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IS AN AWARD OF PUNITIVE DAMAGES COVERED UNDER AN AUTOMOBILE OR COMPREHENSIVE LIABILITY POLICY?

by

Dewey J. Gonsoulin*

THE ORIGIN of punitive damages, called exemplary, punitory, or vindictive damages or "smart money," has been traced to Biblical times.¹ They appeared in the English law by the eighteenth century, and were recognized generally in the United States by the end of the nineteenth century.² Today, all but four states—Louisiana, Massachusetts, Nebraska and Washington—recognize punitive damages.

There are three purposes or functions of punitive damages: (1) as compensation for the injured plaintiff; (2) as vindication by society or revenge manifested by the jury's indignation at the defendant's misconduct; and (3) as civil punishment of the miscreant defendant and as a deterrent to others.³ However, the compensation function has only been recognized by three states: Connecticut,⁴ Michigan⁵ and New Hampshire.⁶ The remaining states that permit recovery of punitive damages acknowledge that they are more of a punishment of the defendant and simply a windfall to the injured plaintiff, who has theoretically been made whole by an award of compensatory damages.⁷

With the nature of punitive damages in mind, two inquiries present themselves: (1) does the language of an automobile or comprehensive liability policy cover punitive damages as well as compensatory damages, and (2) if so, is such a provision against public policy?

I. THE AUTOMOBILE LIABILITY POLICY

The standard automobile liability insurance policy provides:

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¹ "When a man steals an ox or a sheep, and slaughters or sells it, he shall restore five oxen for the one ox and four sheep for the one sheep." *Exodus* 21:37. See *Mayer v. Frobe*, 40 W. Va. 246, 254-56, 22 S.E. 58, 61 (1895).

² Comment, *Punitive Damages and Their Possible Application in Automobile Accident Litigation*, 46 VA. L. REV. 1036 (1960).

³ Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957). See also *Northwestern Nat'l 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), noted in 132 A.L.R. 1259 (1941); *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965); *Cotton v. Cooper*, 209 S.W. 135 (Tex. Comm'n App. 1919), judgment adopted.

⁴ *Tedesco v. Maryland Cas. Co.*, 127 Conn. 533, 18 A.2d 357 (1941), noted in 132 A.L.R. 1259 (1941); *Doroszka v. Lavine*, 111 Conn. 575, 150 A. 692 (1930), noted in 69 A.L.R. 1279 (1930).

⁵ *McFadden v. Tate*, 350 Mich. 84, 85 N.W.2d 181 (1957); *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922).

⁶ *Bixby v. Dunlap*, 56 N.H. 456, 22 Am. R. 457 (1876); *Fay v. Parker*, 53 N.H. 342, 16 Am. R. 270 (1873).

⁷ See *Northwestern Nat'l 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), noted in 132 A.L.R. 1259 (1941); *Bernal v. Seitt*, 158 Tex. 521, 313 S.W.2d 520 (1958).

Section I—Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

Coverage A bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by any person;

.....
arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile

It is, however, generally considered to be against public policy to insure against the risk of intentionally inflicted injuries,⁸ and the standard automobile liability policy excludes liability for "bodily injury or property damage caused intentionally by or at the direction of the insured; . . ." In Texas public liability policies do not insure against such damage.⁹ Therefore, since compensatory damages would not be covered under an automobile liability insurance policy where the injury was intentionally inflicted by the insured, punitive damages would likewise not be recoverable. On the other hand, compensatory damages are recoverable under an automobile liability insurance policy for negligence, including gross negligence, and even for wilful and wanton misconduct. In Texas, the case of *Travelers Insurance Co. v. Reed Co.*¹⁰ expressly held that a public liability policy should be construed to cover compensatory damages for both ordinary and gross negligence, including wanton and reckless conduct, as long as there was no wilful intent to injure.

But despite the immense amount of automobile accident litigation, surprisingly few cases have presented the question as to whether punitive damages are recoverable under an automobile liability insurance policy.

Appleman and Couch both note that in the cases which have considered this question a "majority" of the cases have held that punitive damages are covered.¹¹ However, the writer found that only four states—Alabama,¹² Kentucky,¹³ Tennessee¹⁴ and South Carolina¹⁵—have held that punitive damages were recoverable while six states—Colorado,¹⁶ Connecti-

⁸ 7 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4312 (2d ed. 1962) [hereinafter cited as APPLEMAN].

⁹ *Travelers Ins. Co. v. Reed Co.*, 135 S.W.2d 611 (Tex. Civ. App. 1939), *error dismissed, judgment correct*; *County Gas Co. v. General Accident, Fire & Life Assur. Corp.*, 56 S.W.2d 1088 (Tex. Civ. App. 1933), *error ref.*

¹⁰ 135 S.W.2d 611 (Tex. Civ. App. 1939), *error dismissed, judgment correct. See also* *General Cas. Co. of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956); *Crull v. Gleb*, 382 S.W.2d 17 (Mo. Ct. App. 1964).

¹¹ 7 APPLEMAN § 4312; 15 G. COUCH, *INSURANCE (SECOND)* § 56:27 (1966). *See also* 7 AM. JUR. 2D *Automobile Insurance* § 196 (1963).

¹² *Employers Ins. Co. v. Brock*, 233 Ala. 55, 172 So. 671 (1937); *American Fidelity & Cas. Co. v. Werfel*, 230 Ala. 553, 162 So. 103 (1935).

¹³ *Maryland Cas. Co. v. Baker*, 304 Ky. 296, 200 S.W.2d 757 (Ct. App. 1947).

¹⁴ *General Cas. Co. of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964).

¹⁵ *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965).

¹⁶ *Universal Indem. Ins. Co. v. Tenery*, 96 Colo. 10, 39 P.2d 776 (1934).

cut,¹⁷ Florida,¹⁸ Kansas,¹⁹ New Jersey²⁰ and Pennsylvania²¹—have held to the contrary. In the eleventh state to consider this question, Missouri, a federal court held that punitive damages were recoverable where the insured was only vicariously liable,²² but the state court later decided that they were not recoverable where the insured was also the wrongdoer.²³

The Majority View. Appleman and Couch notwithstanding, a majority of the courts that have been confronted with this question have held that punitive damages are *not* covered under a voluntary automobile liability policy. In *Universal Indemnity Insurance Co. v. Tenery*,²⁴ an early case on point, Callihan rented a car from Hertz and later in the evening, while intoxicated, collided with the plaintiff's car. The plaintiff recovered a judgment for actual and exemplary damages against Callihan. The defendant, who had issued a liability policy for Hertz, contended, among other things, that it was not liable for the exemplary damages, but on appeal failed to raise this point. Nevertheless, the appellate court modified the judgment to exclude the exemplary damage claim. The court based its holding on the construction of the policy language and did not mention any public policy grounds. The court stated:

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 non-participating party for a wrong against the public.²⁵

However, the next case adopting the majority view, *Tedesco v. Maryland Casualty Co.*,²⁶ set forth the public policy argument, though it also based its holding on a construction of the policy language. The plaintiff recovered a judgment for compensatory damages from the driver of a car which collided with his vehicle and also recovered double damages as permitted by a Connecticut statute for violation of a traffic statute. The defendant, which had issued a policy of liability insurance to the owner of the car, paid off the compensatory damages but refused to pay off the punitive or double damages awarded. In holding that the defendant's liability policy did not cover these penalty damages, the court noted that the additional award was granted as punishment for a public wrong. The court continued:

¹⁷ *Tedesco v. Maryland Cas. Co.*, 127 Conn. 533, 18 A.2d 357 (1941), *noted in* 132 A.L.R. 1259 (1941).

¹⁸ *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *Nicholson v. American Fire & Cas. Ins. Co.*, 177 So. 2d 52 (Fla. Ct. App. 1965).

¹⁹ *American Sur. Co. v. Gold*, 375 F.2d 523 (10th Cir. 1966).

²⁰ *LoRocco v. New Jersey Mfrs. Indem. Ins. Co.*, 82 N.J. Super. 323, 197 A.2d 591 (Super. Ct. 1964).

²¹ *Esmond v. Liscio*, 209 Pa. Super. 200, 224 A.2d 793 (1966).

²² *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935).

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

²⁴ 96 Colo. 10, 39 P.2d 776 (1934).

²⁵ 39 P.2d at 779.

²⁶ 127 Conn. 533, 18 A.2d 357 (1941), *noted in* 132 A.L.R. 1259 (1941).

A policy which permitted an insured to recover from the insurer fines imposed for a violation of a criminal law would certainly be against public policy. The same would be true of a policy which expressly covered an obligation of the insured to pay a sum of money in no way representing injuries or losses suffered by the plaintiff but imposed as a penalty because of a public wrong. If the language of the policy is reasonably open to two constructions, one of which would avoid such a result, that should be adopted. . . . The words 'liability imposed upon him [the insured] by law for damages . . . because of bodily injury' do not cover this additional sum.²⁷

Perhaps the best expression of the majority view and the most comprehensive analysis of the public policy question was made in 1962 by Judge Wisdom of the Fifth Circuit in *Northwestern National Casualty Co. v. McNulty*.²⁸ In that case the defendant issued a family combination policy to Smith. The latter, while drunk and traveling at eighty miles per hour, tried to pass the plaintiff where it was impossible to pass and smashed into the rear of the plaintiff's car. Without stopping to render aid, Smith fled the scene of the accident and was arrested twelve miles down the highway. After obtaining a judgment for \$37,500 compensatory damages and \$20,000 punitive damages in a Florida state court McNulty, the plaintiff, brought suit to recover on the defendant's policy. The circuit court held that Florida public policy prohibits insuring against liability for punitive damages. After noting that punitive damages are awarded for punishment and deterrence, the court reasoned that the burden of damages should rest ultimately, as well as nominally, on the party actually responsible. Otherwise punitive damages would serve no useful purpose. The court also realized that if the burden were shifted to the insurance company, in reality the burden would end on the public through the payment of premiums, and society would actually be punishing itself. The court then stated:

[A]ccepting as common knowledge the fact that death and injury by automobile is a problem far from solved by traffic regulations and criminal prosecutions, it appears to us 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 reckless slaughter or maiming on the highway.²⁹

However, Judge Gewin, in a special concurring opinion, doubted that the philosophy of the majority would act as any better deterrent to traffic violations and the high death toll than the criminal penalties which so far have proven unsuccessful.

Vicarious liability adds an additional factor that requires consideration. In *LoRocco v. New Jersey Manufacturers Indemnity Insurance Co.*³⁰ the plaintiffs sued for damages sustained when a vehicle, owned by a dairy and driven by its employee, struck the rear of the plaintiff's automobile. The plaintiffs alleged that the employee had acted in a "deliberate, wanton and reckless manner" but did not demand punitive damages in their peti-

²⁷ 18 A.2d at 359.

²⁸ 307 F.2d 432 (5th Cir. 1962).

²⁹ *Id.* at 441.

³⁰ 82 N.J. Super. 323, 197 A.2d 591 (Super. Ct. 1964).

tion. However, during the presentation of their case, the plaintiffs offered evidence tending to prove that the dairy driver had intentionally rammed the rear of their vehicle several times, and then requested a trial amendment to ask for punitive damages, which was granted by the trial court. At the conclusion of the evidence the dairy was dismissed on the ground that the driver was not acting as its agent at the time of the accident. The jury then awarded the plaintiffs \$3,700 compensatory damages and \$9,500 punitive damages. The insurance company paid the compensatory damages but refused to pay the punitive damages and was upheld by the trial court. The plaintiffs appealed from the trial court judgment denying recovery of punitive damages from the insurance company. The appellate court affirmed, stating that since no party was found vicariously liable, the judgment was against the "willful wrongdoer" alone and it would be contrary to public policy to indemnify him.

In the same year, 1964, Missouri adopted the majority view in *Crull v. Gleb*,³¹ where the plaintiff had recovered a judgment for \$1,500 actual damages and \$2,000 punitive damages caused when the defendant recklessly and wantonly drove his truck into the plaintiff's automobile. The court held that the insurance company was not liable for the punitive damages awarded to the plaintiff, adopting the attitude expressed in *McNulty* that the burden of paying punitive damages should rest ultimately, as well as nominally, on the party who actually committed the wrong, and that it would be contrary to public policy to permit a motorist to insure himself against judgments imposed against him for punitive damages. In 1965, in *Nicholson v. American Fire & Casualty Insurance Co.*,³² the Florida state court followed the reasoning of Judge Wisdom in the *McNulty* case in holding that liability insurance does not require the insurance company to pay punitive damages assessed against its insured.

Two years later, in *Esmond v. Liscio*,³³ Pennsylvania followed the trend toward no coverage for punitive damages where the insured is personally guilty of wanton misconduct. The court in that case first noted that Pennsylvania adheres to the orthodox view that punitive damages are in no sense intended as compensation to the injured plaintiff but rather are a penalty imposed to punish the defendant and deter him and others from similar outrageous conduct. The court reasoned:

When socially irresponsible drivers are guilty of reckless and grossly offensive conduct on the highways, there are sound and compelling policy reasons for not allowing them to escape the element of personal punishment

³¹ 382 S.W.2d 17 (Mo. Ct. App. 1964).

³² 177 So. 2d 52 (Fla. Ct. App. 1965). See also *Commercial Union Ins. Co. v. Reichard*, 262 F. Supp. 275 (S.D. Fla. 1966), which held that a liability policy issued to the owner of a trailer park did not cover punitive damages assessed against the park owner whose employee assaulted the plaintiff where the employer was more than vicariously liable, the court holding that the law does not permit an employer to insure himself against punitive damages which arise from the acts of an employee, if the employer participates or authorizes, or knows or should know in advance that his agent is likely to commit the unlawful injurious act. *But cf.* *Sterling Ins. Co. v. Hughes*, 187 So. 2d 898 (Fla. Ct. App. 1966), which held that punitive damages were covered by an insurance policy issued to an employer whose employee assaulted the plaintiff, where the employer was only vicariously liable.

³³ 209 Pa. Super. 200, 224 A.2d 793 (1967).

in punitive damages. To permit insurance against the sanction of punitive damages would be to permit such offenders to purchase a freedom of misconduct altogether inconsistent with the theory of civil punishment which such damages represent.³⁴

Finally, the most recent case reflecting the majority view is *American Surety Co. v. Gold*,³⁵ which held that punitive damages are not recoverable under an automobile liability policy because it would be a violation of the public policy of Kansas.

The Minority View. In contrast with the preceding cases, a minority of the courts have adopted the contrary view. The earliest case espousing the view that punitive damages are recoverable under an automobile liability policy was *Ohio Casualty Insurance Co. v. Welfare Finance Co.*,³⁶ where the injured party recovered damages, actual and punitive, for personal injuries sustained when the plaintiff finance company's servant negligently backed a truck into the injured party. The punitive damages were based upon allegations that the servant's acts were unlawful, wrongful, wanton and done in a reckless disregard of the plaintiff's rights and safety. In holding, under Missouri law, that punitive damages were recoverable under the defendant's automobile liability insurance policy, the federal circuit court observed: "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."³⁷ Although the defendant contended that it was contrary to public policy to hold that the policy of insurance covered punitive damages, there was no public policy involved since the insured was only vicariously liable for the reckless acts of its servant, and the court expressly noted that a different question might be presented if the insured had been the one committing the tort.³⁸

The next case, in point of time, holding that punitive damages are recoverable under an automobile liability policy was *American Fidelity & Casualty Co. v. Werfel*.³⁹ It held that the insurance policy was broad enough to cover liability for death and under the Alabama statutes damages recoverable for wrongful death are purely punitive, and therefore it could not be successfully contended that the policy did not protect against punitive damages for bodily injuries.

In *Maryland Casualty Co. v. Baker*⁴⁰ the Kentucky Court of Appeals held that punitive damages were covered by two automobile liability policies where the plaintiff had recovered a judgment against the insured, a taxicab owner, for damages she sustained when she was assaulted by the taxi

³⁴ 224 A.2d at 799.

³⁵ 375 F.2d 523 (10th Cir. 1966).

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

³⁷ Id. at 59.

³⁸ See, e.g., *LoRocco v. New Jersey Mfrs. Indem. Ins. Co.*, 82 N.J. Super. 323, 197 A.2d 591 (Super. Ct. 1964); cf. *Crull v. Gleb*, 382 S.W.2d 17 (Mo. Ct. App. 1964).

³⁹ 230 Ala. 553, 162 So. 103 (1935). See also *Employers Ins. Co. v. Brock*, 233 Ala. 55, 172 So. 671 (1937).

⁴⁰ 304 Ky. 296, 200 S.W.2d 757 (Ct. App. 1947).

driver. The court held that the case was governed by a peculiar Kentucky statute designed to provide financial responsibility of owners of taxi permits in order to protect passengers against any act or omission in the operation of the cab. This was another vicarious liability situation similar to the *Ohio Casualty Insurance Co. v. Welfare Finance Co.*⁴¹ case, and no public policy was involved.

In *General Casualty Co. of America v. Woodby*,⁴² a case arising in Tennessee, the Sixth Circuit similarly held that punitive damages were covered under an automobile liability policy where the driver took the insured's car and, while in a drunken condition, collided with the plaintiff. The court noted that the policy obligated the insurance company "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." The court then concluded that the punitive damages awarded were "liabilities imposed by law for damages within the meaning of the policy."⁴³

In 1964, in *Lazenby v. Universal Underwriters Insurance Co.*,⁴⁴ the Tennessee Supreme Court followed the reasoning of the federal court in *General Casualty Co. v. Woodby*.⁴⁵ In doing so, the court disagreed that the closing of the insurance market on the payment of punitive damages would necessarily accomplish the result of deterring drunken drivers in their wrongful conduct, and concluded that it was not against the public policy of Tennessee to hold that punitive damages, as well as compensatory damages, were covered under a liability policy.

Perhaps the most oft-cited case for the minority view is *Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Co. v. Thornton*.⁴⁶ There the plaintiff collected a judgment for actual and punitive damages for personal injuries sustained when the insured's vehicle collided with her automobile. In holding that, under South Carolina law, such punitive damages were covered under the defendant's policy of liability insurance, the circuit court stated:

Negligent conduct may be so gross as to merit characterization as willful and wanton in the sense of the rule for punitive damages, yet fall far short of an assault and battery which would distinguish it from an accidental event and withdraw it from the coverage of the policy. . . . To allow the appellant's argument 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.⁴⁷

The court here completely ignored the public policy heretofore discussed and instead expressed a contrary public policy.

Finally, the most recent case on this subject expressing the minority

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

⁴² 238 F.2d 452 (6th Cir. 1956).

⁴³ *Id.* at 457.

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

⁴⁵ 238 F.2d 452 (6th Cir. 1956).

⁴⁶ 244 F.2d 823 (4th Cir. 1957).

⁴⁷ *Id.* at 827.

view is that of *Carroway v. Johnson*.⁴⁸ In holding that under South Carolina law punitive damages were recoverable under an automobile liability insurance policy, the supreme court first observed: "The policy here is a voluntary policy and defendant agreed to pay 'all sums' which the insured 'shall become legally obligated to pay as damages' because of bodily injury. The punitive damage award is a sum which the insured is legally obligated to pay as damages. However, the question remains: Are punitive damages, 'damages because of bodily injury?'"⁴⁹ The court gave an affirmative answer to the question because of the sufficiently broad language of the policy.

Appleman approves the minority view, which he calls the majority view, noting that the average insured contemplates protection against claims of any character caused by his operation of an automobile, not intentionally inflicted.⁵⁰ He argues that it seems strangely inconsistent for an insurer, in one breath, to admit liability for compensatory damages, and then to deny liability for punitive damages. He urges that a court should not aid an insurer which fails to exclude liability for punitive damages in its policy, since there is nothing in the insuring clause that would forewarn an insured that such was to be the intent of the parties.⁵¹ There is certainly some merit to his argument, since insurance policies are liberally construed in favor of coverage, and if an insurance company wants to exclude liability for punitive damages, it could easily provide such a limitation or exception in the policy.

On the other hand, the writers of many law review articles agree with the majority view.⁵² One writer would even apply the majority rule in the vicarious liability situation. He argues that the public interest is frustrated if the employer can shift the burden of exemplary damages to the insurer.⁵³ Another writer argues that instead of completely destroying culpability in tort,⁵⁴ there is a need to strengthen it in an effort to prevent the accident itself.⁵⁵ Some authors, however, believe that absent the public policy argument, the language in the standard automobile liability insurance policy is broad enough to cover punitive damages.⁵⁶

The Texas View. No Texas decision has yet passed upon the question of

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

⁴⁹ 139 S.E.2d at 910.

⁵⁰ 7 APPLEMAN § 4312.

⁵¹ *Id.* § 4312, at 40 (Supp. 1968).

⁵² Logan, *Punitive Damages in Automobile Cases*, 11 FEDERATION OF INS. COUNSEL 59 (1960); Comment, *Factors Affecting Punitive Damages*, 7 MIAMI L.Q. 517 (1953); Comment, *Insurer's Liability for Punitive Damages*, 14 MO. L. REV. 175 (1949); Comment, *Punitive Damages and Their Possible Application in Automobile Accident Litigation*, 46 VA. L. REV. 1036 (1960); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957); Note, *Insurance: Liability Insurance: Recovery of Punitive Damages*, 14 OKLA. L. REV. 220 (1961); Note, *Insurance Coverage and the Punitive Award in the Automobile Accident Suit*, 19 U. PITT. L. REV. 144 (1957); 46 IOWA L. REV. 645 (1961); 40 MICH. L. REV. 128 (1941).

⁵³ Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 527 (1957).

⁵⁴ As suggested in R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTO INSURANCE* (1965). For an excellent analysis of this book and the deterrent effect of present tort law, which the authors seem to treat rather lightly, see Smith, Book Review, 45 TEXAS L. REV. 1443 (1967).

⁵⁵ Logan, *Punitive Damages in Automobile Cases*, 11 FEDERATION OF INS. COUNSEL 59, 61 (1960).

⁵⁶ 3 N. RISJORD & J. AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES* 3255 (2d ed. 1965).

whether punitive damages are covered by an automobile liability insurance policy. As noted above, in Texas a public liability policy does not cover wilful and intentional wrongs of an agent, committed with the intent to inflict injury.⁵⁷ On the other hand, a public liability insurance policy does cover compensatory damages for wilful or wanton misconduct, as long as there is no intent to injure the plaintiff.⁵⁸ In Texas punitive or exemplary damages are recoverable where the defendant, in the operation of his motor vehicle, has caused injury to another by gross negligence.⁵⁹

Therefore, undoubtedly the problem of whether punitive damages are covered by an automobile liability policy will arise in Texas in the not too distant future. It is difficult to predict what the Texas courts will do when confronted with this problem. Certainly, the public policy argument has some validity in Texas, where the death toll is one of the highest in the nation.⁶⁰ And Texas does follow the general rule that punitive or exemplary damages are not allowed as compensation, but as punishment, or "smart money," for an offense committed, and necessarily involve a blending of the general interest of society with those peculiar to the aggrieved party.⁶¹ One writer, in urging the majority view, has made an analogy to those cases holding that a surety is exempt on an official bond from exemplary damages.⁶² If this analogy is correct, then a recent Texas case implies that Texas might adopt the majority view by holding that an insurance company was not liable for exemplary damages upon a statutory real estate broker's license bond.⁶³

II. THE COMPREHENSIVE GENERAL LIABILITY POLICY

The standard comprehensive general liability insurance policy provides:

1. Coverage A—Bodily Injury Liability.

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

And in the "conditions" section it is provided that "[a]ssault and battery shall be deemed an accident unless committed by or at the direction of the insured."

Appleman simply states that liability policies have been held to cover punitive, as well as compensatory, damages.⁶⁴ However, the only cases that he cites in support of this statement, other than the automobile liabil-

⁵⁷ *County Gas Co. v. General Accident, Fire & Life Assur. Corp.*, 56 S.W.2d 1088 (Tex. Civ. App. 1933), *error ref.*

⁵⁸ *Travelers Ins. Co. v. Reed Co.*, 135 S.W.2d 611 (Tex. Civ. App. 1940), *error dismissed, judgment correct. See also United Servs. Auto. Ass'n v. Zeller*, 135 S.W.2d 161 (Tex. Civ. App. 1939), *error dismissed, judgment correct* (automobile liability policy).

⁵⁹ *Goff v. Lubbock Bldg. Prods.*, 267 S.W.2d 201 (Tex. Civ. App. 1953), *error ref. n.r.e.*; *South Tex. Coaches v. Eastland*, 101 S.W.2d 878 (Tex. Civ. App. 1937), *error dismissed*.

⁶⁰ Texas was second only to California in 1967 in highway deaths.

⁶¹ *South Tex. Coaches v. Eastland*, 101 S.W.2d 878 (Tex. Civ. App. 1937), *error dismissed*.

⁶² Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957).

⁶³ *United States Fire Ins. Co. v. McDaniel*, 408 S.W.2d 134 (Tex. Civ. App. 1966).

⁶⁴ 8 APPLEMAN § 4900, at 367.

ity policy cases discussed previously, are *United States Fidelity & Guaranty Co. v. Janich*⁶⁵ and *Morrell v. Lalonde*.⁶⁶ In the *Janich* case the plaintiff insurance company had issued a liability policy to Janich, who got into an altercation and struck Berrey. When Berrey made a claim, the plaintiff filed this declaratory judgment suit to construe its obligation under the liability policy and Berrey then cross-claimed for his injuries which he alleged were inflicted by Janich maliciously and with wanton disregard of his rights and feelings, and sought both actual and punitive damages. The federal district court tersely stated: "In Coverage A, plaintiff agrees: 'To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of liability imposed by law' Such a broad provision would embrace exemplary damages."⁶⁷ *Morrell* was an action against a surgeon for malpractice based upon the negligent performance of an operation. The court disposed of the problem in one sentence, decreeing that the contract to indemnify for "damages on account of bodily injuries" covered punitive damages, without discussing public policy.

On the other hand, in *American Insurance Co. v. Saulnier*,⁶⁸ a case not cited by Appleman, the federal district court held that a homeowner's liability policy covered compensatory damages but not punitive damages where the homeowner's minor son threw a coke bottle at a little girl to frighten her and missed, striking the minor plaintiff who was nearby. In permitting coverage for compensatory damages, the court noted that this was an intentional act resulting in injury, as distinguished from an intentional injury, and therefore the exclusion in the policy "to injury intentionally caused by the insured" was inapplicable. But on the punitive damages question, the court held: "Any further sum which a jury in assessing damages to fully compensate David for the injury might add as a deterrence to punish Bruce would not be recoverable under the policy. A clear separation can be maintained between those damages which are compensatory and those which are punitive by the submission of interrogatories to the jury."⁶⁹

There are no other cases determining this question, either in Texas or elsewhere, and none under the comprehensive general liability policy, probably because it is relatively new. The only Texas case even mentioning this question is that of *Travelers Insurance Co. v. Reed Co.*,⁷⁰ which held that a public liability policy did cover compensatory damages resulting either from ordinary or gross negligence, including reckless conduct, but expressly reserved the question of whether such a policy should cover punitive damages. Certainly the public policy argument is just as applicable in the comprehensive general liability policy situation as in the automobile liability policy case as long as the purpose of punitive damages is to punish the wrongdoer and deter others from committing similar acts, rather than as

⁶⁵ 3 F.R.D. 16 (S.D. Cal. 1944).

⁶⁶ 45 R.I. 112, 120 A. 435 (1923).

⁶⁷ 3 F.R.D. 16 (S.D. Cal. 1944).

⁶⁸ 242 F. Supp. 257 (D. Conn. 1965).

⁶⁹ *Id.* at 261. See *Tedesco v. Maryland Cas. Co.*, 127 Conn. 533, 18 A.2d 357 (1941), noted in 132 A.L.R. 1259 (1941), for an example of the separation of these two types of damages.

⁷⁰ 135 S.W.2d 611 (Tex. Civ. App. 1940), error dismissed, judgment correct.

compensation for the injured plaintiff. However, the public policy argument might not be as strong in a vicarious liability situation as it would be where the insured was the wrongdoer.

III. CONCLUSION

As more courts are faced with the question, the trend appears to be toward the view that there is no coverage under a liability policy for punitive damages, particularly where the person claiming coverage is the party guilty of wrongdoing. The courts that adopt this view base their decision on the nature and purpose of punitive damages, holding that it would be contrary to public policy to permit irresponsible tortfeasors to shift the burden of penalties imposed upon them as punishment and a deterrent to an insurance company, which would, in turn, shift the burden to the innocent public in higher premiums. This view has been modified by some courts, however, in a vicarious liability situation, where the public policy argument may not be quite as strong. The courts that express the contrary view—that punitive damages are covered by a liability insurance policy—seem to base their decision strictly on a construction of the language of the policy,⁷¹ either choosing to ignore the public policy argument or believing that punitive damages do not serve the deterrent purpose that is intended. No distinction seems to have been made by the courts between an automobile liability insurance policy and a general liability policy. A reasonable interpretation of the language of the standard liability policy indicates that it would cover punitive, as well as actual, damages for reckless but unintentional torts. On the other hand, certainly in those states which recognize the purpose or function of punitive damages as being a punishment of the defendant and not as compensation for the injured plaintiff, the public policy argument seems to be a consistent and compelling one.

When the issue of punitive damages arises in any case, several duties are imposed upon the insurance company: (1) the insured must be promptly and fully advised that the insurance company does not intend to pay punitive damages under the policy, if any are awarded by the jury, in order that the insured may have adequate opportunity to obtain his own counsel to represent him in this regard;⁷² (2) separate special jury issues on actual and compensatory damages, with appropriate instructions, must be timely requested of the trial court.

In addition, two other problems loom on the horizon: (1) In pretrial settlement negotiations, how much should be allowed for actual damages and how much should be considered punitive damages? If the plaintiff offers to settle within the policy limits, but fails or refuses to specify between actual and punitive damages, can the insurance company later be liable for failure to settle if a judgment is awarded in excess of the policy

⁷¹ Following the general rule that if there is an ambiguity in the policy, or the policy is susceptible of two interpretations, the policy will be construed strictly against the insurance company, whose language it is, and liberally in favor of the insured. *Trahan v. Southland Life Ins. Co.*, 155 Tex. 548, 289 S.W.2d 733 (1956); 29 AM. JUR. 2D *Insurance* § 258 (1960).

⁷² Otherwise, the doctrine of waiver or estoppel may be applicable. See *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *Commercial Union Ins. Co. v. Reichard*, 262 F. Supp. 275 (S.D. Fla. 1966).

limits?⁷³ Or can the insurance company make demand upon the insured to pay a portion of the plaintiff's settlement offer? (2) Since, as a general rule, evidence of the financial standing of the defendant may be admitted in assessing punitive damages,⁷⁴ can the plaintiff's attorney show that the defendant is covered by insurance and the amount thereof? As a broad general rule, subject to certain qualifications, evidence directly or indirectly tending to show that the defendant in a personal injury or death action carries liability insurance is inadmissible,⁷⁵ because it is irrelevant to the issues in the case. In those states which deny recovery of punitive damages under a liability insurance policy, no problem should arise. But in those states which allow recovery, it may be that the court will have to balance the equities in deciding the admissibility of this evidence.

⁷³ See *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929), *holding approved* (an insurance company must exercise that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business in determining whether an offer of settlement should be accepted).

⁷⁴ 25 C.J.S. *Damages* § 126(3) (1966). *Contra*, *Texas Pub. Util. Corp. v. Edwards*, 99 S.W.2d 420 (Tex. Civ. App. 1936), *error dismissed*.

⁷⁵ 29 AM. JUR. 2D *Evidence* § 404, at 457 (1960). In Texas, see, e.g., *Dennis v. Hulse*, 362 S.W.2d 308 (Tex. 1962).

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