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Insurance Against Punitive Damages in Drunk Driving Cases

James A. Niquet

INSURANCE AGAINST PUNITIVE DAMAGES IN DRUNK DRIVING CASES

INTRODUCTION

In view of the enormous volume of automobile accident litigation and the increasing public outcry against automobile operators who drink and drive,[1] it is odd that more cases have not addressed the question of whether punitive damages should be assessed against a drunk driver for alcohol-related injuries.[2] The issue is one of special importance for the practitioner, especially in light of the recent cases holding that intoxication of a defendant motorist is itself an adequate basis for an award of punitive damages.[3] Although the doctrine of punitive damages presents an attractive avenue for litigation, its viability as an appropriate legal remedy and the nature of its underlying rationale continues to spur scholarly controversy.[4]

In recent years the Wisconsin Supreme Court has attempted to define the standard of conduct which permits an award of punitive damages in a negligence action.[5] The court has not, however, addressed this issue in a drunk driving case. This Comment will survey the history[6] and examine the rationale behind the award of punitive damages in drunk driving

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1. *See* South Dakota v. Neville, 459 U.S. 553 (1983) (United States Supreme Court refers to the increase in the drunk driving problem); *see also* Kraft, *The Drive To Stop the Drinker from Driving*, 59 N.D.L. REV. 391, 391-92 (1983).

2. Cases addressing this issue are collected at Annot., 65 A.L.R.3D 656 § 2 (1975). For a full discussion of the number of jurisdictions awarding punitive damages against a drunk driver, see *infra* note 40 and accompanying text.

3. *See* Annot., 65 A.L.R.3D 656 § 2.

4. *See generally* DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES (D. Hirsch & J. Pouros eds. 1964); Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411 (1972); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957); Note, *California Supreme Court Permits Punitive Damages Claims Against Intoxicated Driver*, 2 WHITTIER L. REV. 775 (1980).

5. *See, e.g.*, Brown v. Maxey, 124 Wis. 2d 426, 369 N.W.2d 677 (1985); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

6. For a general discussion of the history of punitive damages, see J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE (1983) [hereinafter cited as GHIARDI & KIRCHER]; Note, *The Drunken Driver and Punitive Damages: A Survey of the Case Law and the Feasibility of a Punitive Damage Award in North Dakota*, 59 N.D.L. REV. 413, 415-16 (1983) [hereinafter cited as Note, *North Dakota*]; Note, *Punitive Damages and the Drunken Driver*, 8 PEPPERDINE L. REV. 117, 121-23 (1980) [hereinafter cited as Note, *Drunken Driver*].

cases. Also, it will review the current state of Wisconsin law in this area. Finally, it will discuss insurance against punitive damages in Wisconsin by considering the potential impact of the recent Wisconsin decision of *Brown v. Maxey* in the context of drunk driving.

I. RATIONALE AND OBJECTIVES

References to punitive or exemplary damages appear as early as 2000 B.C.[7] In *Day v. Woodworth*[8] a New Jersey court became the first American court to instruct a jury in awarding punitive damages.[9] Since that time punitive damages have been recognized as an established maxim of American common law.

Most frequently cited as the purposes for punitive damages are punishment and deterrence of the defendant and others who engage in similar conduct.[10] These purposes, although deluged with criticism from the defense bar,[11] are relevant to the current drunk driving problem.

Punitive damages punish drunk drivers even when criminal laws fail to. Undoubtedly, most drunk driving accidents involving death or serious bodily injury are criminally prosecuted. However, many drunk driving incidents cause only minor personal injuries or property damage, and they only

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7. The Babylonian law of restitution provided: "If a man steal an ox, or sheep, or ass, or pig, or boat, from a temple or palace, he shall pay thirty-fold; if it be from a free man he shall pay ten-fold." Code of Hammurabi § 8, *reprinted in* A. KOCOUREK & J. WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 387, 391 (1915).

Other references appear later in 14 B.C. in the Hittite Laws where recovery was permitted for multiple theft. *See* J. SMITH, THE ORIGIN AND HISTORY OF HEBREW LAW 246 (1960). Analogous provisions exist in Judeo-Christian law. *See, e.g., Exodus* 21:29, 22:1, 22:4, 22:9.

8. 54 U.S. (13 How.) 363 (1851) (punitive damages awarded for breach of promise to marry).

9. The Court held that:

> It is a well-established principle of common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.

Id. at 371.

10. *Id. See also generally* GHIARDI & KIRCHER, *supra* note 6, §§ 2.02, 2.06; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9 (1964) [hereinafter cited as W. PROSSER]; RESTATEMENT (SECOND) OF TORTS § 908 comment a (1979); Note, *North Dakota, supra* note 6, at 416-17; Note, *Drunken Driver, supra* note 6, at 123.

11. *See supra* note 4.

subject the defendant to a relatively small fine, suspended sentence or traffic school.[12] A civil claim and the availability of punitive damages serve to punish a defendant for conduct which is essentially unpunished by criminal law.

The second objective of punitive damages is deterrence.[13] In a drunk driving setting, the punitive, or exemplary, award serves as a reminder to the defendant, and others, that drinking and driving warrants financial penalties.[14] In *Taylor v. Superior Court*,[15] the majority addressed the deterrence issue in the drunk driving context, concluding: "[W]e discern no valid reason whatever for immunizing the driver himself from the exposure to punitive damages given the demonstrable and almost inevitable risk visited upon the innocent public by his voluntary conduct as alleged in the complaint."[16] The *Taylor* court favored the assessment of punitive damages because it recognized the extreme threat posed to the public by drunk drivers.[17] Statistical evidence unquestionably supports the majority's concerns,[18] and although the effectiveness of exemplary awards as a deterrent factor has never been conclusively proven,[19] the threat that drunk driving poses to the general public warrants at least the maintenance of the current available sanctions.

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12. *See* Note, *Drunken Driver*, *supra* note 6, at 129.

13. *See* GHIARDI & KIRCHER, *supra* note 6, § 2.06.

14. Those who oppose punitive damages argue that the general public is not deterred by punitive damages. These critics cite the high rate of recidivism among drunk drivers in support of their contention. *See* Note, *Drunken Driver*, *supra* note 6, at 128. Not only is it difficult to prove that punitive damages successfully deter undesirable conduct, but critics also point out that deterrence is not an objective of tort law. *See* DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES 15 (1964).

15. 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).

16. *Id.* at 897, 598 P.2d at 858, 157 Cal. Rptr. at 697-98. The drunk driver, Taylor, had previously caused a serious accident while intoxicated and had been convicted of drunk driving on numerous occasions. *Id.* at 893, 598 P.2d at 855, 157 Cal. Rptr. at 695.

17. *Id.* at 899, 598 P.2d at 859, 157 Cal. Rptr. at 698.

18. A high percentage of all highway fatalities are directly attributable to drunk driving. *See generally* G. HALVERSON, STOP THE DRUNK DRIVER (1970); Crampton, *The Problem Of The Drinking Driver*, 54 A.B.A. J. 995 (1968).

19. *See generally* GHIARDI & KIRCHER, *supra* note 6, §§ 2.07, 2.09.

II. EARLY CASES.

Wigginton's Administrator v. Rickert[20] is an early case that discusses drunk drivers and punitive damages. In *Wigginton*, the defendant and his companions were drinking for several hours prior to an accident.[21] As they made their way to another tavern, they collided with a street car,[22] injuring two passengers who brought an action against Wigginton's estate.[23] At trial the jury awarded the plaintiffs $4,000 in punitive damages.[24]

The defendant's estate appealed and argued that the number of drinks consumed was too remote and prejudicial to determine the outcome of the case.[25] Nevertheless, the court stated the case was appropriate for an assessment of punitive damages as Wigginton's conduct was wanton and reckless, indicating a willful disregard for human life.[26] The court severely chastized the defendant's behavior:

> [I]t is a matter of common knowledge that persons under the influence of liquor are wholly unfit to operate automobiles . . . ; they have no thought of their own safety, and appear to be wholly possessed of a desire to run the machine as fast as it can go, without any regard to the rights of other people . . . .[27]

Wigginton was among the first of a long line of cases which attempted to characterize the seriousness of the conduct of one who drives after drinking. A majority of these cases hold that mere proof that the defendant driver was intoxicated at the time of the accident is sufficient to put the issue of punitive damages before the jury.[28] The minority position, however, is

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20. 186 Ky. 650, 217 S.W. 933 (1920).
21. *Id.* at __, 217 S.W. at 934.
22. *Id.*
23. *Id.* at __, 217 S.W. at 933.
24. *Id.* at __, 217 S.W. at 935.
25. *Id.* at __, 217 S.W. at 934.
26. *Id.* at __, 217 S.W. at 936.
27. *Id.* at __, 217 S.W. at 934. For another early case awarding punitive damages against a drunk driver, see Ross v. Clark, 35 Ariz. 60, 274 P. 639 (1929). The court awarded $3,000 in punitive damages against the defendant for conduct that displayed a reckless and willful disregard for human life. *Id.*
28. This view was adopted in the RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979). In light of the recent number of cases this seems to represent a trend in automobile accident litigation involving drunk drivers. *See* Note, *Punitive Damages and the Drunk Driver—An Untimely Decision*, 12 CAP. U.L. REV. 271 (1982).

that simply driving while intoxicated, without some evidence of malice, ill-will, or evil motive, does not support an award of punitive damages.[29]

III. THE MINORITY POSITION

The courts which follow the minority position, while often acknowledging the fact that driving after drinking to the point of intoxication is negligent and even reckless,[30] hold that such conduct will not support an award of punitive damages without proof of malice on the part of the driver.[31] These jurisdictions require that the plaintiff allege and prove actual malice; the result of this requirement is that punitive damages are seldom awarded.[32] The language of the court in *Baker v. Marcus*[33] exemplifies the minority courts' characterization of malice:

> One who knowingly drives his automobile on the highway under the influence of intoxicants, in violation of a statute, is, of course, negligent. It is a wrong, reckless and unlawful thing to do; but it is not necessarily a malicious act. Evidence of intoxication may be offered to show the negligence of a driver; but in the absence of proof of one or more of the elements necessary to justify an award for punitive damages, it may not be used to enlarge an award of damages beyond that which will fairly compensate the plaintiff for the injury suffered.[34]

Although many courts holding the minority view utilize harsh language similar to that in *Baker*, some courts have recognized "that it is rarely possible to prove actual malice other-

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29. The following jurisdictions represent the minority rule: American Sur. Co. v. Gold, 375 F.2d 523 (10th Cir. 1966); Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); Commercial Union Ins. v. Reichard, 262 F. Supp. 275 (S.D. Fla. 1966); Arnold v. State *ex rel.* Burton, 220 Ark. 25, 245 S.W.2d 818 (1952); Tedesco v. Maryland Casualty Co., 127 Conn. 533, 18 A.2d 357 (1941); Yesel v. Watson, 58 N.D. 524, 226 N.W. 624 (1929); Teska v. Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 300 N.Y.S.2d 375 (1969); Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1966).

30. *See, e.g.*, Gombos v. Ashe, 158 Cal. App. 2d 517, 322 P.2d 933 (1958) (negligence or gross negligence insufficient to justify an award of punitive damages).

31. *See* W. PROSSER, *supra* note 10, § 2, at 9-10.

32. *See* Note, *Drunken Driver*, *supra* note 6, at 139. It is extremely difficult to prove that a drunk driver intended to inflict the injury on the person who was harmed.

33. 201 Va. 905, 114 S.E.2d 617 (1960).

34. *Id.* at 909, 114 S.E.2d at 620.

wise than by conduct and surrounding circumstances."[35] Thus, some courts lessen the burden of proof and permit a determination of malice to be implied from the circumstances: "If it be wrongful, unlawful and intentional, and the natural and probable result of the act is to accomplish the injury complained of, 'malice' is implied."[36] Even applying this more liberal standard, it would be difficult to prove that the natural and probable result of drinking and driving is to accomplish an injury.

The minority's analysis demonstrates the extreme difficulty facing an injured plaintiff when attempting to recover punitive damages. The practitioner should take great pains to be certain to make every possible nexus between the defendant's intoxication and driving. Moreover, if at all possible, an attempt should be made to prove actual malice, relying on legal malice[37] only in the alternative.

IV. THE MAJORITY POSITION

In a majority of jurisdictions, the courts have used a wide variety of expressions to define the type or degree of negligence which will permit an award of punitive damages against a drunk driver. Although many older decisions allowed recovery of punitive damages without a thorough analysis of the rationale,[38] the majority of juridictions permit awards of punitive damages only where the defendant acts in wanton disregard of the rights and safety of another.[39] To prove that a defendant's act was wanton or reckless the plaintiff must show that the defendant knew, or should have known, that his conduct would create a high degree of risk of harm.[40] There must

35. *See, e.g.*, Davis v. Thunison, 168 Ohio St. 471, 475, 155 N.E.2d 904, 907 (1959).

36. Flandermeyer v. Cooper, 85 Ohio St. 327, 348, 98 N.E. 102, 108 (1912).

37. For a definition of legal malice, see BLACK'S LAW DICTIONARY 806 (5th ed. 1979).

38. *See* Note, *Drunken Driver*, *supra* note 6, at 132.

39. The following jurisdictions apply this rule: Giddings v. Zellan, 160 F.2d 585 (D.C. Cir. 1947); Smith v. Chapman, 115 Ariz. 211, 564 P.2d 900 (1977); Mince v. Butters, 200 Colo. 501, 616 P.2d 127 (1980); Walczewski v. Wright, 181 Ind. App. 615, 393 N.E.2d 228 (1979); Gesslein v. Britton, 175 Kan. 661, 266 P.2d 263 (1954); Smith v. Sayles, 637 S.W.2d 714 (Mo. Ct. App. 1982); Gelinas v. Mackey, 123 N.H. 690, 465 A.2d 498 (1983); Detling v. Chockley, 70 Ohio St. 2d 134, 436 N.E.2d 298 (1982); Baker v. Marcus, 201 Va. 905, 114 S.E.2d 617 (1960).

40. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1979).

also be an indication that the defendant deliberately acted or failed to act in a conscious disregard of that risk.

In the Arkansas case of *Miller v. Blanton*,[41] the court determined the viability of the award on the basis of conduct alone: "Miller . . . knew that he was taking into his stomach a substance that would stupefy his senses, retard his muscular and nervous reaction . . . . After Miller voluntarily rendered himself unfit to operate a car properly he undertook to drive his automobile . . . down a well traveled highway."[42] The court in *Miller* emphasized the voluntariness of the defendant's actions in retarding his senses and driving where there existed a high degree of risk of harm to others.[43] Most jurisdictions that follow the majority rule characterize such conduct as so flagrant as to transcend mere negligence and constitute outrageous and reckless behavior.[44] This, however, does not free the plaintiff from proving causation. Punitive damages may be imposed only after the plaintiff establishes that the defendant's intoxication proximately caused the resulting accident and injuries.[45]

The California legislature has determined that the "consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person."[46] As a result, an analysis of the feasibility of punitive damages in that state focuses on the nature of the conduct rather than causation. A prominent California decision which demonstrates the majority view is *Taylor v. Superior Court*.[47] In *Taylor*, the California Supreme Court held that the element of malice was satisfied by showing that the defendant displayed a conscious

41. 213 Ark. 246, 210 S.W.2d 293 (1948).

42. *Id.* at 249, 210 S.W.2d at 294-95.

43. For a similar decision emphasizing the conduct of the defendant while driving intoxicated in a crowded area, see Focht v. Robada, 217 Pa. Super. 35, 41 n.1, 268 A.2d 157, 161 n.1 (1970) (an intoxicated driver speeding through a crowded thoroughfare is clearly liable for punitive damages).

44. *Focht*, 217 Pa. Super. 35, 268 A.2d 157. The *Focht* case followed the Restatement rule: "If the conduct involved a high degree of chance that serious harm will result, the fact that he knows or has reason to know that others are within the range of its effect, is conclusive of his recklessness." RESTATEMENT (SECOND) OF TORTS § 500 comment d (1979).

45. *See* Smith v. Chapman, 115 Ariz. 211, __, 564 P.2d 900, 904 (1977); Note, *North Dakota*, *supra* note 6, at 428; Note, *Drunken Driver*, *supra* note 6, at 133-34.

46. CAL. CIV. CODE § 1714(b) (West 1985).

47. 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).

disregard of the safety of others.[48] A conscious disregard exists when the defendant is "aware of the probable dangerous consequences of his conduct, [but] he willfully and deliberately fail[s] to avoid those consequences."[49]

The court's approach stresses the foreseeability of the harm that would follow from the act of drinking and driving:

> One who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others.[50]

In a vigorous dissent, Justice Clark attacked the majority's "twisted definition [of] malice"[51] which required no showing of evil motive but only an indication that the defendant had an awareness of the probable dangerous consequences of his act. A second objection raised by Justice Clark was that punitive damages serve no deterrent purpose.[52] The defendant's position was that punitive damages were assessed on a fortuitous basis because, "[d]runk drivers not involved in accidents—comprising the vast majority—are not subject to the penalty [of punitive damages]."[53] This argument, however, completely ignores the discretion inherent in law enforcement. It is true that the law has a discriminatory effect on violators that are caught, but to abandon a form of recovery for the victim on this basis violates the rights of the injured and undermines the fundamental rationales of deterrence and punishment.

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48. *Id.* at 895, 598 P.2d at 856, 157 Cal. Rptr. at 696. The court quoted Prosser, stating that punitive damages would be allowed when there are "circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton." *Id.* at 894-95, 598 P.2d at 856, 157 Cal. Rptr. at 696 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9-10 (1964).

49. *Taylor*, 24 Cal. 3d at 896-97, 598 P.2d at 856, 157 Cal. Rptr. at 696.

50. *Id.* at 896, 598 P.2d at 857, 157 Cal. Rptr at 697.

51. *Id.* at 910, 598 P.2d at 866, 157 Cal. Rptr. at 706 (Clark, J., dissenting).

52. *Id.* at 903, 909-10, 598 P.2d at 861, 865-66, 157 Cal. Rptr. at 701, 705.

53. *Id.* at 903-04, 598 P.2d at 862, 157 Cal. Rptr. at 701.

V. ESTABLISHING LIABILITY FOR DRUNK DRIVING IN WISCONSIN

The Wisconsin courts have not yet addressed the issue of whether to award punitive damages in drunk driving cases. Thus far the courts have relied on criminal sanctions to penalize such conduct.[54] In addition to the criminal statutes, Wisconsin courts permit an injured plaintiff to pursue a cause of action for negligence. The following analysis will focus first upon the elements that the plaintiff in a drunk driving case must prove to establish actual damages in tort. Second, it will predict the requisite type of conduct that would support an award of punitive damages in a drunk driving case.

A. Liability in Tort

Before a jury may award punitive damages in Wisconsin, the plaintiff must prove that he or she has suffered actual damages and that such damages were not merely nominal.[55] To establish actual damages in a cause of action for negligence, the plaintiff must prove four basic elements: duty, breach, cause, and harm.[56]In drunk driving cases, proving a breach of duty requires the injured party to show that an ordinarily prudent person would not voluntarily imbibe a dangerous substance knowing of the potential risks. An actionable negligence claim also requires a plaintiff to prove that the defendant's negligent act proximately caused the plaintiff's resulting injuries. Damages based upon evidence of intoxication alone would be unconstitutional because they would punish a

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54. *See, e.g.*, WIS. STAT. § 940.09(1) (1983-84).

55. Wussow v. Commercial Mechanisms, Inc., 90 Wis. 2d 136, 140, 279 N.W.2d 503, 505 (1979), *rev'd on other grounds*, 97 Wis. 2d 136, 293 N.W.2d 897 (1980); Widemshek v. Fale, 17 Wis. 2d 337, 117 N.W.2d 275 (1962).

56. *See* W. PROSSER, *supra* note 10, § 30; RESTATEMENT (SECOND) OF TORTS § 281 (1965); *see also* Coffey v. City of Milwaukee, 74 Wis. 2d 526, 531, 247 N.W.2d 132, 135 (1976); Thomas v. Kells, 53 Wis. 2d 141, 144, 191 N.W.2d 872, 873-74 (1971). The Wisconsin Supreme Court has summarized that:

> [t]o constitute a cause of action for negligence there must be: (1) A duty to conform to a certain standard of conduct to protect others against unreasonable risks; (2) a failure to conform to the required standard; (3) a causal connection between the conduct and the injury; and (4) actual loss or damage as a result of the injury.

Thomas, 53 Wis. 2d at 144, 191 N.W.2d at 873-74.

defendant simply for being drunk.[57] In Wisconsin if a duty and a breach are present the defendant is liable for all consequential damages flowing from the breach, whether or not the damages were foreseeable and provided there was no break in the chain of causation.[58] In Wisconsin only public policy limits liability for damages proximately caused by a negligent act.[59]

In *Ayala v. Farmers Mutual Automobile Insurance Co.*,[60] the Wisconsin Supreme Court detailed the public policy balance between evidence of intoxication and proof that such intoxication was a substantial factor in producing a given accident:

> Intoxication, standing by itself, does not constitute either gross negligence or ordinary negligence. While a person's driving of a motor vehicle when intoxicated is prohibited by statute, and is a criminal offense, nevertheless, an intoxicated driver of a motor vehicle may become involved in a collision and yet be free from negligence, and, therefore, not liable to respond in damages . . . . However, when there is concurrence of intoxication and causal negligence as to items such as speed, management and control, position on the highway, lookout, etc., the same constitutes gross negligence.[61]

The language of *Ayala* indicates that evidence of intoxication by itself will not satisfy the element of causation. It must be coupled with the defendant's irregular or abnormal driving. The reasoning of *Ayala* is that intoxication dulls the senses;[62] dulled senses result in abnormal driving; abnormal driving leads to automobile collisions.[63]

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57. *See* Note, *Drunken Driver*, *supra* note 6, at 118 n.2.

58. Osborne v. Montgomery, 203 Wis. 223, 236, 234 N.W. 272, 377 (1931). Wisconsin has eliminated all elements of foreseeability from the determination of proximate cause or substantial factor in negligence cases. *See* Strahlendorf v. Walgreen Co., 16 Wis. 2d 421, 428-29, 114 N.W.2d 823, 827 (1962); *see also* Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 234-35, 55 N.W.2d 29, 32 (1952).

59. *Osborne*, 203 Wis. at 237, 234 N.W. at 378.

60. 272 Wis. 629, 76 N.W.2d 563 (1956).

61. *Id.* at 640, 76 N.W.2d at 570.

62. It has been suggested that legal intoxication alone does not necessarily indicate that the defendant's senses were so impaired as to be incapable of driving competently. Some habitual drinkers remain unimpaired with blood-alcohol content levels as high as .10%. *See* Zylman, *Hostile Drivers and Alcohol Don't Mix*, 12 TRIAL 60 (Oct. 1976).

63. *See* Note, *Drunken Driver*, *supra* note 6, at 135.

B. Liability for Punitive Damages.

Once liability for actual damages in tort has been established, the question becomes what kind of conduct is likely to justify an award of punitive damages for injuries sustained by another as a result of a collision with a drunk driver. This issue has never been addressed in Wisconsin, but an answer can be reached by applying recent Wisconsin case law on punitive damage awards, *Wangen v. Ford Motor Co.*[64] and *Brown v. Maxey*,[65] to the drunk driving context.

Wisconsin courts have long held that in order for the plaintiff to recover punitive damages there must be some evidence indicating that the wrong was inflicted "under circumstances of aggravation, insult, or cruelty, with vindictiveness and malice."[66] Wisconsin has allowed punitive damages for various intentional torts, including assault and battery,[67] slander,[68] libel,[69] conversion,[70] and malicious prosecution.[71] More recently, punitive damages have been awarded in products liability cases[72] and in negligence cases.[73]

A discussion of the type of conduct that is sufficient to permit an award of punitive damages for drunk driving must begin with a brief discussion of *Bielski v. Schulze*.[74] *Bielski* abolished the type of conduct formerly characterized as gross negligence, stating:

> We recognize the abolition of gross negligence does away with the basis for punitive damages in negligence cases. But punitive damages are given, not to compensate the plaintiff for his injury, but to punish and deter the tortfeasor, and were acquired by gross negligence as accoutrements of intentional torts. Wilful and intentional torts, of course, still ex-

64. 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

65. 124 Wis. 2d 426, 369 N.W.2d 677 (1985).

66. Christensen v. Schwartz, 198 Wis. 222, 227, 223 N.W. 839, 840 (1929) (quoting McWilliams v. Bragg, 3 Wis. 424, 431 (1854)).

67. Jones v. Fisher, 42 Wis. 2d 209, 166 N.W.2d 175 (1969).

68. Lisowski v. Chenenoff, 37 Wis. 2d 610, 155 N.W.2d 619 (1968).

69. Dalton v. Meister, 52 Wis. 2d 173, 188 N.W.2d 494 (1971), *cert. denied*, 405 U.S. 934 (1972).

70. Fahrenberg v. Tengel, 96 Wis. 2d 211, 234, 291 N.W.2d 516, 527 (1980).

71. Walbrun v. Berkel, Inc., 433 F. Supp. 384 (E.D. Wis. 1976).

72. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980); Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984).

73. Brown v. Maxey, 124 Wis. 2d 426, 369 N.W.2d 677 (1985).

74. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

> ist, but should not be confused with negligence . . . . The protection of the public from such conduct or from reckless, wanton, or wilful conduct is best served by the criminal laws of the state.[75]

The language used by the court suggests that punitive damages are inappropriate in negligence cases. However, both commentary[76] and case law[77] agree that where the conduct of the defendant amounts to "what was formerly categorized as gross negligence; that is, where the defendant has acted in wanton, wilful or reckless disregard of the plaintiff's rights,"[78] punitive damages can still be recovered. In *Wangen v. Ford Motor Co.*,[79] however, the Wisconsin Supreme Court put the confusion of *Bielski* to rest.

Wangen expressly referred to the language in *Bielski* regarding reckless conduct as dicta[80] and then proceeded to define the type of conduct for which punitive damages may be awarded in products liability and negligence cases in Wisconsin:

> Because punitive damages depend on the nature of the wrongdoer's conduct, not on the nature of the tort on which compensatory damage is based, we interpret the dicta in *Bielski* to mean that punitive damages are not recoverable if the wrongdoer's conduct is merely negligent. Punitive damages do not rise from negligence. Nor does every products

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75. *Id.* at 18, 114 N.W.2d at 113.

76. *See* Walther & Plein, *Punitive Damages: A Critical Analysis*: Kink v. Combs, 49 MARQ. L. REV. 369, 374 (1965). This commentary refers to the *Bielski* dicta as follows:

> Because gross negligence involved a willful and wanton disregard of the rights of the plaintiff, one could argue that since the concept of gross negligence has been abolished, punitive damages can no longer be recovered in negligence cases. In the *Bielski* decision the Court used language to this effect. Although the Court set forth the classic argument against punitive damages therein, it is unlikely that the court intended to restrict punitive damages to intentional torts exclusively. It is likely that punitive damages are still available in negligence cases where defendant's conduct was willful and wanton.

Id. (footnotes omitted)

77. *See* Cieslewicz v. Mutual Serv. Casualty Ins. Co., 84 Wis. 2d 91, 101 n.4, 267 N.W.2d 595, 600 n.4 (1978); Wangen v. Ford Motor Co., 97 Wis. 2d at 272-73, 294 N.W.2d at 445-46.

78. Ghiardi, *Punitive Damages in Wisconsin*, 60 MARQ. L. REV. 753, 758 (1960).

79. 97 Wis. 2d 260, 294 N.W.2d 437. For a more recent case permitting a reward of punitive damages in a products liability action, see Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984).

80. *Wangen*, 97 Wis. 2d at 272, 294 N.W.2d at 444.

> liability case give rise to punitive damages. Only where there is proof of malice or willful, wanton, reckless disregard of plaintiff's rights can punitive damages be considered.[81]

Furthermore, the court clearly stated that "malice or vindictiveness [were] not the *sine qua non* of punitive damages,"[82] but, rather, conduct which could appropriately be described as "outrageous"[83] would be sufficient to warrant the assessment of punitive damages. Therefore, irrespective of the absence of a malicious or evil intent, punitive damages are permitted when the character of the offense has the outrageousness associated with a serious crime.[84]

Although there may be some confusion as to whether the pre-*Bielski* conduct formerly characterized as gross negligence is the same as that articulated in *Wangen*, the distinction is immaterial. The *Wangen* court seems to equate "outrageous" conduct with "gross negligence,"[85] thereby suggesting that if there is a distinction, it has little relevance when analyzing the appropriate conduct for punitive damages. Thus, while the particular language used by courts may differ, the nature of the conduct appears to be the same. Once it is recognized that the pre-*Bielski* conduct constituting gross negligence is fundamentally the same as the "outrageous" standard of conduct enunciated by the *Wangen* court, the only remaining inquiry relevant to this Comment is whether or not the act of drinking and driving exhibits a wanton or reckless disregard of the plaintiff's rights. A number of pre-*Bielski* cases demonstrate that it does.[86]

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81. *Id.* at 275, 294 N.W.2d at 446. *See also Brown*, 124 Wis. 2d at 433, 369 N.W.2d at 681.

82. *Wangen*, 97 Wis. 2d at 274, 294 N.W.2d at 446 (quoting *Kink*, 28 Wis. 2d at 79, 135 N.W.2d at 797).

83. *Wangen*, 97 Wis. 2d at 268, 294 N.W.2d at 442.

For an analogous standard of conduct, see Focht v. Rabada, 217 Pa. Super. 35, 40, 268 A.2d 157, 160 (1970) ("outrageous conduct" done with "reckless indifference to the interests of others").

84. *See* Entzminger v. Ford Motor Co., 47 Wis. 2d 751, 758, 177 N.W.2d 899, 903 (1970); *see also* Jones v. Fisher, 42 Wis. 2d 209, 219, 166 N.W.2d 175, 180 (1969).

85. *Wangen*, 97 Wis. 2d at 275, 294 N.W.2d at 446.

86. *See, e.g.*, Twist v. Aetna Casualty & Sur. Co., 275 Wis. 174, 81 N.W.2d 523 (1957); Ayala v. Farmers Mut. Auto. Ins. Co., 272 Wis. 629, 76 N.W.2d 563 (1956); State v. Peckham, 263 Wis. 239, 56 N.W.2d 835 (1953); Christie v. State, 212 Wis. 136, 248 N.W. 920 (1933); Tomasik v. Lanferman, 206 Wis. 94, 238 N.W. 857 (1931).

An early drunk driving case, *Tomasik v. Lanferman*,[87] sustained a trial court finding of gross negligence. In that case, a pedestrian was struck by a milk wagon which itself had been struck by a drunk driver.[88] The court, relying on circumstantial evidence of the defendant's intoxication, held that "the driving of a car upon our highways by one intoxicated fully responds to all of the elements necessary to constitute gross negligence."[89] Without any discussion of malice the court said that one who drives a car while intoxicated "betrays an absence of any care, and indicates such recklessness and wantonness as evinces an utter disregard of consequences."[90] This language is nearly identical to that used in *Wangen*. Moreover, the tenor of the decision suggests that the conduct of the driver approached the level of outrageousness associated with serious crime.[91]

Another prominent decision which discussed the type of conduct exhibited by a drunk driver is *Ayala v. Farmers Mutual Automobile Insurance Co.*[92] In *Ayala* the jury found that the driver was intoxicated at the time of the collision and was negligent as to position on the highway, management and control, and lookout. Ironically, they also found that his intoxication was not a causal factor.[93] The court, having difficulty with the jury finding, stated that intoxication could not be disassociated from negligence.[94] More specifically, the court stated that "[t]he finding of causal negligence coupled with the finding of intoxication is, as a matter of law, in effect, a finding of causal gross negligence."[95]

The rationale the *Ayala* court forwards is fundamentally sound. Highway travelers have a right to be free from the

87. 206 Wis. 94, 238 N.W. 857 (1931).

88. *Id.* at 95, 238 N.W. at 857.

89. *Id.* at 97, 238 N.W. at 858.

90. *Id.*

91. *Tomasik* was, in fact, applied in a negligent homicide case. *See* State v. Peckman, 263 Wis. 239, 56 N.W.2d 835 (1953).

92. 272 Wis. 629, 76 N.W.2d 563 (1956).

93. *Id.* at 640, 76 N.W.2d at 570. The facts of the case suggest that the jury was influenced by the defendant's having consumed only two cans of beer over the duration of at least one and one half hours. *Id.* at 636, 76 N.W.2d at 567.

94. *Id.* at 640, 76 N.W.2d at 570. The court did not mean that the jury could not find intoxication without finding negligence. Such a conclusion would remove the element of proximate cause. *Id.*

95. 272 Wis. at 640, 76 N.W.2d at 570.

erratic and abnormal behavior of a drunk driver. One way of facilitating that end is to hold the defendant liable not only for the actual damages incurred by the plaintiff but also for an additional punitive award commensurate with the conduct of the defendant that exceeds ordinary negligence.[96] The implication is that causal negligence, coupled with proof of intoxication, is an indication of more than simply a failure to use due care. It demonstrates conduct appropriately deemed outrageous. Such conduct, according to the *Wangen* rule, warrants imposition of punitive damages. Therefore, an examination of the language in *Wangen*, in relation to the pre-*Bielski* characterization of drunk driving, indicates that Wisconsin will permit punitive damages for injuries sustained to another from a drunk driver. In order to be awarded exemplary damages, the plaintiff must simply establish that the defendant was causally negligent and that he was intoxicated at the time of the collision. When these two elements are met, the "reckless conduct" standard of *Wangen* should be applied as a matter of law.

VI. INSURING AGAINST PUNITIVE DAMAGES.

The issue of whether or not punitive damages assessed against a drunk driver are insurable is as important as the threshold determination of whether punitive damages should even be available. In addressing this issue, courts generally consider two questions: First, is the language of the insurance contract sufficiently broad to cover such damages; second, should public policy permit coverage? The recent decision in *Brown v. Maxey*[97] has answered both of these questions in the affirmative. Unfortunately, *Maxey* is decided primarily on the basis of insurance contract principles. The arguably more significant public policy implications are not adequately discussed. Because the availability of insurance against punitive damages has the effect of shifting the direct responsibility for the act of drinking and driving to the general public, the un-

96. The court stated in an early portion of the decision that "[o]rdinary negligence and gross negligence are distinct kinds of negligence, and do not grade into each other. Ordinary negligence lies in the field of inadvertence, and gross negligence in the field of actual or constructive intent to injure." *Id.* at 637, 76 N.W.2d at 568.

97. 124 Wis. 2d 426, 369 N.W.2d 677 (1985).

derlying objectives of punishment and deterrence are seriously jeopardized.

A. Contractual Interpretation

An analysis of the insurability of punitive damages must begin with the language of the insurance policy itself. As a matter of contractual interpretation the majority of jurisdictions agree that the terms of the general liability policy permit coverage against punitive damages.[98] Most courts find the typical policy to be either broad enough to cover such dam-

98. The following cases have held that the typical liability policy provides coverage against punitive damages: Pennsylvania Threshermen and Farmers' Mut. Casualty Ins. Co. v. Thornton, 244 F.2d 823 (4th Cir. 1957); General Casualty Co. v. Woodby, 238 F.2d 452 (6th Cir. 1956); New Amsterdam Casualty Co. v. Jones, 135 F.2d 191 (6th Cir. 1943); Ohio Casualty Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934), *cert denied*, 295 U.S. 734 (1935); Norfolk and Western Ry. v. Hartford Accident and Indem. Co., 420 F. Supp. 92 (N.D. Ind. 1976); Concord Gen. Mut. Ins. Co. v. Hills, 345 F. Supp. 1090 (D. Me. 1972); 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); American Fidelity & Casualty Co. v. Werfel, 230 Ala. 552, 162 So. 103 (1935); Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 502 P.2d 522 (1972); Southern Farm Bureau Casualty Ins. Co. v. Daniel, 246 Ark. 849, 440 S.W.2d 582 (1969); Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co., 95 Idaho 501, 511 P.2d 783 (1973); Scott v. Instant Parking, Inc., 105 Ill. App. 2d 133, 245 N.E.2d 124 (1969); Maryland Casualty Co. v. Baker, 304 Ky. 296, 200 S.W.2d 757 (1947); Anthony v. Frith, 394 So. 2d 867 (Miss. 1981); Fitzgerald v. Western Fire Ins. Co., 679 P.2d 790 (Mont. 1984); Wolff v. General Casualty Co., 68 N.M. 292, 361 P.2d 330 (1961); Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155 (Okla. 1980); Harrell v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977); 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); Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341 (Tex. Civ. App. 1972); Hensley v. Erie Ins. Co. 283 S.E.2d 227 (W. Va. 1981). The following cases have held that the general public liability policy does not provide coverage for punitive damages: American Sur. Co. v. Gold, 375 F.2d 523 (10th Cir. 1966); Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); Commercial Union Ins. Co. v. Reichard, 262 F. Supp. 275 (S.D. Fla. 1966), *vacated*, 273 F. Supp. 952 (1967); American Ins. Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965); Hanna v. State Farm Mut. Auto. Ins. Co., 233 F. Supp. 510 (E.D.S.C. 1964); Arnold v. State *ex rel.* Burton, 220 Ark. 25, 245 S.W.2d 818 (1952); Universal Indem. Ins. Co. v. Tenery, 96 Colo. 10, 39 P.2d 776 (1934); Brown v. Western Casualty & Sur. Co., __ Colo. App. __, 484 P.2d 1252 (1971); Tedesco v. Maryland Casualty Co., 127 Conn. 533, 18 A.2d 357 (1941); Nicholson v. American Fire & Casualty Ins. Co., 177 So. 2d 52 (Fla. Dist. Ct. App. 1965); Crull v. Gleb, 382 S.W.2d 17 (Mo. App. 1964); Yesel v. Watson, 58 N.D. 524, 226 N.W. 624 (1929); Teska v. Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 300 N.Y.S. 2d 375 (1969); Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1966); Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964).

ages or sufficiently ambiguous to resolve coverage against the insurer.[99]

The Wisconsin Supreme Court in *Brown v. Maxey*[100] considered the insurability of punitive damages assessed against a landlord for failure to maintain his apartment complex reasonably fire-safe.[101] The court concluded that the standard liability policy language was sufficiently broad; therefore, the insured could reasonably have expected to be covered for such damages.[102]

If the policy in *Maxey* had specifically excluded coverage for punitive damages, the court would not have addressed the reasonable expectations of the insured. It was evident, however, that the insurance company in *Maxey* was simply trying to benefit from its own ambiguity. Implicit in the court's holding is a warning to insurers that they may exclude punitive damages by policy language. For the exclusionary provision to be effective it must be definite and express, leaving no ambiguity in its application. Furthermore, the court will not permit an insurer to exclude coverage for punitive damages by characterizing "outrageous" conduct as intentional.[103]

B. Public Policy

One of the earliest cases referring to public policy is the Colorado case of *Universal Indemnity Insurance Co. v. Tenery*.[104] The court, while never expressly addressing the issue of public policy, indicated a concern for the objectives of punitive damages. The court stated that because the insurance company agreed to provide coverage only for bodily inju-

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99. *See generally* Burrell & Young, *Insurability of Punitive Damages*, 62 MARQ. L. REV. 1 (1978) [hereinafter cited as Burrell & Young, *Insurability*]. A typical policy generally provides coverage for "all sums which the insured shall become obligated to pay by reason of liability imposed by law." *See also* Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431, 436 (1976) [hereinafter cited as Note, *Insurance Reevaluation*].

100. 124 Wis. 2d 426, 369 N.W.2d 677 (1985).

101. *Id.* at 441-47, 369 N.W.2d at 685-88.

102. *Id.* at 442, 369 N.W.2d at 685 (emphasis added). The *Maxey* court noted two reasons that indicated why the policy language was not ambiguous with respect to punitive damages: the term "damages" was sufficiently broad to cover for both compensatory and punitive damages, and punitive damages were awarded "because of bodily injury."

103. *See Maxey*, 124 Wis. 2d at 444, 369 N.W.2d at 686.

104. 96 Colo. 10, 39 P.2d 776 (1934).

ries and because punitive damages are assessed on the basis of punishment, "[T]he injured [party] will not be allowed to collect from a non-participating party for a wrong against the public."[105]

The leading case prohibiting coverage for punitive damages by an insurance company is *Northwestern National Casualty Co. v. McNulty*.[106] The defendant, insured under a policy issued in Virginia, lost control of his car while intoxicated. The plaintiff suffered severe injuries and brought suit for compensatory and punitive damages in Florida where the accident had occurred. The plaintiff was awarded a total of $57,000, including $20,000 in punitive damages. The insurance company appealed, protesting the liability for punitive damages. Judge Wisdom premised his decision on the public policy behind punitive damages:

> Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. 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.
>
> The policy considerations in a state where, as in Florida and Virginia, punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well as nominally 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. Such damages do not compensate the plaintiff for his injury since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but 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.[107]

105. *Id.* at 17, 39 P.2d at 779.
106. 307 F.2d 432 (5th Cir. 1962).
107. *Id.* at 440-41.

As the *McNulty* decision clearly indicates, if one rationale of punitive damages is to punish the drunk driver, permitting insurance coverage of the award severs the direct responsibility of the wrongdoer from his actions and shifts the punishment to the insurer.

Juxtaposed against *McNulty* is the leading case permitting insurance coverage against punitive damages. *Lazenby v. Universal Underwriters Insurance Co.*[108] involved a plaintiff who sustained personal injuries as the result of a collision with a negligent drunk driver. The Supreme Court of Tennessee found the insurer liable for punitive damages and then went on to question the viability of deterrence as an appropriate objective of punitive damages:

> We . . . are not able to agree [that] the closing of the insurance market, on the payment of punitive damages, to [socially irresponsible] drivers would necessarily accomplish the result of deterring them in their wrongful conduct. This State, in regard to the proper operation of motor vehicles, has a great many detailed criminal sanctions, which apparently have not deterred this slaughter on our highways and streets. Then to say the closing of the insurance market, in the payment of punitive damages, would act to deter guilty drivers would in our opinion contain some element of speculation.[109]

Not only did the *Lazenby* court take issue with the effectiveness of deterrence as an objective, but it also stated that denial of coverage on public policy grounds would be arbitrary because of the difficulty involved in distinguishing between ordinary negligence and negligence which justifies an award of punitive damages.[110]

As stated above, the Wisconsin Supreme Court held in *Maxey* that the wording of a liability policy may be sufficiently broad to cover punitive damages.[111] In addressing the second, and perhaps more significant query of whether public policy precludes coverage, the court emphasized the importance of maintaining freedom of contract:

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108. 214 Tenn. 639, 383 S.W.2d 1 (1964). *See also* Long, *Insurance Protection Against Punitive Damages*, 32 TENN. L. REV. 573 (1965).

109. *Lazenby*, 214 Tenn. at 648, 383 S.W.2d at 5.

110. *Id.*

111. *Maxey*, 124 Wis. 2d at 443, 369 N.W.2d at 686.

> 'Public policy' is no magic touchstone. This state has more than one public policy. Another and countervailing public policy favors freedom of contract, in the absence of overriding reasons for depriving the parties of that freedom. Still another public policy favors the enforcement of insurance contracts according to their terms, where the insurance company accepts the premium and reasonably represents or implies that coverage is provided.[112]

In addition, the *Maxey* court emphasized that insurance against punitive damages could function as a successful deterrent in four ways: the defendant's premiums may rise; insurance coverage may become unavailable; the punitive award may exceed the policy coverage; and his reputation in the community may be injured.[113] For these reasons, the court believed that the rationale for punitive damages would not be undermined.

VII. IMPLICATIONS OF *BROWN V. MAXEY*

The Wisconsin Supreme Court's decision to allow insurability of punitive damages had, as its foundation, the question of whether to adopt the reasoning of *Lazenby* or that of *McNulty*. Both cases dealt with punitive damages within the drunk driving context, and both cases addressed the insurability issue on public policy grounds. However, *Lazenby* stands for the proposition that coverage should be based on the reasonable expectations of the insured, whereas *McNulty* holds

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112. *Id.* at 446, 369 N.W.2d at 687 (quoting Cieslewicz v, Mutual Serv. Casualty Ins. Co., 84 Wis. 2d at 91, 267 N.W.2d 595, 601 (1978).

Also consistent with the court's holding in *Cieslewicz*, the *Maxey* court refused to interfere with the bargaining process between the insurer and the insured. The court stated that the insurer has an option either to exclude coverage for punitive damages or to collect a premium as sufficient consideration for such coverage. When the parties arrive at an agreement and exchange sufficient consideration, the resulting contract will be enforced unless the court finds an overriding public policy reason not to enforce it. The countervailing public policy that the court faced was whether insurance coverage would defeat the purpose of punitive damages. The court indicated that both deterrence and punishment, the objectives of punitive damages, would remain intact after their decision. In reaching the conclusion that public policy favors insurance coverage for punitive damages, the *Maxey* court, citing *Cieslewicz*, relied on a very basic, but often contested, rationale: "[I]nsurance does not necessarily shift the burden from the individual . . . to the general public but simply spreads the burden out among similarly situated persons, while avoiding the devastating financial impact on particular individuals." *Id.* at 446, 369 N.W.2d at 688.

113. *Id.* at 447, 369 N.W.2d at 688.

that insurability would defeat the purpose of punitive damages. The *Maxey* decision applied the "reasonable expectation" theory and thereby followed the *Lazenby* line of cases. The remainder of this Comment will attempt to demonstrate the logical inconsistency of the *Lazenby* rule and the *Maxey* decision with respect to drunk driving cases.

In nearly every decision holding that punitive damages are insurable, the reasonable expectation of the insured is considered a major factor in the determination.[114] Those that favor coverage argue that the average insured expects protection against any claims caused by operation of a motor vehicle, provided that such claims arise out of unintentional actions.[115] An analogous assertion was made in *Maxey*, wherein the court showed deferrence to the policy of upholding insurance coverage after the insured has paid a premium.[116] There are several reasons why this argument should not apply to the insured drunk driver. First, the "reasonable expectation" theory is more closely akin to a method of contractual interpretation than a public policy argument. The theory is most frequently used to decide what terms a reasonable person would expect to be included in a contract.[117] Understanding the theory as a basic contract construction method, one can see that the fault with the argument lies in its failure to adequately address public policy.

Second, it is doubtful that a reasonable person would expect to be covered when causing injuries to another while driving under the influence. If coverage is expected there are reasons why these expectations should not be met. It is clear that one should reasonably expect to be protected for harm caused to another by ordinary negligence, since the unguarded conduct of the tortfeasor lacks the sufficient *mens rea* associated with a serious crime. But as noted earlier in this Com-

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114. *See supra* note 98 and accompanying text.

115. *See, e.g.*, Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 487-88, 502 P.2d 522, 524-25 (1972); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 239, 248, 383 S.W.2d 1, 5 (1964); Cieslewicz v. Mutual Serv. Casualty Ins. Co., 84 Wis. 2d 91, 97, 267 N.W.2d 595, 598 (1978).

116. Brown v. Maxey, 124 Wis. 2d 426, 447, 369 N.W.2d 677, 688 (1985).

117. *See* Kremers-Urban Co. v. American Employers Ins., 119 Wis. 2d 722, 735-36, 351 N.W.2d 156, 163-64 (1984) (court discusses reasonable expectations of insured as a method of contract construction).

ment, there is considerable variance in the characterization of the conduct attributed to a drunk driver.

In Wisconsin the conduct of one who drinks and drives is equivalent to what was formerly characterized as gross negligence; that is, it constitutes a wanton, wilful and reckless disregard for the rights of the plaintiff. Such conduct "falls short of being intentional but probably is closer to intentional than negligent action."[118] In fact, some courts go so far as to imply malice from mere evidence of injuries caused by an intoxicated driver.[119] Irrespective of the language used to define drunk driving, it is evident that when a person voluntarily imbibes a mind altering substance into his system, while having full knowledge that he must later drive a vehicle, he has arguably met the requisite *mens rea* associated with a serious crime. Indeed, the conduct involved in drunk driving cases rises well above ordinary negligence and is more closely akin to intentional wrongdoing.

The third reason why drunk drivers' expectations of insurance coverage should not be determinative of public policy involves the effect of such coverage on deterring future conduct. One court has stated that denying insurance coverage for punitive damages would not act to deter the wrongful conduct of the driver.[120] This court reached its conclusion by stating that since criminal sanctions had not deterred drunk driving, it would be speculative to say that punitive damages could have any deterrent effect.[121] The *Maxey* court implicitly adopted the same reasoning.[122]

This argument, however, has been successfully countered in the decision of *American Surety Co. v. Gold*:[123]

> [W]e may as well say criminal sanctions serve no useful purpose just because they are constantly violated. The question is not so much the efficacy of the policy underlying punitive damages; rather it is a question of the implementation of that

118. *Maxey*, 124 Wis. 2d at 450, 369 N.W.2d at 690 (Steinmetz, J., dissenting).

119. *See generally* Annot., 65 A.L.R.3D 656, § 2 (1975). *See also supra* note 44 and accompanying text.

120. Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 648, 383 S.W.2d 1, 5 (1964).

121. *Id.*

122. 124 Wis.2d at 445, 369 N.W.2d at 687.

123. 375 F.2d 523 (10th Cir. 1966).

> policy. Permitting the penalty for the misdeed to be levied on one other than he who committed it cannot possibly implement the policy.[124]

As the *Gold* court indicated, permitting the payment of punitive damages to be shifted to a non-participant undermines the deterrent function of the award.

The same contention can be made for the objective of punishment. Wisconsin has recognized the public policy of deterrence and punishment as the purposes of punitive damages. When the penalty for drunk driving is unfairly shifted to the insurance company, the defendant is no longer directly punished for the injuries caused. Similarly, by virtue of this wrongful conduct going unpunished, others who drink and drive are in no way deterred.

The *Maxey* decision stated, however, that the burden will not be unfairly shifted to the insurer. Rather, the cost will simply be spread among similiarly situated persons.[125] Since the insurer collects a premium, this whole process can be conveniently labelled as freedom of contract and thus remain immune from judicial interference. This argument, nevertheless, ignores one of the fundamental purposes of punitive damages. Punitive damages are intended as a personal punishment for an individual's wrongful conduct and should not be shifted to the public as policy holders. Furthermore, the *Maxey* court "appears . . . to give license to violent, conscious, wanton, outrageous behavior as long as you can afford to pay for it in advance."[126] Deterrence of wrongful conduct simply is not achieved when an individual can avoid responsibility for his reprehensible behavior merely because it is characterized as "outrageous" rather than intentional. If one of the intended purposes of punitive damages is personal punishment, then the defendant must be forced to face the financial impact of a punitive award.[127] Voluntary intoxication, coupled with

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124. *Id.* at 527.

125. 124 Wis. 2d at 446, 369 N.W.2d at 688.

126. 124 Wis. 2d at 451, 369 N.W.2d at 690 (Steinmetz, J., dissenting).

127. Although *Cieslewicz* formed the theoretical background for *Maxey*, the case was relied upon improperly. The *Cieslewicz* case arose out of statutorily defined negligence for violation of a dog bite statute. *Cieslewicz*, 84 Wis. 2d at 101, 267 N.W.2d at 600. It is clear that the requisite *mens rea* for punitive damages exceeds that required for ordinary negligence under the dog bite statute. Thus, while insurance coverage for punitive damages is inappropriate, coverage for ordinary negligence damages, such as

causal negligence, warrants greater punishment than do other intentional torts traditionally warranting an award of punitive damages. Clearly, public policy should prohibit persons from protecting themselves against their own voluntary wrongdoing.

CONCLUSION

Wisconsin has been cautious in extending punitive damages to unintentional conduct. For many years it refused to assess punitive damages in the gray area between ordinary negligence and intentional conduct. Recently, however, the standards set forth in *Wangen v. Ford Motor Co.*[128] and *Brown v. Maxey*[129] have clearly defined that area and have eliminated the ambiguity created by *Bielski v. Schulze.*[130] Although the decisions in *Wangen* and *Maxey* did not involve drunk driving claims, they may have their most significant impact in that context.

Drunk driving has become a social evil that demands immediate and effective treatment in all jurisdictions. The imposition of any doctrine which has the effect of thwarting such insidious conduct warrants full consideration. Punitive damages are available in Wisconsin to punish and deter outrageous conduct of the kind associated with drinking and driving. Only when these fundamental purposes are served is the imposition of a punitive award appropriate. When the drunk driver is permitted to shift the financial responsibility to the general public, punitive damages no longer serve their intended purpose. Insurance coverage will undermine the very nature of punitive damages and leave the act of drunk driving to be punished by an already ineffectual criminal system. Punitive damages should be assessed against a drunk driver, but the assessment necessarily requires the preservation of the objectives underlying the doctrine.

JAMES A. NIQUET

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those arising from violation of the dog bite statute, properly protects a negligent tortfeasor from unintended or unguarded mishap.

128. 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

129. 124 Wis. 2d 426, 369 N.W.2d 677 (1985).

130. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).