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AUTOMOBILE INSURANCE COVERAGE FOR PUNITIVE DAMAGES

A persistently troublesome question of increasing interest to courts, attorneys, insurance companies, and perhaps the few policyholders who have read their automobile insurance policies is whether an award of punitive damages¹ against an insured is covered by a liability insurance policy. The question has been litigated with surprising infrequency. A majority of the courts hold that the language of the typical policy does obligate payment of a judgment for punitive damages on the theory that such coverage exists unless specifically excluded.² A few courts,³ and the majority of writers who have commented on the subject,⁴ support the opposite position on the ground that obligating an insurance company to pay a judgment for punitive damages violates public policy.

I. THE NATURE OF PUNITIVE DAMAGES

Compensatory damages are those intended to make the plaintiff whole, that is, to restore him in every way possible to the position in which he would have been but for the conduct of which he complains. Because compensatory damages are ordi-

1. The term punitive damages, as used in this note is synonymous with exemplary damages, vindictive damages, and "smart money."

2. See, e.g., *Pennsylvania Threshermen and Farmers' Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *General Cas. Co. of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956); *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935); *United States Fidelity & Guar. Ins. Co. v. Janich*, 3 F.R.D. 16 (S.D. Cal. 1943); *Employers Ins. Co. v. Brock*, 233 Ala. 551, 172 So. 671 (1937); *American Fidelity & Cas. Co. v. Werfel*, 231 Ala. 285, 164 So. 383 (1935); *American Fidelity & Cas. Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935); *Maryland Cas. Co. v. Baker*, 304 Ky. 296, 200 S.W.2d 757 (1947); *Morrell v. Lalonde*, 45 R.I. 112, 120 A. 435 (1923); *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964).

3. *Northwestern Nat. Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *Universal Indem. Ins. Co. v. Tenery*, 96 Colo. 10, 39 P.2d 776 (1934); *Tedesco v. Maryland Cas. Co.*, 127 Conn. 533, 18 A.2d 357 (1941); *Nicholson v. American Fire & Cas. Ins. Co.*, 177 So. 2d 52 (Fla. 1965); *Crull v. Gleb*, 382 S.W.2d 17 (Mo. 1964).

4. H. OLECK, *DAMAGES TO PERSONS AND PROPERTY* § 275c (1967); [hereinafter cited as OLECK]; Logan, *Punitive Damages in Automobile Cases*, 1961 *INS. L.J.* 27; Note, *Exemplary Damages in the Law of Torts*, 70 *HARV. L. REV.* 517 (1957); Comment, *Factors Affecting Punitive Damages*, 7 *MIAMI L. Q.* (1953); Comment, *Insurer's Liability for Punitive Damages*, 14 *MO. L. REV.* 175 (1949); Note, *Insurance Coverage and the Punitive Award in the Automobile Accident Suit*, 19 *U. PITT. L. REV.* 144 (1957); Comment, *Punitive Damages and Their Possible Application in Automobile Accident Litigation*, 46 *VA. L. REV.* 1036 (1960). *But see* 7 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4312 (1962).

narily a prerequisite to the recovery of punitive damages,⁵ it is assumed in the discussion that follows that the facts are such that the compensatory damages are covered by the policy.

Punitive damages have become an accepted mechanism of modern jurisprudence. Although it has been criticized,⁶ the practice of awarding punitive damages is firmly established in most jurisdictions.⁷ The prevailing view is that the dominant function of an award of punitive damages is to punish the defendant in order to deter repetition of the wrongful conduct.⁸ Following this view, most commentators⁹ think that public policy requires exclusion of such damages from liability insurance coverage when they are assessed against the party personally responsible for the wrong, since otherwise the wrong-doing defendant is not punished.¹⁰

Not all states view punitive damages solely as punishment. Oregon has construed punitive damages as serving the dual role of both compensation and punishment.¹¹ Michigan¹² and New Hampshire¹³ seem to share this view. Connecticut goes even further and holds that what are called punitive damages are in effect purely compensatory;¹⁴ they limit the amount of a "punitive" award to the plaintiff's expenses of litigation in the suit, less his taxable costs.¹⁵ Although it is well established in South Carolina that punitive damages are regarded as a punishment for wrong, there is language in some of the South Carolina cases which suggests that punitive damages are not

5. *E.g.*, *Durham v. New Amsterdam Cas. Co.*, 208 F.2d 342 (4th Cir. 1953); *Gomez v. Dykes*, 89 Ariz. 171, 359 P.2d 760 (1961); *Cook v. Atlantic Coast Line R.R.*, 183 S.C. 279, 190 S.E. 923 (1937); *Zedd v. Jenkins*, 194 Va. 704, 74 S.E.2d 791 (1953).

6. C. McCORMICK, DAMAGES § 77 (1935).

7. Only four states absolutely reject the doctrine: Louisiana, Massachusetts, Nebraska, and Washington. C. McCORMICK, DAMAGES § 78 (1935).

8. OLECK, § 275A (1961).

9. Authorities cited note 4 *supra*.

10. See OLECK, § 275C, at 560.6; Note, *Insurance Coverage and the Punitive Award in the Automobile Accident Suit*, 19 U. PITT. L. REV. 144, 154 (1957).

11. *Kinzua Lumber Co. v. Daggett*, 203 Ore. 585, 281 P.2d 221 (1955).

12. *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922).

13. *Bruton v. Leavitt Stores Corp.*, 87 N.H. 304, 179 A. 185 (1935).

14. *Chykirda v. Yanush*, 131 Conn. 565, 41 A.2d 449 (1945); *Armstrong v. Dolge*, 130 Conn. 516, 36 A.2d 24 (1944); *Hanna v. Sweeney*, 78 Conn. 492, 62 A. 785 (1906).

15. Cases cited note 14 *supra*.

entirely separable in theory from actual damages and in fact have a compensatory aspect.¹⁶

A claim for punitive damages gives the plaintiff a double-barreled approach to possible recovery in that he usually alleges compensatory damages and then adds an allegation to punish the defendant. This provides a psychological means of satisfying the plaintiff's desire for retribution from the wrongdoer in addition to a monetary return.

There is a lot to be said for punitive damages in this time of flagrant negligence on the highways. Certainly the criminal courts have not been altogether effective in the control of the automobile traffic problems, and if punitive damages in an automobile tort action can in any way help to alleviate this problem they should have a place in our system.

II. DECISIONS FAVORING COVERAGE

Of the cases which have squarely dealt with the issue, the South Carolina case of *Carroway v. Johnson*¹⁷ is the latest and most representative of the decisions holding punitive damages to be within policy coverage. In that case 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 insurer refused to pay the judgment, and the plaintiff thereupon sued the defendant and the insurer on the judgment. Upon a finding for the plaintiff, the insurance company appealed, questioning its liability for punitive damages. The policy contained the language of the commonly used 1958 Family Auto Policy Standard Provisions obligating the insurer "[t]o pay on behalf of the insured 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."¹⁸ The Supreme Court of South Carolina affirmed, holding that the language of the policy was sufficiently broad to cover a judgment for punitive damages, such judgment being included in the "sums" which

16. *E.g.*, *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965); *Rogers v. Florence Printing Co.*, 233 S.C. 567, 196 S.E.2d 258 (1958); *Davenport v. Woodside Cotton Mills Co.*, 225 S.C. 52, 80 S.E.2d 740 (1954); *Beaufort v. Southern R.R.*, 69 S.C. 160, 48 S.E. 104 (1904).

17. 245 S.C. 200, 139 S.E.2d 908 (1965).

18. *Id.* at 202, 139 S.E.2d at 909.

the insured had legally obligated itself to pay within the meaning of the policy. The court said that “[l]iability policies have been held to cover punitive, as well as compensatory damages”¹⁹ 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 wrong doing], or even though the verdict may have included punitive damages.”²⁰ 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.” The court observed that insurance carriers have the right to limit their liabilities and impose whatever conditions they please so long as the limitations are not contrary to public policy. Here, the insurance policy was a voluntary agreement between the parties to pay “all sums,” and the court felt that such an agreement should be broadly interpreted.²¹

Of parenthetical interest is the fact that in *Carroway* the court distinguished the case of *Laird v. Nationwide Insurance Company*,²² in which it was held that when a South Carolina statute²³ required all policies to contain an uninsured-motorist coverage clause, the coverage afforded thereunder was limited to awards of compensatory damages only and did not include punitive damages. That holding was, in turn, based on a distinction between the language of the South Carolina statute²⁴ setting forth the general requirements of liability policies as opposed to the specific language of the statute requiring uninsured motorist coverage.²⁵

Shortly after the action in *Carroway* was instituted but before the Supreme Court decision was rendered, the South Carolina Legislature conclusively settled the issue in this state by amending the code to provide that “[d]amages in an automobile liability-insurance policy shall include both actual and punitive

19. *Id.* at 204, 139 S.E.2d at 910, quoting from 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4900 (1942).

20. *Id.* at 205, 139 S.E.2d at 910, quoting from 7 J. APPLEMAN, *supra* note 19, § 4312.

21. *Carroway v. Johnson*, 245 S.C. 200, 205, 139 S.E.2d 908, 910 (1965).

22. 243 S.C. 388, 134 S.E.2d 206 (1964).

23. S.C. CODE ANN. § 46-750.14 (1962).

24. S.C. CODE ANN. § 46-750.13 (1962).

25. *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964).

damages."²⁶ Since the legislature has acted, the public policy argument cannot even be raised in South Carolina.

Construing policy language identical to that involved in *Carroway*, the Tennessee Supreme Court similarly held in favor of coverage for punitive damages in *Lazenby v. Universal Underwriters Insurance Company*.²⁷ In *Lazenby* the insured, who had an accident while driving in an intoxicated condition, was protected by his liability policy for both compensatory and punitive damages, and the policy as so construed was held not to violate public policy.

The case most often cited for the proposition that an insurer is liable for punitive damages is *American Fidelity and Casualty Company v. Werfel*.²⁸ In that case the complainant, having been awarded a judgment including punitive damages against the insured for injuries caused by his wilful or wanton conduct, brought an action to reach the insurance money. The Alabama court held that the policy language was broad enough to cover personal injury or death resulting from an accident; therefore, it was broad enough to cover punitive damages. It should be noted, however, that under Alabama law only punitive damages are recoverable in a wrongful death action.²⁹

The *Werfel* case has been followed by later Alabama cases. In *Employer's Insurance Company v. Brock*,³⁰ the court said only that the punitive damages awarded fell within the terms of the policy as construed in the *Werfel* case. Later in *Capital Motor Lines v. Loring*³¹ the Alabama court said, in answer to the contention that the insurer was not liable for punitive damages assessed under the homicide act, that "the damages are not imposed to punish the indemnitor, and its liability to pay such damages arises out of its voluntary obligation to pay the judgment against the indemnitee."³²

26. S.C. CODE ANN. § 46-750.31(4) (Supp. 1966).

27. 214 Tenn. 639, 383 S.W.2d 1 (1964).

28. 230 Ala. 552, 162 So. 103 (1935).

29. ALA. CODE tit. 7, § 123 (1958).

30. 233 Ala. 551, 172 So. 671 (1937).

31. 238 Ala. 260, 189 So. 897 (1939).

32. *Id.* at 263, 189 So. at 899. The Alabama cases have been described as being "based not on legal reasoning but . . . the product of a peculiar statutory scheme which would seem to have little application outside of Alabama." Note, *Insurance Coverage and the Punitive Award in the Automobile Accident Suit*, 19 U. PITT. L. REV. 144, 151 (1957). The Alabama cases are open to the objection that the decision is based on a section of the Alabama Code giving judgment creditors of an insured the right to have the insurance money provided

A Federal court decision using Missouri law, *Ohio Casualty Insurance Company v. Welfare Finance Company*³³ followed this same line of reasoning. A liability policy insuring "against loss by reason of bodily injuries . . . accidentally sustained . . . by any person or persons other than employees of the assured"³⁴ was held to cover punitive damages recovered by a person who had been injured by the defendant's truck. The court said:

The contention of appellant that exemplary damages are outside of the language and meaning of the policy is not well taken. . . . The basis of the . . . action was negligence and nothing more than negligence. Obviously, negligence is covered in the term of the policy 'accidentally sustained.' The assessment of punitive damages was a 'liability imposed by law upon the assured' in connection with and because of the bodily injuries and aggravated conduct of the servant in causing such injuries. Under the Missouri law, where injuries are negligently caused and the negligence is of such an aggravated form or attended by such circumstances as to be wanton and reckless in character, punitive damages are authorized. . . .

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.³⁵

The decision, while holding that the policy involved covered punitive damages for gross negligence, pointed out that the master was being held liable for such negligence on the part of his servant, without direct or indirect violation on the master's part, so that there could be no violation of public policy from insurance protection of the master. There is dictum that there would be a grave question of validity because of the public policy argument if the insured's own actions were involved. This case may thus be regarded as a bridge between the cases finding coverage and those denying it.

for in the contract of insurance applied to the satisfaction of a judgment, which was held to authorize the recovery by an injured party of punitive damages from the insurance company apparently on the theory that the legislature had so determined public policy by the passage of the statute. ALA. CODE tit. 28, §§ 11-12 (1958).

33. 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935).

34. *Id.* at 58.

35. *Id.* at 59.

*Maryland Casualty Company v. Baker*³⁶ held that policies issued to a taxicab operator covered a judgment rendered against the operator in favor of a female passenger for both actual and punitive damages because of an assault on her by the taxicab driver. In *United States Fidelity & Guaranty Company v. Janich*³⁷ the payment of punitive damages was held to be an obligation under policy language agreeing "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of liability imposed by law."³⁸

The argument that punitive damages are not within the policy provisions because they are actually not damages at all but rather penalties was expressly rejected in *General Casualty Company v. Woody*³⁹ by the Sixth Circuit Court of Appeals. The policy in that case obligated the appellants "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability . . . imposed upon him by law (a) for damages . . . sustained . . . by any person . . ."⁴⁰ The appellants contended that their liability policy did not obligate them to pay that portion of the judgments award as punitive damages, in that they were penalties rather than damages. The court admitted that injuries inflicted intentionally are not accidental injuries within the coverage of the usual liability policy but noted that injury from gross or wanton negligence is not the same as intentional injury.⁴¹ The court, therefore, was of the opinion that the punitive damages awarded were liabilities imposed by law for damages within the meaning of the policy. It should be noted, however, that the reason there is no coverage for intentionally inflicted injuries is that the policy expressly excludes such injuries. In other words, the absence of such coverage is not based on any punitive quality in the damages for such injury. When there is no such policy exclusion it has been held that there can be coverage even of intentional injuries despite the argument that public policy prevents any valid insurance against one's own intentional illegal

36. 403 Ky. 296, 200 S.W.2d 757 (1947).

37. 3 F.R.D. 16 (S.D. Cal. 1944).

38. *Id.* at 19.

39. 238 F.2d 452 (6th Cir. 1956).

40. *Id.* at 457.

41. See *Miller v. Fidelity & Cas. Co.*, 291 Mass. 445, 197 N.E. 75 (1935); *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 133 N.E. 432 (1921); *Commonwealth Cas. Co. v. Headers*, 118 Ohio St. 429, 161 N.E. 278 (1928).

acts.⁴² 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,⁴³ and that such policies include recovery for wilful or wanton misconduct.⁴⁴ Almost all 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 intentional misconduct.⁴⁵ 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,⁴⁶ 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.

In South Carolina punitive damages are allowed when there is proof of wilful, reckless or malicious violation of a person's rights;⁴⁷ and it must be more than "mere gross negligence."⁴⁸ The Fourth Circuit, declaring the rule of South Carolina, (a rule which prevails in many other jurisdictions) has said that "recklessness is the equivalent of . . . intentional wrong."⁴⁹ Such expressions have led to the proposition that when the driver of an automobile deliberately inflicts injury upon a person, it should be regarded as an assault and battery and not an acci-

42. *New Amsterdam Cas. Co. v. Jones*, 135 F.2d 191 (6th Cir. 1943).

43. *E.g.*, *United States Fidelity & Guar. 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* 6 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 3997 (1945).

44. *American Fidelity & Cas. Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935)

45. *E.g.*, *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *General Cas. Co. of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956); *New Amsterdam Cas. Co. v. Jones & Hines*, 135 F.2d 191 (6th Cir. 1943); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964).

46. *La Rocco v. New Jersey Mfrs. Indem. Ins. Co.*, 82 N.J. Super. 323, 197 A.2d 591 (1964); *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 133 N.E. 432 (1921). *Contra*, *Jernigan v. Allstate Ins. Co.*, 269 F.2d 353 (5th Cir. 1959).

47. *Davenport v. Woodside Cotton Mills Co.*, 225 S.C. 52, 80 S.E.2d 740 (1954); *Darlington County Fair & Driving Ass'n v. Atlantic Coast Line R.R.*, 90 S.C. 436, 73 S.E. 790 (1912); *Gwynn v. Citizens Tel. Co.*, 69 S.C. 434, 48 S.E. 460 (1904).

48. *Hicks v. McCandlish*, 221 S.C. 410, 70 S.E.2d 629 (1952).

49. *Galloway v. General Motors Acceptance Corp.*, 106 F.2d 466 (4th Cir. 1939).

dent within the meaning of the policy. However, the Fourth Circuit in *Pennsylvania Threshermen & Farmers' Mutual Casualty Company v. Thornton*⁵⁰ rejected the insurance carrier's argument that prior South Carolina decisions had equated recklessness with intentional wrong, policy coverage being limited to negligent and unintentional acts. In holding that the policy covered an award for punitive damages, the court concluded that to sustain the carrier's position would "lead to the illogical and indefensible result, contrary to the purpose and spirit of liability insurance 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."⁵¹

III. DECISIONS HOLDING NO LIABILITY INSURANCE COVERAGE FOR PUNITIVE DAMAGES

Perhaps the leading and best reasoned of the few cases denying coverage of punitive damages because of public policy is *Northwestern National Casualty Company v. McNulty*.⁵² The insurer urged that a claim for punitive damages was not one for "bodily injury" under coverage identical to that contained in the 1958 Family Auto Policy Standard Provisions. (This is the same policy language as interpreted in *Carroway v. Johnson*.⁵³) The court for the Fifth Circuit found it unnecessary to construe the insurance contract, holding merely that public policy prohibits insurance against liability for punitive damages.⁵⁴ The court observed that

there are especially strong public policy reasons for not allowing socially irresponsible automobile drivers to escape the element of personal punishment in punitive damages when they are guilty of wreckless slaughter or maiming on the highway. It is no answer to say, society imposes criminal sanctions to deter wrongdoers. . . . A criminal conviction and payment of a fine to the state may be atonement to society for the offender. But it may not have a sufficient effect on the conduct of others to make the public policy in favor of punitive damages useful and effective. . . . To make that policy useful and effective the delinquent driver must not be

50. 244 F.2d 823 (4th Cir. 1957).

51. *Id.* at 827.

52. 307 F.2d 432 (5th Cir. 1962).

53. 245 S.C. 200, 139 S.E.2d 908 (1965).

54. 307 F.2d 432, 434.

allowed to receive a windfall at the expense of the purchasers of insurance, transferring his responsibility for punitive damages to the very people—the driving public—to whom he is a menace.⁵⁵

The court also pointed out that if a culpable defendant is permitted to shift the burden to an insurance company, punitive damages would serve no socially useful purpose because punitive damages do not compensate the plaintiff for his injury.⁵⁶ With almost unassailable logic, the court concluded that because of the nature of punitive damages there is no point in punishing the insurance company; it has committed no wrong.

*Tedeso v. Maryland Casualty Company*⁵⁷ does not deal with punitive damages as such, but rather with an award under a Connecticut statute⁵⁸ allowing double or treble damages for torts resulting from wilful violation of traffic regulations. The court held that an award of double damages under such a statute was a penalty and that allowing a wrongdoer to protect himself against it by insurance would be contrary to public policy. The court in effect equated the statute to one permitting recovery of a penalty (in the quasi-criminal sense) as opposed to a punishment in the civil punitive damage sense. It was accordingly held that the policy did not cover an award for punitive damages on the theory that it would be contrary to public policy to permit recovery from an insurer of amounts for fines in criminal cases.

*Universal Indemnity Insurance Company v. Tenery*⁵⁹ denied coverage of punitive damages apparently upon grounds both of the insurance policy construction and public policy.

The insurance company did not participate in this wrong, and was under no contract to indemnify against such. In this particular matter the policy indemnifies against damages for bodily injuries, and nothing in addition is contracted for, and there is no further liability. The injured will not be allowed to collect from a nonparticipating party for a wrong against the public.⁶⁰

55. *Id.* at 441-42.

56. *Id.* at 442.

57. 127 Conn. 533, 18 A.2d 357 (1941).

58. GEN. STAT. CONN. REV. § 14-295 (1958).

59. 96 Colo. 10, 39 P.2d 776 (1934).

60. *Id.* at 779.

This nonparticipating party argument is one of the most frequently cited and cogent arguments sustaining the position

The case of *Crull v. Gleb*⁶¹ is additional authority for the proposition that a policy should not cover a judgment for punitive damages. The court stated that the issues of construction of the contract and public policy overlap.⁶² In denying coverage for punitive damages the court stated:

The chief purpose of punitive damages is punishment to the offender, and a deterrent to similar conduct by others. . . . This being true, it seems only just that the burden of paying punitive damages should rest ultimately, as well as nominally, on the party who actually committed the wrong. If the defendant Gleb was permitted to shift to garnishee the burden of the punitive damage award, then the award would have served no purpose. Plaintiff would have already been made whole through his compensatory damages, and the insurance company, which had done no wrong, would be punished. There is no language in the policy that provides for the payment of judgments for punitive damages. The policy covers only damages for bodily injury and property damage sustained by any person. Punitive damages do not fall in this category.⁶³

The most recent case denying coverage of punitive damages because of public policy is *Nicholson v. American Fire & Casualty Insurance Company*.⁶⁴ In that case the Florida court reached its decision solely on the grounds of public policy, relying heavily on *McNulty*.⁶⁵ The court stated that "based on the rationale of punitive damages, we are convinced that to allow drivers of automobiles to shift the responsibility for this type of penalty to an insurance company contravenes the public policy of the state."⁶⁶ The court also expressed its disagreement with Appelman's statement that "it is clear that the average insured contemplates protection against claims of any character caused by his operation of an automobile, not intentionally in-

61. 382 S.W.2d 17 (Mo. 1964).

62. See also *Universal Indem. Ins. Co. v. Tenery*, 96 Colo. 10, 39 P.2d 776 (1934).

63. *Crull v. Gleb*, 382 S.W.2d 17, 23 (Mo. 1964).

64. 177 So. 2d 52 (Fla. 1965).

65. 307 F.2d 432 (5th Cir. 1962).

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

flicted.”⁶⁷ In response to this assertion the court stated: “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.”⁶⁸

IV. CONCLUSION

While the majority of cases have found the insurer liable for punitive damages, the majority of legal writers seem to favor the opposite result on grounds of public policy. At first blush it would seem that insurance against punitive damages frustrates their purposes and should be considered contrary to public policy. The majority opinion in *McNulty*⁶⁹ cites a number of articles, notes, and comments to this effect. On the other hand, Appleman takes the contrary position concluding “that the average insured contemplates protection against claims of any character caused by his operation of an automobile, not intentionally inflicted.”⁷⁰ The majority of courts have agreed with this view, and have imposed liability upon the insurer even though the recovery was based upon wilful or wanton conduct or even though the verdict may have included punitive damages.

It is true that most of the cases allowing an injured party to recover punitive damages from the wrongdoer’s insurance company do not discuss the public policy argument,⁷¹ but it does not necessarily follow that they would have reached a contrary result upon express consideration of public policy. Determination of the true and proper public policy in this situation is not a simple matter, and as Judge Gervin’s opinion in the *McNulty* case indicates, there are many complicating interests to be weighed.⁷² Since public policy embraces the principle that no person can lawfully do that which is injurious to the public good, we must carefully weigh the validity of the insurance industry’s arguments as they apply to the best interests of the public.

67. 7 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4312 (1962).

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

69. *Northwestern Nat’l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962).

70. 7 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4312, at 77 (1962).

71. The one exception is *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964), in which the Tennessee court through a concurring opinion by Justice White came to grips with the public policy argument and concluded that it would not violate the public policy of Tennessee to hold in favor of liability insurance coverage for punitive damages.

72. *Northwestern Nat’l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962).

Insurer liability would cause difficulty at the trial with respect to the introduction of evidence of the defendant's financial position and if juries attempt to get beyond insurance coverage to stick the wrong-doer himself, insurer liability may have the effect of inflating punitive damage awards. On the other hand, nonliability would produce a conflict of interests between the insurer and the insured in settlement negotiations and trial tactics, the insurer being principally interested in minimizing the claim for compensatory damages, and the insured in minimizing the punitive damages claim. Further difficulties would be caused at the appellate level in those jurisdictions in which the jury must return a lump-sum verdict.

The objection to most cases heretofore decided is not that they have reached the wrong result but that they fail to give proper consideration to all the relevant factors. As previously stated, most of the cases holding the insurer liable for punitive damages fail to discuss the public policy argument. On the other hand, cases denying coverage of punitive damages on grounds of public policy do not take into consideration the injured party to whom the question of public good also applies. We should have in the forefront of our minds the injured plaintiff, for whose benefit compulsory insurance laws are passed, and from whose injury the claim for damages, both compensatory and punitive, arises. Public policy properly analyzed reveals that liability insurance is as much for the protection of the injured party as for the protection of the insured.

There is often a fine line between simple negligence and negligence upon which an award for punitive damages may be made. This line is too thin and exacting to apply insurance coverage in one case and deny it in the other.

The grounds on which the cases denying coverage of punitive damages rest so heavily is that punitive damages are meant to punish, and such punishment should fall on the guilty party, not the innocent, nonparticipating insurance company. The logic and validity of this argument is weak and indefensible. The concern for not wanting to punish the insurance carrier, an innocent party, is not logical since any insurance carrier's liability is determined by the contractual relationship of indemnification.

The logic and validity of the public policy argument that to require insurance companies to pay punitive damages would

place a burden upon the insurance carrier and ultimately the public itself is also without merit. Juries are never required to give punitive damages and the overwhelming majority of cases indicate that juries award punitive damages only when the facts of the case indicate that they are well deserved. The rapid rise in insurance rates certainly cannot be attributed to the small number of cases in which insurance carriers have been required to indemnify an insured for punitive damages.

There is no indication that denying insurance coverage for punitive damages would deter wrongful conduct. It would be pure speculation to conclude that the result of denying coverage would be a reduction in accidents on the highways.

The issue of public policy boils down to which activity would be better for the public good. Is society really protected when insurance companies, no longer liable for punitive damages, have less interest in preventing wanton acts? Allowing the insurance carrier to escape payment of punitive damages under the guise of public policy is acceptance of a doctrine that the more extreme the recklessness the more likely the carrier to escape liability.

If the insurance industry feels that punitive damages protection should not be afforded under automobile liability policies, it can very easily make such an exclusion from the policy coverage.⁷³ In the absence of such a specific exclusion, public policy, properly analyzed, requires it to pay. 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 result of the policy language.

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73. However this alternative of exclusion is not open to insurance companies doing business in a state like South Carolina where by statute punitive damages are included within policy coverage. This result is highly desirable since the average policyholder believes the insurance company will pay *all* damages arising out of an accident for which he is held liable.