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**Punitive Damages: Punishment of an  
Insured Defendant?**

*Carroway v. Johnson*<sup>1</sup>

The plaintiff sued the defendant for injuries sustained in an automobile collision and was awarded a judgment in the amount of \$5,000 actual damages and \$1,500 punitive damages. The defendant's insurance company had refused to defend her in that action or to pay the judgment obtained, relying upon an employee exclusion clause in the policy. The plaintiff thereupon sued the defendant on the judgment, this time joining the insurer as co-defendant, and won a verdict to recover against the insurer the aforesaid amount. The insurance company appealed, questioning its liability for punitive damages.

The Supreme Court of South Carolina affirmed, holding that the insurer's obligation under an automobile liability policy requiring it to pay "all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . sustained by any person . . . arising out of the . . . use of the owned automobile or any non-owned automobile" did embrace the obligation to pay an award

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1. 245 S.C. 200, 139 S.E.2d 908 (1965).

for punitive damages. The court said that "liability policies have been held to cover punitive, as well as compensatory, damages"<sup>2</sup> and that the "majority of courts . . . have imposed liability upon the insurer even though the recovery was based upon wilful or wanton conduct [as distinguished from intentional wrongdoing], or even though the verdict may have included punitive damages."<sup>3</sup> Although noting the maxim that a policy "must be construed most liberally in favor of the insured and where the words . . . are ambiguous, or . . . capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured,"<sup>4</sup> the court found no ambiguity and held that the policy must be enforced according to its express terms, like any other contract. According to the court, punitive damages were included in the "sums" which the insured was "legally obligated to pay" under the policy; therefore, the contract, construed on its face, clearly encompassed punitive as well as compensatory awards as "damages because of . . . bodily injury." A factor which the court did not stress, but which very well may have motivated its decision, is the notion that the average person who takes out an automobile insurance policy contemplates protection against claims of *any* character.<sup>5</sup>

The holding in this case is undoubtedly in accord with the prevailing case law on the subject,<sup>6</sup> but is it sound in the light of public policy? Should the law permit one to insure himself against liability for torts resulting from his own wilful or wanton misconduct?

The majority of cases have held that an award of punitive damages comes within the coverage of an automobile liability policy insuring against loss resulting from death or bodily injuries,<sup>7</sup> and that such policies include recovery for wilful or wanton misconduct.<sup>8</sup> One court reasoned that, since acts of wanton and reckless character come essentially within the scope of negligence and since punitive damages are imposed because of a particularly negligent act, such damages are covered by the policy.<sup>9</sup> Almost all of the cases holding the insurer liable for punitive as well as compensatory damages have been careful to note the distinction between wilful or wanton misconduct and inten-

2. *Id.* at 910. The court was quoting from APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4900 (1942).

3. *Ibid.* The court again quoted APPLEMAN, *op. cit. supra* note 2, § 4312.

4. *Id.* at 909.

5. In support the court cited APPLEMAN, *op. cit. supra* note 2, § 4312. The court may have been influenced also by the fact that the insurer in this case was reluctant to pay any damages at all, as evidenced by its refusal to defend the insured in the original action.

6. See Annot., 173 A.L.R. 503, 506 (1947), 132 A.L.R. 1262 (1941). Note also, 7 AM. JUR. 2d *Automobile Insurance* §§ 92 and 196 (1963); and 45 C.J.S. *Insurance* § 827 (1946).

7. *E.g.*, *United States Fidelity and Guaranty Co. v. Janich*, 3 F.R.D. 16 (S.D. Cal. 1943); *Capital Motor Lines v. Loring*, 238 Ala. 260, 189 So. 897 (1939); *Employers Ins. Co. v. Brock*, 233 Ala. 551, 172 So. 671 (1937). See also APPLEMAN, *op. cit. supra* note 2, § 4900, and 6 BLASHFIELD, *CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE* § 3997 (1945).

8. *American Fidelity & C. Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935). See also 6 BLASHFIELD, *op. cit. supra* note 7, § 3997.

9. The court stated, "Since this policy clearly covers bodily damage through negligence and since these punitive damages are imposed because of the aggravated circumstances or form of this negligence, such punitive damages must be regarded as coming within the meaning of the policy." *Ohio Casualty Ins. Co. v. Welfare Finance Co.*, 75 F.2d 58, 59 (8th Cir. 1934).

tional misconduct.<sup>10</sup> The view seems to be that, although no person should be allowed to benefit from or insure himself against liability for his own *intentional* wrongdoings,<sup>11</sup> there is nothing wrong with permitting him to insure against his own *negligent* acts, however wanton or reckless they may be. The law of insurance thus adopts the thin line between gross negligence and intentional misconduct — almost always a purely factual question for the jury's determination — as its test of insurer liability.

There is a strong current of opinion which declines to accept this view and refuses to recognize the distinction between wilful or wanton acts and intentional acts, especially when such misconduct involves the use of a motor vehicle.<sup>12</sup> This group of courts takes the position that, the automobile being an inherently dangerous instrumentality, one should not be able to insure himself against his grossly negligent or reckless driving. Therefore, when punitive damages are assessed, it does not matter whether the driver's conduct was intentional or negligent; the mere fact that punitive damages have been levied renders him personally liable for them and not subject to any indemnification by way of insurance.

Thus, in the Connecticut case of *Tedesco v. Maryland Casualty Co.*,<sup>13</sup> an insurer under a policy substantially the same as that issued in the principal case, and in a similar automobile collision situation, was held *not* liable for payment of double or treble damages as provided by the specific statute being construed. The court there ruled that the punitive damages were not included within the scope of the policy because "the additional award . . . is imposed upon an offending driver as punishment"<sup>14</sup> and the misconduct had "the aspects of a wrong to the public rather than to the individual."<sup>15</sup>

10. *E.g.*, *Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *General Casualty Co. of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956); *New Amsterdam Casualty Co. v. Jones*, 135 F.2d 191 (6th Cir. 1943); *Rothman v. Metropolitan Casualty Ins. Co.*, 134 Ohio St. 241, 16 N.E.2d 417 (1938) (distinguished in *Northwestern National Casualty Co. v. McNulty*, 307 F.2d 422, 438 (5th Cir. 1962)); *Herrell v. Hickok*, 57 Ohio App. 213, 13 N.E.2d 358 (1937); *Sheehan v. Goriansky*, 321 Mass. 200, 72 N.E.2d 538, 541, 173 A.L.R. 497 (1947) (which took the view that if the act were "wilful," it was intentional and therefore not within the coverage of the policy); *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W. 2d 1 (Tenn. 1964).

11. *LoRocco v. N.J. Manufacturers Indemnity Ins. Co.*, 82 N.J. Super. 323, 197 A.2d 591 (1964); *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 133 N.E.2d 432, 19 A.L.R. 876 (1921). *Contra*, *Jernigan v. Allstate Ins. Co.*, 269 F.2d 353 (5th Cir. 1959).

12. See, *e.g.*, *Tomerlin v. Canadian Indemnity Company*, 37 Cal. Rptr. 15 (1964); *Crull v. Gleb*, 382 S.W.2d 17 (Mo. App. 1964).

13. 127 Conn. 533, 18 A.2d 357 (1941).

14. *Id.* at 359. The punishment involved here was for violation of a statute which made persons neglecting to conform to the laws of the road liable to one injured as a result of the violation of such laws in double or treble damages if, in the discretion of the court, double or treble damages should seem just.

15. *Ibid.* The court in this case tried to distinguish the facts of several of the cases mentioned as favoring the majority rule, citing specifically *American Fidelity & Casualty Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935) and *Ohio Casualty Ins. Co. v. Welfare Finance Co.*, 75 F.2d 58 (8th Cir. 1934). But it is doubtful that those cases could be validly distinguished, and even more improbable that the later cases such as *Pennsylvania Threshermen and Farmers' Mutual Casualty Insurance Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957) and *General Casualty Company of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956) could have been. Indeed, one court, dealing specifically

By far the most carefully analyzed and well-reasoned decision involving the public policy question is *Northwestern National Casualty Company v. McNulty*.<sup>16</sup> The United States Court of Appeals for the 5th Circuit found it unnecessary to construe the insurance contract, holding merely that public policy prohibits insurance against liability for punitive damages.<sup>17</sup> "The force of public policy on insurance covering punitive damages is that of a *penalty*, levied against the defendant as a punishment, to deter him and others from similar conduct."<sup>18</sup> The court thus recognized that punitive damages differ from compensatory damages.<sup>19</sup> As another court said, "Punitive or exemplary damages is an amount allowed over and above actual or compensatory damages. Its allowance depends on malice, moral turpitude, wantonness, or the outrageousness of the tort and is awarded as a deterrent to others inclined to commit a like offense."<sup>20</sup> To allow insurance for punitive damages would be to frustrate the purposes of such assessments: punishment and deterrence.<sup>21</sup>

Although the doctrine that "no one shall be permitted to take advantage of his own wrong" (the term "wrong" given a broad interpretation)<sup>22</sup> provides some force to the argument that insurance against punitive damages would run counter to public policy, it is by no means the sole rationale. As the court in *McNulty* stated:

The policy considerations . . . where . . . punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well nominally [*sic*] on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. . . . [T]here is no point in punishing the insurance company; it has done no wrong. In

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with the public policy question involved in *Tedesco*, said, "We see no difference in principle between public policy as established by the legislature and public policy established by the judiciary," thus discarding a distinction made by *Tedesco*. *Northwestern National Casualty Company v. McNulty*, 307 F.2d 432, at 437 (5th Cir. 1962). See also 19 U. Prrt. L. Rev. 144, 149 (1957) and 14 Mo. L. Rev. 175, 176 (1949).

16. 307 F.2d 432 (5th Cir. 1962).

17. *Id.* at 434.

18. *Ibid.*

19. *Contra*, *Smith v. Bagwell*, 19 Fla. 117 (1882), where the court stated, at 121: Compensatory damages are such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses, and to these may be added bodily pain and suffering. Exemplary, vindictive or punitive damages are such as 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.

See RESTATEMENT, TORTS (1939) § 903 and OLECK, DAMAGES TO PERSONS AND PROPERTY § 269.540.1 (1961). For a general discussion, see Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931).

It should be pointed out that two states, Connecticut and Michigan, consider punitive damages to be compensatory in nature. *Hanna v. Sweeny*, 78 Conn. 492, 62 Atl. 785 (1906); *Holsted v. VanWagnen*, 243 Mich. 350, 220 N.W. 762 (1926).

20. *Dr. P. Phillips & Sons, Inc. v. Kilgore*, 152 Fla. 578, 12 So. 2d 465, 467 (1943).

21. "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." *Northwestern National Casualty Company v. McNulty*, 307 F.2d 432, 440 (5th Cir. 1962).

22. *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 133 N.E.2d 432, 19 A.L.R. 876 (1921) (Cardozo, J.).

actual fact, . . . the burden would ultimately come to rest . . . on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.<sup>23</sup>

This element of personal punishment seems all the more important when considering that the nature of the offense is the use of an inherently dangerous motor vehicle on public highways,<sup>24</sup> and a verdict which includes punitive damages is justifiable only if it is the driver who pays.<sup>25</sup>

The court in *McNulty* adopted a rather broad standard: where punitive damages are awarded, no indemnity should be allowed the insured party.<sup>26</sup> In so doing it distinguished those decisions relied upon by the principal case,<sup>27</sup> stating that in each of those cases the plaintiff received a lump sum judgment for compensatory and punitive damages.<sup>28</sup> Such, however, was not the situation in the present *Carroway* case, which thus appears to be in direct contrast with *McNulty*.<sup>29</sup>

Although the issues of construction of the contract and public policy overlap,<sup>30</sup> most courts have refrained from coming directly to

23. *Northwestern National Casualty Company v. McNulty*, 307 F.2d 432, 440-41 (5th Cir. 1962). See also Ertsgaard, *Liability Beyond Insurance Policy Limits*, 425 *Ins. L.J.* 404 (1958).

24. "Our highway safety problems have greatly increased. Death and destruction stalk our roads. The peaceful Sunday afternoon family drive through the hills has been abandoned by many as the result of brushes with near death at the hands of half-baked morons drunkenly weaving in and out of traffic at 80 or 90 miles per hour." *Crull v. Gleb*, 382 S.W.2d 17, 23 (Mo. App. 1964).

25. Certain practical difficulties in allowing insurance against punitive damages are also noted by the court in *Northwestern National Casualty Company v. McNulty*, 307 F.2d 432, 441 (5th Cir. 1962): "(1) It would produce a serious conflict of interest between the insurer and the insured in settlement negotiations and in trial tactics . . . (2) There would be a conflict between the rule that in assessing punitive damages evidence of the financial standing of the defendant may be considered by the jury and the rule against referring to the defendant's insurance in the presence of the jury. (3) Fantastic results would be possible having no relation to making the injured party whole [where, for example, actual damages awarded are minute compared to punitive assessments.]" See also 70 *HARV. L. REV.* 517, 527 (1957).

26. In a specially concurring opinion, Judge Gewin said that this test is too broad, that the term "punitive damages" is too loose, vague, indefinite and uncertain. Sometimes compensatory damages embrace and blend with punitive damages. The more appropriate basis, the Judge submits, is a consideration of "the nature of the conduct of the wrongdoer — not the nature of the damages awarded. If the defendant acted willfully, intentionally, maliciously or fraudulently, coverage should be denied. . . ." *Northwestern National Casualty Company v. McNulty*, 307 F.2d 432, 445 (5th Cir. 1962). But this test appears difficult to apply, since the jury is asked to distinguish between grossly negligent and intentional misconduct. See *Tomerlin v. Canadian Indemnity Company*, 37 *Cal. Reprtr.* 15 (1964) and *Crull v. Gleb*, 382 S.W.2d 17 (Mo. App. 1964).

27. *American Fidelity and Casualty Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935); *Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957).

28. "The failure to award separate amounts . . . presented an obstacle . . . since the appellate court could not make a separation itself." *Northwestern National Casualty Co. v. McNulty*, 307 F.2d 422, 439 (1962). The jury should always be required to separately designate the amount of punitive damages and the amount of compensatory damages in order to avoid the pitfalls of lump-sum verdicts. See 46 *VA. L. REV.* 1036, 1050 (1960).

29. Another case subsequent to *McNulty*, and diametrically opposed to its result, is *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964).

30. See *Universal Indemnity Insurance Company v. Tenery*, 96 Colo. 10, 39 P.2d 776 (1934).

grips with the latter.<sup>31</sup> It has been left to the various commentators to deal with the policy question, and the overwhelming majority of them have agreed with the principle espoused by *McNulty*. The principle behind their reasoning is that an insurance company which has done no wrong should not be punished because of its insured's wrongdoings. The nature of the policy contemplates compensatory damages arising out of an accident, but not punitive damages awarded because the policy holder has acted in a careless or reckless manner. Should the insurer be held for punitive damages, the essential reasons for such an award — to punish the wrongdoer himself and to deter others — would be frustrated.<sup>32</sup>

In reaching its conclusion, the court in *Carroway* relied heavily on the ideas that punitive damages do not in fact deter future wrong actions, and that when one takes out a policy which does not specifically exclude punitive damages, he expects to be fully covered for any judgment rendered against him.<sup>33</sup> These arguments are not without merit, but public policy focuses upon a weightier consideration: to protect society by forcing the wrongdoer, not the innocent insurance company, to pay the penalty. An important exception to basic contract theory must be established here, where the misconduct takes on the character of a wrong to the public rather than to the individual.

In Maryland the problem is still largely a moot one since exemplary or punitive damages may not be recovered in an action for injuries arising out of the operation of an automobile in the absence of fraud, malice, evil intent or oppression.<sup>34</sup> "In automobile negligence cases

31. See *McNulty*, 307 F.2d 432, 436 (5th Cir. 1962); also Logan, *Punitive Damages in Automobile Cases*, 1961 *INS. L.J.* 27, 30. The principal case also emphasizes construction of the contract instead of a public policy consideration.

32. See generally OLECK, *op. cit. supra* note 19 § 275C (1961); Note, *Exemplary Damages in the Law of Torts*, 70 *HARV. L. REV.* 517 (1957); Note, *Insurance Coverage and the Punitive Award in Automobile Accident Suits*, 19 *U. PRR. L. REV.* 144 (1957); Comment, *Punitive Damages and Their Possible Application in Automobile Accident Litigation*, 46 *VA. L. REV.* 1036 (1960); Comment, *Damages — Intoxicated Driver — Punitive Damages*, 46 *IOWA L. REV.* 645 (1961).

Appleman is the only major commentator on the subject to disagree. APPLEMAN, *op. cit. supra* note 2, § 4312. Appleman's 1965 Supplement to this section notes the dissenting voice of *McNulty* and offers a rebuttal, based largely on conjecture as to how the author himself (Appleman) might have met that court's persuasive arguments, and emphasizing the construction of the specific policy: "Mr. Appleman's arguments apply with equal force to punitive damages. In any event a court should not aid an insurer which fails to exclude liability for punitive damages. Surely there is nothing in the insuring clause that would forewarn an insured that such was to be the intent of the parties."

It has been argued that legislatures have determined public policy in favor of holding the insurer liable for punitive damages, and that punitive damages are in fact compensatory and not penal, but it is difficult to justify these positions. "Legislatures in truth have not considered the problem, public policy neither demands nor suggests excessive recoveries and common sense dictates that punitive damages are penal in nature. It is certainly not socially desirable that the insured be protected from the consequences of his wanton conduct since the insured, knowing of this protection, is more apt to use less care even to the point of malicious behavior, than were he uninsured." Note, 19 *U. PRR. L. REV.* 144, 154 (1957).

33. In *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964), the court used similar arguments to reach the same conclusion.

34. *Davis v. Gordon*, 183 Md. 129, 133, 36 A.2d 699, 701 (1944). The public policy problem still has relevance in Maryland, however, in diversity of citizenship cases. See, e.g., *McNulty*, 307 F.2d at 434 (5th Cir. 1962).

the Maryland court obviously is of the opinion that criminal statutes are a better deterrent than civil penalties.<sup>35</sup>

In the light of well-reasoned public policy, liability insurance contracts such as the one involved in the principal case should not be held to embrace an award of punitive damages. Instead, an exception should be made to the rule that a policy be construed in favor of the insured party, where the insurer has not specifically included coverage for punitive damages in the contract.<sup>36</sup> Courts should recognize that in this area, punitive damages ought to be assessed only against the insured, and not against the insurer.\*

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35. *Gittings v. Zellan*, 160 F.2d 585, 587 (D.C. Cir. 1947). Maryland apparently takes the position that, where the driver's conduct is so reprehensible as to warrant punishment, the case becomes one for the criminal courts, thereby withdrawing it from the realm of the accident insurance policy.

It should be noted that there is a strong current of thought in the law today which favors the total abolition of punitive damages in civil cases, on the ground that if the defendant's activity was so gross as to necessitate punishment, then "the criminal court is obviously the arena where society's vindication best lies: whatever the theory of criminal law one chooses — punishment, deterrence, rehabilitation — the criminal court, with its flexibility in sentencing, its vast experience with wrongdoers, and its staff of parole, probation and other experts, is best equipped to achieve society's ends." Conrad, *Punitive Damages: A Challenge to the Defense*, 5 FOR THE DEFENSE 2 (1964).

36. There is no doubt that the insurer would be free from liability where coverage for punitive damages is specifically *excluded* from the policy. *Northwestern National Casualty Co. v. McNulty*, 307 F.2d 432, 443 (1962). But it is questionable whether courts should go so far as to hold that, should a policy specifically *provide* for such punitive damages coverage, it would contravene public policy, as did the tribunal in *McNulty*, 307 F.2d at 434.

\* *Editor's note*: As this issue of the REVIEW went to press, the District Court of Florida decided the case of *Nicholson v. American Fire and Casualty Insurance Company*, 177 So.2d 152 (Fla. 1965), which followed the principle laid down by the *McNulty* decision and the policy advocated by this casenote.