the insured's acts except intentional ones. The question was whether in criminal law the defendant would be guilty of murder or manslaughter. If murder, then his act must be intentional and hence no recovery from an insurance company is possible. If manslaughter, then it is an accident, a non-intentional act no matter how grossly or criminally negligent, and the policy would cover him.[20]

New York case law distinguishes wanton from wilful, and allows recovery from the insurance company for all but the wilful or *extremely* wanton conduct of the defendant. The point at which wantonness becomes a bar is when it would be deemed by the criminal law to be so devoid of social responsibility and so lacking in concern for human life and the consequences to life, that although no harm is intended to any particular individual, the actor must know someone will be killed or seriously hurt. (*i.e.*, the standard of section 1044(2) of the New York Penal Law—wanton and reckless murder in the first degree.) Judge Cardozo set up this standard by dictum in *Messersmith v. American Fidelity Company*, a 1921 New York Court of Appeals decision apparently involving only compensatory damages. In that case, a father's wilful act in permitting his underage son to drive the father's auto-

17. *Id.* at 204, 72 N.E.2d at 542.
18. Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934).
19. Rothman v. Metropolitan Cas. Ins. Co., 134 Ohio St. 241, 16 N.E.2d 417 (1938); *accord*, United Services Automobile Ass'n v. Zeller, 135 S.W.2d 161 (Tex. Civ. App. 1939).
20. Timline v. White Cross Ins. Ass'n, [1921] 3 K.B. 327.

mobile in violation of statute did not bar recovery from the insurance company for the son's negligence in causing an accident. Had the son's act been wilful, recovery would have been barred on public policy grounds.[21] This opinion was written before the sections defining third degree assault[22] and criminal negligence in operation of vehicle resulting in death[23] were added to the New York Penal Law. However, these sections seem to have had no effect on his interpretation of wantonness.

A recent New York case, citing Judge Cardozo's opinion in *Messersmith*, appears to reaffirm his view.[24] It concerned a girl who stole an automobile and in a 90 m.p.h. police chase caused fatal injuries to another. Her mother's insurance company was held liable for the harm caused by the girl. The court stated, "There was no proof in the wrongful death action that Christine *intentionally* collided with decedent's car nor were there allegations to that effect in the complaint. On the contrary, the complaint was framed solely in terms of *negligence* in the operation of a motor vehicle, and the judgment in favor of plaintiff, as the insurer concedes, was based solely on 'the negligence of the infant defendant.' "[25] In the light of the fact situation, the implication seems to be that unless the result is intended the act will be termed negligence and recovery from the insurance company will be allowed. What the New York law would be in a similar case involving punitive damages, granted as such, is uncertain.

If compensatory damages are recoverable from insurance companies for wanton conduct, should punitive damages based on the same conduct also be recoverable? The problem is complicated by guest statutes, agency problems, intra-family torts and by mixed verdicts which lump together compensatory and punitive damages.[26] In most jurisdictions the answer is "yes"; they are recoverable.[27]

One of the clearest statements of the affirmative view comes from the Fourth Circuit in an interpretation of South Carolina law in 1957. The Court of Appeals declared that the fact of punitive damages does not withdraw the case from insurance coverage. Punitive damages may be granted for wanton negligence as well as intent. So long as the offender's act with the automobile falls short of assault and battery, the insurance company is liable. The court, stressing the protection of the public, stated:

> Punitive damages are not limited to assaults and batteries. . . . To allow the appellant's argument would lead to the illogical and indefensible result, contrary to the purpose and spirit of liability insurance

21. Messersmith v. American Fid. Co., *supra* note 15, at 165, 133 N.E. at 433.
22. N.Y. Penal Law § 244.
23. N.Y. Penal Law § 1053-a.
24. Sperling v. Great Am. Indem. Co., 7 N.Y.2d 442, 451, 166 N.E.2d 482, 487, 199 N.Y.S.2d 465, 472 (1960).
25. *Ibid.*
26. 7 Appleman, *op. cit. supra* note 14, at 132-33, § 4312; Oleck, *op. cit. supra* note 9, at 546-47, § 271, 560.6-0.7, § 257C.
27. 7 Appleman, *op. cit. supra* note 14, at 132-33, § 4312.

> policies, which are designed to protect members of the public, that the more extreme the recklessness the more likely the insurer would be to escape liability. There was no claim at the trial and there is no intimation in this record that the insured, however reckless he may have been, intentionally used his automobile as a weapon to injure the plaintiff.[28]

Most jurisdictions reason in this fashion from the underlying tort. If punitive damages are granted by the court for an intentional tort, no recovery from the insurance company is allowed for punitive or compensatory damages. If the punitive damages are granted for a wanton tort, recovery is allowed for punitive as well as compensatory damages.[29]

Punitive damages in New York are usually granted only in cases of intentional torts.[30] Where recovery is based on wantonness, the courts define the act as malicious, with an improper motive, vindictive, an act approaching intent.[31]

By the insurance policy in *McNulty*, the instant case, the insurers agreed "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages."[32] The contract specifically excluded coverage for intentional torts. Thus, the contract, by its terms, included punitive damages so long as the act was not intentional. In spite of these provisions the court reached its conclusion that the insurance company would not be liable to pay the punitive damages on two distinct but interdependent grounds. First, it held that because punitive damages are meant to punish, the defendant should not be able to shift this punishment to the insurer. It qualified this statement, however, by looking to the underlying tort and concluding that the defendant's wanton act was of a "criminal character" and, therefore, a proper subject of punishment. This second line of reasoning by the court indicates that if the act were, though wanton, not of a criminal character, then perhaps the insurance company would be liable to pay such punitive damages.[33]

This decision does not reflect the trend encouraging compulsory insurance laws. Such legislation is meant to protect injured members of the public from judgment proof tortfeasors.[34] If beyond his minimum recovery, plaintiff is awarded an additional sum because of the flagrant character of defendant's act, should plaintiff be prevented from enjoying this extra grant because defendant is judgment-proof and his insurance cannot be reached to satisfy

28. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Thornton, 244 F.2d 823, 827 (4th Cir. 1957).

29. General Cas. Co. of Am. v. Woodby & Walker, 238 F.2d 452 (6th Cir. 1956); Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934); Morrell v. Lalonde, 45 R.I. 112, 118, 120 Atl. 435, 438 (1923).

30. Walker v. Sheldon, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490 (1961).

31. Douglas v. Tomkins Realty Corp., 210 N.Y.S.2d 550, 552 (Sup. Ct. 1960).

32. Northwestern Nat. Cas. Co. v. McNulty, *supra* note 1, at 433.

33. Northwestern Nat. Cas. Co. v. McNulty, *supra* note 1, at 442.

34. McCarthy v. Motor Vehicle Acc. Indemnification Corp., 16 A.D.2d 35, 224 N.Y.S.2d 909 (4th Dep't 1962).

the judgment? Should a defendant who considers himself protected by this insurance suddenly face loss of home, car, property, and wages because a jury considers his act wanton and grants punitive damages. Further, defendant expects such protection. As Appleman in his work on damages states:

> It is clear that the average insured contemplates protection against claims of any character caused by his operation of an automobile . . . not intentionally inflicted. . . . The insured expects, and rightfully so, that his liability under those circumstances will be protected by his automobile liability policy. With this view the majority of courts have agreed.[35]

However, Oleck in his treatise on damages writes: "It would seem that insurance against exemplary damages frustrates their purposes and should be considered contrary to public policy."[36] This emphasis on punishment as the primary purpose of punitive damages was the first ground used by the court in *McNulty*, the instant case. The criminal law, however, exists to punish the wrongdoer. The civil suit is meant to protect fully the wronged party. Even though a criminal prosecution is not undertaken, a defendant is deterred by the possibility of having his insurance cancelled and/or his license revoked. The rule of the instant case gives the impression of symmetry, that perfection of form which judges and lawyers strive to achieve through logic. Based on public policy, it says in short: let punitive mean what it says, punishment.[37]

In reality it is the injured party who is punished. Today, punitive damages are in essence additional compensation for plaintiff. This is indicated by courts which relate the amount of these damages to the injury done. As stated in a New York Supreme Court opinion:

> The only question here is whether the jury was guided by sound discretion as to the element of punitive damages, which they assessed at $2,000. Though there is no fixed measure of damages applicable, as they must vary with the circumstances of each case, they ought to be reasonably proportionate to the injury done.[38]

Obviously, a judgment for punitive damages is of no value to plaintiff unless he can recover them. In many cases plaintiff could not recover, because the defendant is judgment-proof, unless the insurance company is made liable. Insurance companies today take a great interest in promoting safer driving. Their interest may become even keener if they can be held liable for punitive damages based on the wantonness of their insureds.[39] Above all, the insured and the injured party will be better protected.

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35. 7 Appleman, *op. cit. supra* note 14, at 132-33, § 4312.
36. Oleck, *op. cit. supra* note 9, at 560.6, § 275C.
37. See An act to establish a uniform system of bankruptcy throughout the United States § 17, 30 Stat. 550 (1898), 11 U.S.C. 35; 6 Am. Jur. *Bankruptcy* §§ 784-86 (1950); Gilbert's Collier on Bankruptcy 370-71 (1937).
38. De Marasse v. Wolf, 140 N.Y.S.2d 235, 239 (Sup. Ct. 1955).
39. Northwestern Nat. Cas. Co. v. McNulty, *supra* note 1, at 444.

If an insurance company wishes to protect itself from paying for the punitive damages assessed against its insureds or even for compensatory damages based on wanton negligence, it may do so by drawing up policies specifically defining situations to be excluded from coverage. Such a procedure relieved the insurance company from liability in a Seventh Circuit case.[40] The assured, en route from the Whoopee Club in Evansville, Indiana, drove into a tree and injured a lady guest in his car. The Indiana guest statute required that plaintiff prove wanton negligence.[41] A $10,000 verdict was rendered against him. Plaintiff's suit on the policy of insurance against the insurance company was dismissed, however, because a provision in the policy excluded liability of the company for wanton acts of the assured.

An underlying assumption in punitive damages is that they are appropriate only for extremely reprehensible conduct, intentional or wanton in character, and traditionally the burden of liability has not been permitted to be shifted for intentional torts. An appellate division dissent declared that New York's compulsory insurance coverage (MVAIC) includes even intentional injuries inflicted with an automobile.[42] The majority held that this insurance covered only unintentional acts. Therefore, when a driver deliberately drove into plaintiff's automobile, the compulsory insurance could not be reached to reimburse the plaintiff. Judge Goldman, the dissenter, cited a New Hampshire case[43] as illustrating recoveries based on intentional torts. In that case, however, the wrongdoing driver merely "bumped" another car intentionally. It was held that no harm was intended and the injuries were negligently inflicted. Judge Goldman would extend insurer's liability to ramming. The theory behind Judge Goldman's dissent is that compulsory insurance is primarily meant to protect the public. Therefore, such insurance should cover even intentional acts.

If such a view is ever accepted, a major prop supporting the barrier against recovery from insurance companies for punitive damages, that such damages are given only for intentional or wanton torts and public policy excludes all recoveries from insurance companies that are based on intent, will be knocked away. Then, the first ground on which *McNulty*, the instant case, rested so heavily, *viz.*, that punitive damages are meant to punish, will stand alone. However, as previously stated, other questions are pertinent. Is not plaintiff harmed as well? Is society really protected when insurance companies, no longer liable for punitive damages, have less interest in preventing wanton acts? We should have in the forefront of our minds the injured plaintiff, for whose benefit

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

41. 8 Burns Anno. Ind. Stat. § 47-1021 (1952).

42. McCarthy v. Motor Vehicle Acc. Indemnification Corp., *supra* note 34, at 47-48, 224 N.Y.S.2d at 921; N.Y. Ins. Law § 600-26.

43. Hartford Acc. & Indem. Co. v. Wolbarst, 95 N.H. 40, 57 A.2d 151 (1948); *accord*, United States Fid. & Guar. Co. v. Janich, 3 F.R.D. 16 (S.D. Cal. 1943).

compulsory insurance laws are passed, from whose injury the claim for damages, compensatory and punitive, arises. Thus, recovery from insurance companies for punitive as well as compensatory damages should be possible.

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DISTRIBUTION OF ESTATES TO BENEFICIARIES BEHIND THE IRON CURTAIN

Three perplexing questions are manifest in the area of distribution of estates to beneficiaries residing behind the Iron Curtain. First, will the legatees actually receive the beneficial use or control of the funds so that the intent of the testator will be effectuated? Should these funds be allowed to leave the country despite the possibility that they might be used to aid our nation's enemies? Finally, should the state or the federal government control this area? Distribution of these estates is, of course, important to the parties directly involved. Furthermore, the interested countries have shown concern about these funds. In fact, Iron Curtain powers have even interpreted their currency regulations in an attempt to facilitate distribution of estates to beneficiaries residing within their borders.[1]

Mechanically, the administration by the surrogate is easily explained. If the decedent leaves funds to be distributed in a Communist-controlled country, the surrogate determines whether the beneficiary will receive the actual control of the legacy. If he decides that the beneficiary will not receive such benefit, then the funds are deposited with an appropriate treasurer.[2] The focal point of this article will be an analysis of the criteria used by a surrogate in New York in determining whether the amount should be distributed or deposited, and whether in making such a decision the surrogate is invading or encroaching upon the foreign relations power of our federal government. Section 269-a(1) of the Surrogate's Court Act provides in part:

> Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto.

There are similar provisions in the New York Civil Practice Act.[3] Section 269-a

1. In the Matter of Tybus, 28 Misc. 2d 278, 279, 217 N.Y.S.2d 913, 915 (Surr. Ct. 1961), citing 9 Polish Law Reg. or Journal (Feb. 19, 1951) containing decree of Feb. 3, 1947 (translated in decree of Feb. 3, 1947, Title I, article 4 on file with U.S. Embassy in Warsaw).
2. N.Y. Surr. Ct. Act § 269-a(1) (1939), as amended L. 1960, ch. 975.
3. N.Y. Civ. Prac. Act §§ 474, 978 (1939).