

1978

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# MARQUETTE LAW REVIEW

Vol. 62

Fall 1978

No. 1

## INSURABILITY OF PUNITIVE DAMAGES

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### I. INTRODUCTION

The issue of whether a person can be insured for liability arising from punitive damages has been presented with increasing frequency and has been decided with conflicting results both in Wisconsin and throughout the country. This issue presents two fundamental issues—first, whether standard insurance policy language includes punitive damages within its coverage and second, whether public policy prohibits such coverage. Analysis of these issues involves vital concepts of insurance contract interpretation, the operation of the doctrine of punitive damages and consideration of special situations such as vicarious liability for punitive damages.

The numerous jurisdictions which have now considered the issue are fairly evenly divided on the question of the insurability of punitive damages.<sup>1</sup> In addition to the judicial considera-

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The authors gratefully acknowledge the assistance of W. Ted Tornehl, senior student at Marquette University Law School, in the preparation of this article.

1. Courts in the following cases, not involving vicarious liability, have permitted insurance coverage for punitive damages: *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957) (applying South Carolina law); *General Cas. Co. of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956) (applying Tennessee law); *Fagot v. Ciravola*, 445 F. Supp. 342 (E.D. La. 1978) (applying Louisiana law, but with respect to punitive damages awarded in federal action based upon 42 U.S.C. § 1983; Louisiana does not permit punitive damages); *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); *Employers Ins. Co. v. Brock*, 233 Ala. 551, 172 So. 671 (1937); *American Fidelity & Cas. Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935); *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); *Greenwood*

tion of punitive damages, the issue has also been subjected to the numerous conflicting views of various commentators.<sup>2</sup> The

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Cemetery, Inc. v. Travelers Indem. Co., 238 Ga. 313, 232 S.E.2d 910 (1977); Continental Ins. Cos. v. Hancock, 507 S.W.2d 146 (Ky. 1974); Wolff v. General Cas. Co. of America, 68 N.M. 292, 361 P.2d 330 (1961); 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); Lipscombe v. Security Ins. Co., 213 Va. 81, 189 S.E.2d 320 (1972) (uninsured motorist coverage); see Reynolds v. Willis, 209 A.2d 760, 763 (Del. 1965).

In the following cases of nonvicarious liability, the courts have not permitted insurance coverage for punitive damages: American Sur. Co. v. Gold, 375 F.2d 523 (10th Cir. 1966) (applying Kansas law and denying coverage on public policy grounds); Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962) (applying Florida and Virginia law and denying coverage on public policy grounds); Universal Indem. Ins. Co. v. Tenery, 96 Colo. 10, 39 P.2d 776 (1934) (coverage denied essentially under contract language with reference to public policy); Gleason v. Fryer, 30 Colo. App. 106, 491 P.2d 85 (1971) (coverage denied under contract language); Brown v. Western Cas. & Sur. Co., 484 P.2d 1252 (Colo. Ct. App. 1971) (coverage denied under contract language); Nicholson v. American Fire & Cas. Ins. Co., 177 So. 2d 52 (Fla. Dist. Ct. App. 1965) (coverage denied on public policy grounds); Caspersen v. Webber, 298 Minn. 93, 213 N.W.2d 327 (1973) (coverage denied under contract language); Crull v. Gleb, 382 S.W.2d 17 (Mo. Ct. App. 1964) (coverage denied under contract language and on public policy grounds); Teska v. Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 300 N.Y.S.2d 375 (1969) (coverage denied on public policy grounds); Esmond v. Liscio, 209 Pa. Super. Ct. 200, 224 A.2d 793 (1966) (coverage denied on public policy grounds); see Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941).

There is no disagreement with the proposition that one may be insured for punitive damages for which he or she is vicariously liable. Commercial Union Ins. Co. v. Reichard, 404 F.2d 868 (5th Cir. 1968) (applying Florida law); Glen Falls Indem. Co. v. Atlantic Bldg. Corp., 199 F.2d 60 (4th Cir. 1952) (applying South Carolina law); Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934) (applying Missouri law), cert. denied, 295 U.S. 734 (1935); Norfolk & W. Ry. v. Hartford Accident & Indem. Co., 420 F. Supp. 92 (N.D. Ind. 1976) (applying Indiana law); Southern Farm Bureau Cas. Ins. Co. v. Daniel, 246 Ark. 849, 440 S.W. 2d 582 (1969); Sterling Ins. Co. v. Hughes, 187 So.2d 898 (Fla. Dist. Ct. App. 1966); 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); Colson v. Lloyd's of London, 435 S.W.2d 42 (Mo. Ct. App. 1968).

2. See, e.g., 7 & 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 4312, 4900 (1962 & Supps. 1972, 1973); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 216-17 (1973); J. GHIARDI, PERSONAL INJURY DAMAGES IN WISCONSIN, ch. 3 (1964); R. KEETON, BASIC TEXT ON INSURANCE LAW § 5.3(f) (1971); 1 R. LONG, THE LAW OF LIABILITY INSURANCE § 1.27, at 1-81 (1976); H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 275C, at 560 (1961); Conley & Bishop, *Punitive Damages and the General Liability Insurance Policy*, 25 FED'N INS. COUNSEL Q. 309 (1975); Gonsoulin, *Is An Award of Punitive Damages Covered Under An Automobile or Comprehensive Liability Policy?*, 22 Sw. L.J. 433 (1968); Kendrigan, *Public Policy's Prohibition Against Insurance Coverage for Punitive Damages*, 1969 INS. COUNSEL J. 622; Logan, *Liability Insurance Protection From Punitive Damages*, in THE CASE AGAINST PUNITIVE DAMAGES 23 (Def. Research Inst. 1969); Long, *Insurance Protection Against Punitive Damages*, 32 TENN. L. REV.

developing wealth of analysis makes available a complete consideration and a rational resolution of the question of the insurability of punitive damages.

Resolution of the issue is now imminent in Wisconsin in light of the recent Wisconsin Supreme Court decision in *Cieslewicz v. Mutual Service Casualty Insurance Co.*<sup>3</sup> In *Cieslewicz*, the court considered the insurability of punitive damages in the context of insurance coverage for treble damages imposed by section 174.04 of the Wisconsin Statutes, a dog bite statute. The court found that the standard insurance policy coverage for "all sums which the Insured shall become legally obligated to pay as damages because of bodily injury" was sufficiently broad to give the insured a reasonable impression that such treble damages were covered. However, the court carefully distinguished statutory multiple damages from common-law punitive damages and specifically deferred decision on whether common-law punitive damages could be insured against. Speaking solely in the dog bite context, the court concluded that since such insurance coverage would not destroy the elements of deterrence and punishment, public policy did not provide a basis for voiding part of the insurance contract which the policyholder had reasonably believed provided coverage. Thus, the insurer was found liable for both the compensatory and multiple statutory damages. Of additional interest in *Cieslewicz*, the court commented that as a result of statements it made in *Bielski v. Schulze*,<sup>4</sup> a question exists as to whether common-law punitive damages are available for negligent torts in Wisconsin.<sup>5</sup> Of course, the availability of punitive damages is a vital consideration as to their insurability.

Although *Cieslewicz* may be read by some as a harbinger that common-law punitive damages may be insured against, dicta within *Cieslewicz* indicates that when the issue is presented, the court will refuse on public policy grounds to permit such coverage. The authors submit, based upon analysis of

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573 (1965); Zuger, *Insurance Coverage of Punitive Damages*, 53 N.D.L. Rev. 239 (1976); Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431 (1976); Comment, *Insurer's Liability for Punitive Damages*, 14 Mo. L. Rev. 175 (1949); Note, *Insurance Coverage and the Punitive Award in the Automobile Accident Suit*, 19 U. PRRT. L. Rev. 144 (1957). See also Annot., 20 A.L.R.3d 343 (1968).

3. 84 Wis. 2d 91, 267 N.W.2d 595 (1978).

4. 16 Wis. 2d 1, 17-18, 144 N.W.2d 105, 113 (1962).

5. *Cieslewicz v. Mutual Serv. Cas. Ins. Co.*, 84 Wis. 2d 91, 101 n.4, 267 N.W.2d 595, 600 n.4 (1978).

opposing positions on this issue, that unless punitive damages are limited in their availability to intentional torts, public policy forbids insurance coverage for common-law punitive damages.

This article will first briefly explore the theory of punitive damages in Wisconsin; then the question of coverage under policy terms will be considered, followed by an examination of the public policy considerations. Finally, the public policy argument and the distinguishing features of *Cieslewicz* will be analyzed in presentation of the authors' thesis that one may not be insured against liability for punitive damages.

## II. THE DOCTRINE OF COMMON-LAW PUNITIVE DAMAGES

The theory and historical development of the doctrine of punitive damages has been the subject of considerable commentary in Wisconsin.<sup>6</sup> This article is not intended to provide an all encompassing primer on this doctrine, but rather, to provide a framework within which the questions relating to the insurability of punitive damages can be discussed.

Because this article is primarily concerned with insurance coverage for common-law punitive damages, it necessarily assumes such damages are available. The fact however is, that while the availability of punitive damages appears to be solidly imbedded in the common law of most states including Wisconsin, punitive damages are not, in the absence of statute, permitted in four states.<sup>7</sup> Courts and legal commentators continue, long after the adoption of the doctrine of common-law punitive damages, to question the wisdom and efficacy of the doctrine, and the abolition of punitive damages has been vigorously advocated.<sup>8</sup>

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6. Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 MARQ. L. REV. 245 (1977); Ghiardi, *Punitive Damages in Wisconsin*, 60 MARQ. L. REV. 753 (1977); Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 MARQ. L. REV. 369 (1964); Wickhem, *The Rule of Exemplary Damages in Wisconsin*, 2 WIS. L. REV. 129 (1923).

7. Louisiana (*McCoy v. Arkansas Natural Gas Co.*, 175 La. 487, 143 So. 383, cert. denied, 287 U.S. 661 (1932)); Massachusetts (*Ellis v. Brockton Pub. Co.*, 198 Mass. 538, 84 N.E. 1018 (1908)); Nebraska (*Riewe v. McCormick*, 11 Neb. 261, 9 N.W. 88 (1881)); Washington (*Walker v. Gilman*, 25 Wash. 2d 557, 171 P.2d 797 (1946)).

8. See, e.g., *Harrell v. Travelers Indem. Co.*, 279 Or. 199, 216, 223-26, 567 P.2d 1013, 1021, 1025, 1026 (1977) (majority and dissenting opinions); *Jones v. Fisher*, 42 Wis. 2d 209, 222-27, 166 N.W.2d 175, 182-84 (1969) (dissenting opinion); 1 R. LONG, THE LAW OF LIABILITY INSURANCE § 1.27, at 1-81 (1976); Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411 (1972); Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431, 434-35 (1976).

The doctrine of punitive or exemplary damages was originally adopted in Wisconsin in the 1854 decision of *McWilliams v. Bragg*.<sup>9</sup> In *Bragg* the Wisconsin Supreme Court affirmed the trial court's instruction that the jury had "a right to give damages as a punishment to the defendant, for the purpose of making an example, and as a warning to him and others."<sup>10</sup> The purpose of punitive damages as a punishment to the defendant and as a deterrent to other potential tortfeasors has been consistently reiterated by the court.<sup>11</sup>

Although since its adoption the rule of punitive damages has remained in Wisconsin law, it has been repeatedly criticized by various members of the supreme court. Chief Justice Ryan in *Bass v. Chicago & Northwestern Railway*<sup>12</sup> expressed his regret that the court had adopted the rule and expressed his views about its inequities. He lamented: "But the rule was adopted as long ago as 1854 in *McWilliams v. Bragg*, . . . and has been repeatedly affirmed since. It is therefore too late to overturn it by judicial decision. That could well be done now by legislative enactment only."<sup>13</sup> Two years later the Chief Justice declared that "the rule of punitive damages so long and so generally established is a sin against sound judicial principle . . ." and expressed that his negative attitude toward the rule was sanctioned by every present member of the court.<sup>14</sup>

This discontent of the Wisconsin Supreme Court with the rule of punitive damages did not cease with the comments of Chief Justice Ryan. In 1914, Justice Timlin, at times writing only for himself and at times for the majority of the court, termed aspects of the doctrine illogical.<sup>15</sup> Much more recently Justices Robert W. Hansen and Leo B. Hanley have expressed

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9. 3 Wis. 424 (1854).

10. *Id.* at 425.

11. *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 697, 271 N.W.2d 368, 379 (1978); *Herrmeyer v. Kleeman*, 76 Wis. 2d 410, 414, 251 N.W.2d 445, 447 (1977); *Lawrence v. Jewell Cos. Inc.*, 53 Wis. 2d 656, 661, 193 N.W.2d 695, 698 (1972); *Mid-Continent Refrigerator Co. v. Straka*, 47 Wis. 2d 739, 746, 178 N.W.2d 28, 32 (1970); *White v. Benkowski*, 37 Wis. 2d 285, 290, 155 N.W.2d 74, 77 (1967); *Kink v. Combs*, 28 Wis. 2d 65, 81, 135 N.W.2d 789, 798 (1965); *Malco v. Midwest Aluminum Sales, Inc.*, 14 Wis. 2d 57, 66, 109 N.W.2d 516, 521 (1961); *Gladfelter v. Doemel*, 2 Wis. 2d 635, 647, 87 N.W.2d 490, 497 (1958); *Morse v. Modern Woodmen of America*, 166 Wis. 194, 203, 164 N.W. 829, 833 (1917); *Craker v. Chicago & Northwestern Ry.*, 36 Wis. 657, 678 (1875).

12. 42 Wis. 654 (1877).

13. *Id.* at 673.

14. *Brown v. Swineford*, 44 Wis. 282, 286, 288 (1878).

15. *Luther v. Shaw*, 157 Wis. 234, 238, 147 N.W. 18, 19 (1914).

doubts about the "public policy involved in thus placing in private hands the use of punishment to deter."<sup>16</sup>

Although the belief persists that the judicially created rule of common-law punitive damages may only be changed by the legislature,<sup>17</sup> the present court does not experience the same qualms in changing this or other court made doctrines.<sup>18</sup> Indeed, in *Bielski v. Schulze*<sup>19</sup> the court abolished the doctrine of gross negligence and stated that it realized this destroyed the basis for punitive damages in negligence cases.<sup>20</sup> The court's statement makes clear its view that punitive damages are no longer available in actions for other than intentional torts. No case in Wisconsin since *Bielski* has involved an award of punitive damages in a negligence action, and the recent cases in which the court has considered punitive damages exemplify Wisconsin's conservative approach to the doctrine. The court has placed great emphasis upon the necessity for outrageous and intentional conduct.<sup>21</sup>

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16. *Jones v. Fisher*, 42 Wis. 2d 209, 226, 166 N.W.2d 175, 184 (1969) (dissenting opinion). See also *Dalton v. Meister*, 52 Wis. 2d 173, 188 N.W.2d 494 (1971) (dissenting opinion), *cert. denied*, 405 U.S. 934 (1972).

17. See, e.g., *Templeton v. Graves*, 59 Wis. 95, 98, 17 N.W. 672, 672 (1883).

18. See *May v. Skelly Oil*, 83 Wis. 2d 30, 38, 264 N.W.2d 574, 578 (1977); *Bielski v. Schulze*, 16 Wis. 2d 1, 17-18, 114 N.W.2d 105, 113-14 (1962).

19. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

20. The court stated:

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 exist, but should not be confused with negligence. See sec. 481, p. 1260, Restatement, 2 Torts. 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.

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

21. See *Entzminger v. Ford Motor Co.*, 47 Wis. 2d 751, 757-58, 177 N.W.2d 899, 903 (1970); *Kink v. Combs*, 28 Wis. 2d 65, 79, 135 N.W.2d 789, 797 (1965). In *Entzminger* the court stated:

Punitive damages are not allowed for a mere breach of contract, *White v. Benkowski* (1967), 37 Wis. 2d 285, 291, 155 N.W.2d 74; *Gordon v. Brewster* (1858), 7 Wis. 309 (\*355), or for all torts or for crimes but generally for those personal torts, which are malicious, outrageous or a wanton disregard of personal rights which require the added sanction of a punitive damage to deter others from committing acts against human dignity. See: *Jones v. Fisher* (1969), 42 Wis. 2d 209, 166 N.W.2d 175; *Malco v. Midwest Aluminum Sales* (1961), 14 Wis. 2d 57, 109 N.W.2d 516; Ghiardi, *Exemplary or Punitive Damages in Wisconsin*, Vol. 1, No. 1, Wisconsin Continuing Legal Education Series (1961). The type of cases allowing punitive damages has been cases of assault and battery, slander and libel, seduction, malicious prosecution, breach of promise,

At least one Wisconsin federal district court judge has held that in Wisconsin punitive damages are available only in cases involving intentional torts.<sup>22</sup> This conclusion has also been reached by a leading Wisconsin tort law commentator<sup>23</sup> and by at least one trial court.<sup>24</sup> Additionally, in *Cieslewicz*, the court indicated its appreciation of the effect of its statements in *Bielski*, but referred to the question of the availability of punitive damages as an open one.<sup>25</sup>

Although the authors believe punitive damages are clearly unavailable in the absence of outrageous and intentional conduct, the Wisconsin Supreme Court has not yet been faced with that specific issue. Thus, this article analyzes the availability of such damages for both negligent and intentional conduct. In the following consideration of the insurability of punitive damages it must be emphasized that the rules regarding the nature of the conduct for which punitive damages are available are inextricably entwined with the analysis as to whether the insurance policy covers, by its terms, punitive damages, and whether public policy forbids such coverage.

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and the like. *Despite repeated criticism of the punitive-damage rule, this court has adhered to it but has refused to extend the doctrine. However, in a most recent case, the court did lay down, as an additional requirement, that where no actual malice is shown the character of the offense must have the outrageousness associated with serious crime. Jones v. Fisher, supra.*

47 Wis. 2d at 757-58, 177 N.W.2d at 903 (footnotes omitted and emphasis added).

22. *Walbrun v. Berkel, Inc.*, 433 F. Supp. 384 (E.D. Wis. 1976) (Judge Warren). *Contra, Drake v. Wham-O Mfg. Co.*, 373 F. Supp. 608 (E.D. Wis. 1974) (Judge Gordon).

23. Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 MARQ. L. REV. 245, 246 (1977) (Professor James D. Ghiardi).

24. *Granger v. Smeal Mfg. Co.*, No. 76-CI-0200 (Wis. Cir. Ct. Wash. County, filed Apr. 27, 1978) (memorandum decision granting motion to strike claim for punitive damages).

25. The court stated in a footnote:

We note that it is an open question whether punitive damages may be awarded in Wisconsin in the context of a negligent tort. When we abolished the doctrine of gross negligence in *Bielski v. Schulze*, 16 Wis. 2d 1, 18, 114 N.W.2d 105 (1962), we used language that can be read as suggesting that punitive damages are inappropriate in negligence cases. The commentators, however, have not read this language as precluding punitive damages in those cases. Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 MARQ. L. REV. 369, 374 (1965); Ghiardi [*Punitive Damages in Wisconsin*], *supra*, 60 MARQ. L. REV. [753] at 758.

84 Wis. 2d at 101 n.4, 267 N.W.2d at 600 n.4. In citing Professor Ghiardi's article, the court overlooks his subsequent statements in Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 MARQ. L. REV. 245, 249 (1977), where it is stated punitive damages may not be awarded in the absence of intentional conduct.



### III. COVERAGE UNDER POLICY LANGUAGE

Before facing the public policy issues involved, any discussion of the insurability of punitive damages must necessarily begin with the applicable insurance policy language. As in *Cieslewicz*, the general insuring language of most property and liability policies provides coverage for "all sums which the Insured shall become legally obligated to pay as damages because of bodily injury." The threshold question is whether this general language encompasses punitive damages. The existence and development of specific insurance policy exclusions for punitive damages must then be analyzed.

While a few courts have held that because punitive damages are awarded as punishment to the defendant and as a deterrent to others, they arise from the grievous conduct of the defendant and not "because of bodily injury,"<sup>26</sup> the majority of courts hold that the general insuring language includes coverage for punitive damages.<sup>27</sup> The typical policy language is either considered broad enough to include punitive damages or at least sufficiently ambiguous to resolve the issue in favor of coverage. For example, in *Carroway v. Johnson*<sup>28</sup> the South Carolina court interpreted a typical automobile liability policy as providing coverage for punitive damages. The court found that the punitive damages were clearly a sum the insured was "legally obligated to pay" and found that such obligation arose because of bodily injury since the lawsuit itself was the result of the bodily injuries suffered by the plaintiff.<sup>29</sup>

In order to find that the language of typical insurance policies covers punitive damages, courts and commentators have often referred to the reasonable expectations of the insured. In

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26. *Caspersen v. Webber*, 298 Minn. 93, 100, 213 N.W.2d 327, 331 (1973); *Brown v. Western Cas. and Sur. Co.*, 484 P.2d 1252 (Colo. Ct. App. 1971); *Crull v. Gleb*, 382 S.W.2d 17 (Mo. Ct. App. 1964). In *Crull* the Missouri court stated:

There is no language in the policy that provides for the payments of judgments for punitive damages. The policy covers only damages for bodily injury and property damages sustained by any person. Punitive damages do not fall in this category. The \$2,000 award of punitive damages to plaintiff was to punish defendant for his wrongful acts and as a warning to others. It was not to compensate plaintiff for bodily injury or property damages.

382 S.W.2d at 23.

27. See generally Annot., 20 A.L.R.3d 343 (1968).

28. 245 S.C. 200, 139 S.E.2d 908 (1965).

29. *Id.* at 205, 139 S.E.2d at 910. See also *Concord Gen. Mut. Ins. Co. v. Hills*, 345 F. Supp. 1090 (D. Me. 1972); *Price v. Hartford Accident and Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); *Southern Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969).

*Lazenby v. Universal Underwriters Insurance Co.*, the court stated that the average policyholder would reasonably expect this typical language to provide protection against all claims based on injuries not intentionally inflicted.<sup>30</sup> This theme was reiterated by a leading treatise on insurance:

[I]t is clear that the average insured contemplates protection against claims of any character caused by his operation of an automobile, not intentionally inflicted. When so many states have guest statutes, in which the test of liability is made to depend upon wilful and wanton conduct, or when courts, in effort to get away from contributory negligence of the plaintiff, permit a jury to find a defendant guilty of wilful and wanton conduct where the acts would clearly not fall within the common law definitions of those terms, the insured expects, and rightfully so, that his liability under those circumstances will be protected by his automobile liability policy.<sup>31</sup>

In conjunction with the reasonable expectation of the insured, most courts have also relied upon a rule of insurance contract interpretation that policies are to be liberally construed in favor of coverage and any ambiguities must be resolved in favor of the insured.<sup>32</sup>

Recently, for example, the Supreme Court of Oregon noted the contract ambiguity and went further to state that the insurer could have removed the ambiguity by a specific contract exclusion:

Upon the application of these rules to the provisions of this insurance policy, we hold that such provisions were ambiguous, at the least, so as to require the resolution of any reasonable doubts against the insurance company; that upon reading the policy provisions as set forth above, and in the absence of any express exclusion of liability for punitive damages, a person insured by such a policy would have reason to suppose that he would be protected against liability for "all sums" which the insured might become "legally obligated to pay" and that the term "damages" would include all damages, including punitive damages which became, by judgment, a "sum" that he became "legally obligated to pay."

Defendant insurance company could have removed this

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30. 214 Tenn. 639, 648, 383 S.W.2d 1, 5 (1964).

31. 7 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4312, at 132-33 (1962).

32. See, e.g., *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co.*, 95 Idaho 501, 507, 511 P.2d 783, 789 (1973) (observing the Idaho rule in that regard).

ambiguity easily by including an express exclusion from liability for punitive damages, but apparently chose not to do so. As stated by Appleman, *supra* [7 J. Appleman, Insurance Law and Practice sec. 4312](at 86 Supp.), "there is nothing in the insuring clause that would forewarn an insured that such was to be the intent of the parties," if indeed, such was the intent of the insurance company.<sup>33</sup>

In order to emphasize that wilful, wanton or reckless behavior on the part of the insured should not be and was not intended to be covered by insurance, and apparently in response to those courts holding that unless excluded, punitive damages were to be covered, a specific punitive damages exclusion was formulated by the insurance industry.<sup>34</sup> The exclusion was formulated by the Insurance Services Office, the insurance industry's national statistical rating and advisory organization.

The punitive damages exclusion endorsement was intended to become effective November 1, 1977, in all property and liability insurance contracts. However, the exclusion failed to receive the national acceptance sought by the Insurance Services Office; as of March 1978, thirty-three jurisdictions, including Wisconsin, had approved the endorsement, five had rejected it and approval was still pending in nineteen states.<sup>35</sup> A number of insurers, however, including Aetna Casualty & Surety Company, The Hartford Group and Employers Mutual Insurance of Wausau, declined to use the exclusion endorsement.<sup>36</sup>

In all probability, the rejection by the insurers resulted from their belief that punitive damages were already clearly beyond the policy coverage and a specific exclusion was thus unnecessary and undesirable. Because the desired nationwide industry approach was not effected, the Insurance Services Office on March 29, 1978, withdrew the exclusion from all jurisdictions including those thirty-three jurisdictions which had approved it. The news release announcing the withdrawal noted the vari-

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33. *Harrell v. Travelers Indem. Co.*, 279 Or. 199, 205, 567 P.2d 1013, 1015 (1977).

34. Insurance Information Institute, Insurance Services Office News Release (March 29, 1978). See also Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 MARQ. L. REV. 245, 250-51 (1977) (citing J. of Com., Aug. 23, 1977, at 10, col. 1).

35. Insurance Information Institute, Insurance Services Office News Release (March 29, 1978).

36. Additionally, at least five national agent association members of the National Insurance Producers Conference disapproved of the exclusion endorsement because of marketing concerns. The Nat'l Underwriter, March 31, 1978, at 1.

ance among the states regarding the basis for punitive damages and stated that language of the insurance contract may not be the most practical means of attaining a nationally uniform exclusion of punitive damages.<sup>37</sup> The net result of the Insurance Services Office action means that no nationally utilized punitive damages insurance policy exclusion exists today.

Even absent an express insurance policy exclusion for punitive damages, it still remains arguable that the general language of most insurance policies ought not be considered to cover punitive damages. Such damages are certainly beyond mere damages "because of bodily injury;" they arise because of the defendant's aggravated conduct. Nevertheless, the primary contention supporting coverage appears to be centered on

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37. The news release stated:

In November 1977, ISO introduced an endorsement stating specifically that coverage for punitive damages is excluded from property and liability insurance contracts filed or recommended by ISO on behalf of its affiliated companies.

This endorsement was introduced to emphasize that wilful and wanton behavior on the part of the insured should not be and is not intended to be covered by insurance as coverage for such behavior is clearly contrary to public policy. The basis for assessing punitive damages, however, varies from state to state, and many have expressed the view that the wording of our endorsement is not appropriate for all circumstances.

Adoption of the ISO endorsement varied by insurer, by line of business, and by individual risk and some insurers did not adopt the endorsement at all. In addition, consideration of the endorsement is still pending in 19 states. This has resulted in substantial confusion and dislocation in the marketplace for the public, insurers and producers.

Accordingly, ISO will immediately withdraw the amendatory endorsement from all jurisdictions, including those 33 jurisdictions which have approved the endorsement.

While reaffirming the objective of our original action, ISO recognizes the prevailing view within the insurance marketplace that the language of the insurance contract may not be the most practical means of accomplishing our goal. However, an uncontrolled escalation of punitive damages awards may cause serious insurance and financial problems for many policyholders and add considerable cost to the consumers of goods and services. ISO believes that the complex issue of the circumstances under which punitive damages should be awarded, the standards governing appropriate and reasonable amounts and the insurability of such awards should be addressed through established legislative and judicial procedures.

We therefore urge all insurance trade associations and other trade associations representing business and industry, as well as insurance producer associations and individual insurers, to seek promptly legislative action which will achieve the necessary reform.

ISO stands ready to make its services available to appropriate interests in the development of such legislative programs.

Insurance Information Institute, Insurance Service Office News Release (March 29, 1978).

the mere existence of a legal controversy whether the typical language includes punitive damages. The argument based upon the reasonable expectations of the insured and rules of construction of insurance policies essentially asserts that the existence of a dispute as to whether the policy language covers punitive damages attests to the ambiguity of the language, thus requiring construction of the policy in favor of coverage. The typical policy language, it is claimed, does not forewarn the insured that there is no coverage for punitive damages. Because the insurer drafted the policy and could have made clear its intention to exclude coverage for punitive damages, the rules of construction require it to bear the burden of the ambiguity.

In Wisconsin the insurance coverage question has apparently been resolved in favor of the insured. In *Cieslewicz* the Wisconsin Supreme Court found the language "all sums which the Insured shall become legally obligated to pay as damages because of bodily injury" extensive enough to cover statutory multiple damages. The court cited the rules that ambiguities must be resolved against the insurer and that the policy must be construed as it would be understood by a reasonable person in the position of the insured. It concluded that "[a] reasonable person in the position of the insured would believe that the language of the policy provides coverage against all civil liability arising out of an occurrence resulting in bodily injury."<sup>38</sup> In response to the appellant insurance company's argument that the multiple damages were not compensatory and therefore did not arise "because of bodily injury," the court said: "It is the infliction of bodily injury which gives rise to the cause of action. Once the cause of action arises, punitive or multiple damages are awarded in connection with, or because of, the injuries incurred."<sup>39</sup>

Although the Wisconsin court, as later discussed in this article, clearly distinguished between the coverage provided for statutory multiple damages and the issue of coverage for common-law punitive damages, its discussion of the insurance policy language is equally applicable to both. Therefore, it can be expected that when the Wisconsin court considers the issue of coverage for common-law punitive damages, it will rule that

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38. 84 Wis. 2d at 98, 267 N.W.2d at 598.

39. *Id.* at 97, 267 N.W.2d at 598.

the typical liability coverage clause is ambiguous and thus broad enough to cover punitive damages.

#### IV. PUBLIC POLICY

The crucial issue in any punitive damages coverage discussion is whether public policy permits insurance coverage for such damages. Prior to 1962, when Judge John Wisdom wrote his now famous opinion in *Northwestern National Casualty Co. v. McNulty*,<sup>40</sup> the public policy issue had received little attention by the courts. Analysis of the early cases shows the courts were primarily concerned with whether the insurance contract language provided coverage for punitive damages. Public policy was not usually an issue. Prior to 1962, courts blithely held that liability insurance contracts covering legal liability included coverage for punitive as well as compensatory damages.<sup>41</sup>

A few early cases, however, did foreshadow the rationale applied in *McNulty* that public policy forbids insurance coverage for common-law punitive damages. In *Universal Indemnity Insurance Co. v. Tenery*,<sup>42</sup> the Colorado court concluded, on policy interpretations grounds, that the terms of an insurance policy did not cover punitive damages. The court, however, did indicate that its decision of denying coverage for punitive damages was somewhat motivated by the public policy that the wrongdoer should not be permitted to shift the burden of punishment. The court stated:

This award was primarily for the punishment of Callahan for his wrongful acts and as a warning to others. It was in nowise compensation to the injured party for bodily injuries or actual loss occasioned by the negligence of Callahan. 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

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40. 307 F.2d 432 (5th Cir. 1962).

41. *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *General Cas. Co. of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956); *United States Fidelity & Guar. Co. v. Janich*, 3 F.R.D. 16 (S.D. Cal. 1943); *American Fidelity & Cas. Co. v. Werfel*, 231 Ala. 285, 164 So. 383 (1935); *Morrell v. LaLonde*, 45 R.I. 112, 120 A. 435 (1923).

42. 96 Colo. 10, 39 P.2d 776 (1934).

from a nonparticipating party for a wrong against the public.<sup>43</sup>

*Tedesco v. Maryland Casualty Co.*<sup>44</sup> also contains an early expression of the doctrine that public policy prohibits coverage for punitive damages. Noting that in Connecticut exemplary damages were not intended to be compensatory, but were rather designed to serve as punishment for the defendant, the court reasoned:

A policy which permitted an insured to recover from the insurer fines 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.<sup>45</sup>

The argument based on the public policy's prohibition against coverage for punitive damages fully matured in *McNulty*, which arose out of an automobile accident in Florida. The injured McNulty was awarded \$37,500 in compensatory damages and \$20,000 in punitive damages by the jury's verdict. In an ancillary garnishment action against the tortfeasor's insurer, Northwestern National Casualty Company, McNulty received summary judgment up to the \$50,000 policy limits, and the insurer appealed from that part of the judgment holding it liable for punitive damages. Concluding that public policy forbids insurance coverage for punitive damages, the court found it unnecessary to construe the insurance contract language.<sup>46</sup>

In developing the public policy rationale, Judge Wisdom first examined the character of punitive damages and determined that both generally and under the applicable Florida law, such damages were a penalty, imposed as punishment to deter the defendant and others from certain conduct, and were to no significant extent compensation. The court next considered and illustrated the weak precedential value of the numerous cases holding that an insurer was obligated to pay punitive damages.<sup>47</sup>

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43. *Id.* at 17, 39 P.2d at 779.

44. 127 Conn. 533, 18 A.2d 357 (1941).

45. *Id.* at 537, 18 A.2d at 359.

46. 307 F.2d at 434.

47. *Id.* at 435-36. *McNulty* noted that in both *American Fidelity & Cas. Co. v.*

Proceeding to a discussion of public policy's prohibition of coverage, Judge Wisdom concluded:

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.<sup>48</sup>

In every discussion of prohibiting insurance coverage for punitive damages because of public policy, it is necessary to distinguish those cases in which the insured is vicariously liable for punitive damages. Such cases, of course, deal with the situation of punitive damages against an employer for an injury caused by an employee. It is generally accepted that public policy does not prevent the employer's insurance from covering

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Werfel, 231 Ala. 285, 164 So. 383 (1935), and *Morrell v. LaLonde*, 45 R.I. 112, 120 A. 435 (1923), the courts failed to consider public policy. Further, the decision in *Werfel* is weakened by the unique rule in Alabama that any damages for wrongful death are purely punitive. Judge Wisdom noted that in *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957), the plaintiff had obtained a lump sum judgment of \$10,000 against the insured including both compensatory and punitive damages. The plaintiff then sought recovery from the insurer on a \$5,000 policy. The court in *Thornton* was faced with a situation where it could not determine what portion of the judgment was punitive; the compensatory damages alone probably exceeded the \$5,000 limit, and it could not order a new trial between the plaintiff and the insured. Thus, the court in *Thornton* was confronted with an all-or-nothing decision. 307 F.2d at 438-39.

48. 307 F.2d at 440-41.



this liability.<sup>49</sup> Judge Wisdom in *McNulty* explained the distinction of the vicarious liability cases by stating "if the employer did not participate in the wrong the policy of preventing the wrongdoer from escaping the penalties for his wrong is inapplicable."<sup>50</sup>

*McNulty* is thus the leading case for the proposition that public policy prohibits coverage for punitive damages. The leading contrary case is *Lazenby v. Universal Underwriters Insurance Co.*,<sup>51</sup> decided by the Supreme Court of Tennessee. The plaintiff, injured in an automobile accident, was awarded \$1,087.00 in punitive damages. Finding the insurer liable for punitive damages, the court questioned the basic proposition that punitive damages are a deterrent to wrongful conduct:

We . . . are not able to agree the closing of the insurance market, on the payment of punitive damages, to such [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.<sup>52</sup>

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49. *Commercial Union Ins. Co. v. Reichard*, 404 F.2d 868 (5th Cir. 1968) (applying Florida law); *Glen Falls Indem. Co. v. Atlantic Bldg. Corp.*, 199 F.2d 60 (4th Cir. 1952) (applying South Carolina law); *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934) (applying Missouri law), *cert. denied*, 295 U.S. 734 (1935); *Norfolk & W. Ry. v. Hartford Accident & Indem. Co.*, 420 F. Supp. 92 (N.D. Ind. 1976) (applying Indiana law); *Southern Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969); *Sterling Ins. Co. v. Hughes*, 187 So. 2d 898 (Fla. Dist. Ct. App. 1966); *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); *Colson v. Lloyd's of London*, 435 S.W.2d 42 (Mo. Ct. App. 1968).

50. 307 F.2d at 440. In *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58, 60 (8th Cir. 1934), the court put it this way:

[I]t might well be said that it would be against public policy to permit a person to protect himself in advance against the consequences of intentional wrongdoing injurious to others. A different situation is present where the sole liability of the insured arises out of the relation of master and servant . . . .

In this situation where there is no direct or indirect volition upon the part of the master in the commission of the act, no public policy is violated by protecting him from the unauthorized and unnatural act of his servant.

A rebuttal to this distinction by those courts which follow *McNulty* was made in *Harrell v. Travelers Indem. Co.*, 279 Or. 199, 212-14, 567 P.2d 1013, 1019-20 (1977).

51. 214 Tenn. 639, 383 S.W.2d 1 (1964).

52. *Id.* at 647, 383 S.W.2d at 5.

Noting that the courts and authorities have concluded that it is not contrary to public policy to insure oneself against liability for ordinary negligence, the court in *Lazenby* argued that denial of coverage on public policy grounds would be arbitrary, because of the difficulty in distinguishing between ordinary negligence and negligence of the type justifying an award of punitive damages.<sup>53</sup> The court further observed that it was the rule of a majority of courts that the policy language covered punitive damages and that public policy should only be the basis of decision when the public policy is clear and unequivocal. Reasoning that the public policy basis in *McNulty* was not clear, the court concluded that the insurance contract and reasonable expectation of the insured should control.<sup>54</sup>

Thus, *McNulty* and *Lazenby* set forth the basic arguments on each side of the public policy debate and can be considered the first generation of decisions dealing with this question. In numerous recent cases since these decisions, courts have in large measure followed the basic rationale of either *McNulty* or *Lazenby*, with the issue reduced primarily to a choice between either (1) coverage based on the reasonable expectations of the insured or (2) no coverage since insurability would defeat the fundamental purpose of punitive damages. Because this choice is essentially one between two irreconcilable options, the courts have, in rationalizing their determination, closely examined many of the underlying aspects of each of the two competing principles. For example, in *American Surety Co. of New York v. Gold*,<sup>55</sup> the court refuted the *Lazenby* argument that punitive damages were not a deterrent by stating: "The question is not so much the efficacy of the policy underlying punitive damages; rather it is a question of the implementation of that policy. Permitting the penalty for the misdeed to be levied on one other than he who committed it cannot possibly implement the policy."<sup>56</sup>

The position taken in *Lazenby* that it is too difficult to distinguish between ordinary negligence and wanton or reckless negligence, and therefore insurance coverage would only be arbitrarily denied was countered by the court in *Gold* thusly: "We must assume, however, any given jury will accurately fol-

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53. *Id.* at 648, 383 S.W.2d at 5.

54. *Id.*

55. 375 F.2d 523 (10th Cir. 1966).

56. *Id.* at 527.

low the law and correctly distinguish liability for ordinary from liability for gross and wanton negligence. To hold to the contrary would impugn the integrity of the jury system."<sup>57</sup>

Since 1970, the majority of courts considering this issue have sided with the *Lazenby* rationale, and it has been suggested that a trend in that direction is developing.<sup>58</sup> In *Price v. Hartford Accident and Indemnity Co.*,<sup>59</sup> for instance, insurance coverage was permitted by the Arizona court. Although *Lazenby* was cited, the *Price* court emphasized its own reasoning that even though a tortfeasor is insured for punitive damages, he or she cannot engage in reckless conduct with impunity because of criminal sanctions, the threat of increased insurance rates and the possibility that the punitive damages will exceed the limits of coverage. The court also stressed its conclusion that a reasonable insured would have expected coverage under the policy language.<sup>60</sup> The *Lazenby* approach was also adopted, without independent reasoning, by the Idaho Supreme Court in *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Insurance Co.*<sup>61</sup>

The Supreme Court of Oregon, in a four-three split decision, recently allowed coverage for punitive damages in *Harrell v. Travelers Indemnity Co.*<sup>62</sup> Both the majority and dissenting opinions present strong bases for their conclusions. The majority, quoting from its earlier opinions, affirmed its position that:

"A contract to indemnify the insured for damages he is forced to pay as a result of an *intentionally inflicted injury* upon another should not be regarded as contrary to public policy unless the fact of insurance coverage can be *related in some substantial way* to the commission of wrongful acts of that character.\*" (Emphasis added)<sup>63</sup>

In the same vein as the *Lazenby* argument that punitive damages are not a deterrent, the court in *Harrell* apparently indicates its belief that there is no evidence that coverage would

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57. *Id.*

58. See Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431, 443-45 (1976).

59. 108 Ariz. 485, 502 P.2d 522 (1972).

60. *Id.* at 487, 502 P.2d at 524.

61. 95 Idaho 501, 511 P.2d 783 (1973).

62. 279 Or. 199, 567 P.2d 1013 (1977).

63. *Id.* at 207, 567 P.2d at 1016-17 (quoting *Isenhardt v. General Cas. Co.*, 233 Or. 49, 52-53, 377 P.2d 26, 27 (1962)).

make outrageous and intentional conduct damages more probable.

The majority in *Harrell* then focused upon the types of conduct subject to an award of punitive damages. In Oregon punitive damages were not limited to intentional, wanton or wilful acts but extended to include any conduct which could be found to constitute gross negligence. Unfortunately, the rationale of the public policy argument did not attach to merely grossly negligent conduct. Thus, to deny coverage for all punitive damages, on the grounds of public policy, would unfairly and arbitrarily deny coverage to defendants whose conduct was found only to be grossly negligent.<sup>64</sup>

The *Harrell* court rejected the *McNulty* rationale that it is wrong to shift the penalty of punitive damages to the innocent insurance company. Responding that insurance companies could charge an extra premium for punitive damage coverage, the court stated:

Thus, in the event that an insured who has a contract of insurance which includes coverage for punitive damages incurs a judgment for punitive damages, he does not "shift the burden" of that judgment to an unsuspecting insurance company so as to "punish it" and, through it, to "punish society." Instead, he and others desiring to contract for that additional coverage have presumably paid additional premiums for such coverage, so as to provide a separate fund of moneys collected by the insurance company for the express purpose of paying such judgments, without "punishment" to either the insurance company or "society."<sup>65</sup>

The majority in *Harrell* additionally pointed out that it believed the exception of cases involving vicarious liability from the public policy prohibition of coverage to be an inconsistency in the theory that coverage should not be permitted. The court stated that the policy of punitive damages imposed vicariously upon an employer is also one of deterrence intended to encourage the employer to exercise tighter control over his employees, and, therefore, it is illogical for those who argue public policy forbids insurance coverage because the purpose

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64. *Id.* at 208-12, 567 P.2d at 1017-19. The court also noted the difficulty in distinguishing between conduct which justifies only compensatory damages and that which also justifies punitive damages as a reason coverage would be arbitrarily excluded. *Id.*

65. *Id.* at 213, 567 P.2d at 1019-20.

of deterrence would be frustrated to except insurance coverage for vicarious liability for punitive damages.<sup>66</sup>

Finally, the *Harrell* majority suggested various alternatives to the legislature:

There may be other alternatives that would be preferable to the present state of the law in Oregon on the subject of punitive damages, such as:

- (1) The complete elimination of punitive damages;
- (2) Some limitation upon the amount of awards for punitive damages;
- (3) A limitation of liability for punitive damages to flagrant misconduct, such as intentionally inflicted injury.<sup>67</sup>

The court concluded by emphasizing the reasonable expectations of the insured and that public policy considerations were inadequate to forbid coverage. In a final footnote responding to the dissenting opinions, the majority stated: "[T]he essence of our disagreement arises from the fact that awards of punitive damages are not limited to wanton or intentional misconduct, but extend to conduct that is grossly negligent or reckless."<sup>68</sup>

Justice Holman, with Chief Justice Denecke concurring, filed a strong dissent, refuting every aspect of the *Harrell* majority opinion. The dissent focused upon purpose of punitive damages, noted the jury instructions that such damages be awarded in an amount proper to deter the conduct, and commented that the jury had decided that the proper amount to deter was \$25,000.00, not the amount of an insurance premium.<sup>69</sup> In the opinion of the dissenters, the majority's reliance upon the reasonable expectation of the insured was misplaced. Justice Holman advised that while it might be proper to assume that the insured expected to be covered, the analysis should not end there. He stated: "I see nothing reasonable or desirable in protecting the insured's expectation of being above the law of punitive damages."<sup>70</sup>

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66. *Id.* at 214-15, 567 P.2d at 1020. The court further seemed to indicate it believed it would be unfair to require the individual nonemployer to bear the burden of punitive damages but to allow an employer which is affluent enough to be able to insure against punitive damages or wise enough to incorporate to shift that burden.

67. *Id.* at 216, 567 P.2d at 1021.

68. *Id.* at 218 n.22, 567 P.2d at 1022 n.22.

69. *Id.* at 220, 567 P.2d at 1023 (dissenting opinion).

70. *Id.* at 223, 567 P.2d at 1024 (dissenting opinion).

Challenging the argument that there is no evidence that punitive damage effects deterrence, Justice Holman stated: "I would expect punitive damages to have a deterrent effect. If they would not, there is no reason for their existence and they should be abolished."<sup>71</sup>

Also discounted was the argument that less affluent tortfeasors, if denied coverage, would be threatened with financial ruin. The majority had failed to consider that for precisely that reason the law of punitive damages requires the wealth of a defendant be considered by the jury in awarding such damages.<sup>72</sup> Further, the dissenters noted, the allowance of insurance coverage is a determination which does not favor less affluent defendants, but rather the more affluent and knowledgeable who will obtain such coverage.

Justice Holman also argued that it was the court's responsibility, not the legislature's, to deal with the problem which underlies the entire issue of coverage for punitive damages—the law of punitive damages itself.

In its concluding summary, the majority pays lip service to the idea of limiting or eliminating punitive damages. It suggests that this might be a matter best left to the legislature, presumably in its next session two years from now. If there is a problem with the scope of punitive damages in Oregon, it has been created by this court, and this court should attempt to solve it. In the past this court has at least limited punitive damages to cases in which they served the public policy of deterrence. In the present case it abandons that limitation. Instead, it is satisfied to allow the foresighted and affluent to place themselves above the policy of the law of punitive damages through the purchase of insurance, while the less foresighted and less affluent remain subject to the law as before. This is a solution which I cannot, in good conscience, accept.<sup>73</sup>

As previously noted, the Wisconsin case of *Cieslewicz v. Mutual Service Casualty Insurance Co.*<sup>74</sup> sheds considerable light upon the issue of insurability of punitive damages in Wisconsin. Holding that insurance coverage for statutory multiple damages is permitted, the court relied upon a number of the

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71. *Id.* at 225, 567 P.2d at 1025 (dissenting opinion).

72. *Id.*

73. *Id.* at 225-26, 567 P.2d at 1026 (dissenting opinion).

74. 84 Wis. 2d 91, 267 N.W.2d 595 (1978).

basic arguments made by those who have concluded that public policy does not forbid coverage for common-law punitive damages. After recognizing the public policy argument of *McNulty*, the court referred to the policy of protecting an insured's expectations:

"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.<sup>75</sup>

In the context of the tort associated with dog bites, the court argued that allowing coverage would not destroy the elements of deterrence and punishment of statutory multiple damages. The court pointed out that section 174.01 permitted the killing of a dog during an attack on a person,<sup>76</sup> and commented that it would be expected that owners of dogs, or at least of dogs that have attacked a person, would be required to pay higher insurance premiums and that there was always the possibility the statutory multiple damages would exceed the policy limits.<sup>77</sup> Higher premiums would not shift the burden upon insurance companies and the public, but rather upon dog owners, and would avoid the potentially devastating financial impact of multiple damages upon the less affluent, the court stated.

In avoiding setting precedent on coverage for punitive damages, the Wisconsin court distinguished statutory multiple damages from common-law punitive damages by noting three primary differences:

The first important distinction between common law punitive and statutory multiple damages is the differing levels of culpability required to warrant the additional damages. In the context of an intentional tort, punitive damages are awarded when the tort has the character of outrage frequently associated with crime . . . . In the multiple damages statutes, however, no particular state of mind or outrageous character of the conduct is necessary at all . . . .

Another distinction between common law punitive and

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75. *Id.* at 103, 267 N.W.2d at 601.

76. See Wis. STAT. § 174.01 (1975).

77. 84 Wis. 2d at 103-04, 267 N.W.2d at 601.

statutory multiple damages is in the mode of assessment. Common law punitive damages are assessed in the discretion of the jury, and the plaintiff has no absolute entitlement to punitive damages in any case . . . . Multiple damages, on the other hand, are assessed whenever the statutory requirements are met . . . .

A final distinction rests in the differing methods of calculation of the damages. In the case of common law punitive damages, the wealth of the defendant must be considered, as this has an important bearing on the sufficiency of punishment . . . . Wealth, however has nothing to do with the assessment of statutory multiple damages. Rich and poor pay the same amount, as the statute provides simply for an automatic multiplier of the compensatory damages.<sup>78</sup>

The distinctions drawn by *Cieslewicz* between punitive damages and statutory multiple damages<sup>79</sup> are paramount on the issue of public policy and the insurability of punitive damages. Additionally, the court's question regarding the availability of punitive damages in negligence cases, as noted earlier in this article,<sup>80</sup> indicates its concern over the propriety of such damages.

The above discussion has set forth the precedential authority on the question of the insurability of punitive damages both nationally and in Wisconsin. The next section will attempt to demonstrate that if punitive damages are to be allowed, it is absurd that insurance coverage for them be permitted. All of the arguments favoring coverage are essentially arguments that punitive damages be abolished or limited to intentional torts. Thus, the wisest course which suggests itself for Wisconsin is the limitation of punitive damages to actions involving outrageous and intentional torts (a course upon which the Wisconsin court has already embarked in *Bielski v. Schulze*), and thereafter the denial of insurance coverage for such conduct and the damages resulting therefrom.

## V. ANALYSIS

Most statements by courts and commentators who favor insurance coverage for punitive damages betray the actual view that the doctrine of punitive damages itself is outmoded and

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78. *Id.* at 101-02, 267 N.W.2d at 600-01 (footnotes and citations omitted).

79. See 84 Wis. 2d at 101-03, 267 N.W.2d at 600-01.

80. See text accompanying note 25 *supra*.



unjustified and, therefore, that a defendant should not be required to carry this additional burden. This distaste for punitive damages, coupled with the expectation of the reasonable insured, is the impetus for the conclusion that coverage should be allowed. This approach is illogical and, as a result, the arguments raised against the public policy prohibition of coverage are to a large degree fabricated to reach a desired result. These arguments simply cannot refute the basic premise that insurance coverage for punitive damages is directly in conflict with the purpose of punitive damages.

In *Harrell v. Travelers Indemnity Co.* the court raised the question of whether public policy as a doctrine is sufficiently adequate to singlehandedly void an otherwise valid policy provision granting coverage for punitive damages.<sup>81</sup> As the *Harrell* dissenters pointed out, however, public policy's direction of the outcome in legal controversies is not new. In Wisconsin in negligence cases, the court will deny liability upon public policy grounds where the injury is too remotely caused by the negligence.<sup>82</sup> The Wisconsin court has held contractual terms freely agreed to by parties may be unenforceable as contrary to public policy.<sup>83</sup> It has been generally recognized for some time that it is contrary to public policy to indemnify an insured for losses arising out of the commission of an intentional act which causes damage to another<sup>84</sup> or to insure a person for liability for a criminal fine.<sup>85</sup> Wisconsin has continually recognized the public policy of deterrence and punishment as the purposes of punitive damages.<sup>86</sup> As the above discussion illustrates, the notion that public policy forbids insurance coverage for puni-

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81. See text accompanying notes 62-73 *supra*.

82. See, e.g., *Howard v. Mt. Sinai Hospital Inc.*, 63 Wis. 2d 515, 217 N.W.2d 383, 219 N.W.2d 576 (1974); *Hass v. Chicago & Northwestern Ry.*, 48 Wis. 2d 321, 327, 179 N.W.2d 885, 888 (1970).

83. See, e.g., *Holsen v. Marshall & Ilsley Bank*, 52 Wis. 2d 281, 284, 190 N.W.2d 189, 191 (1971); *Marquette Savings & Loan Ass'n v. Village of Twin Lakes*, 38 Wis. 2d 310, 315, 156 N.W.2d 425, 427 (1968); *Pedrick v. First Nat'l Bank*, 267 Wis. 436, 439, 66 N.W.2d 154, 155 (1954); *Fricke v. Fricke*, 257 Wis. 124, 126, 42 N.W.2d 500, 501 (1950).

84. 7 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4312, at 129 (1962); 9 G. COUCH, *COUCH ON INSURANCE* § 39:15 (2d ed. 1966); 1 R. LONG, *THE LAW OF LIABILITY INSURANCE* § 1.26, at 1-76 (1976).

85. 7 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4252, at 3 (1962); 1 G. COUCH, *COUCH ON INSURANCE* § 1:36 (2d ed. 1966); R. LONG, *THE LAW OF LIABILITY INSURANCE* § 1.26, at 1-78 (1976).

86. See cases cited note 11 *supra*.

tive damages was considered long before *McNulty* in 1962.<sup>87</sup> To state that public policy prohibits insurance coverage for punitive damages would not require the adoption of any new rule of public policy by the Wisconsin Supreme Court, but rather simply a statement of what the public policy is and how it operates in this context. Moreover, insurance coverage prohibition would be consistent with Wisconsin's attitude toward punitive damages.

It has occasionally been contended that punitive damages are compensatory in some sense and therefore coverage would not be contrary to public policy.<sup>88</sup> A variation of this argument, made by the respondents in *Cieslewicz*, is that punitive damages in Wisconsin are considered punishment for a private wrong and go to the injured party by way of private damages.<sup>89</sup> If, indeed, punitive damages are in any way compensatory, they should be abolished as extra compensation to which the injured is not entitled in light of the liberalization of the rules of compensatory damages to include damages for such items as wounded feelings and sense of insult.<sup>90</sup> Moreover, that punitive damages are privately awarded does not alter the public policy of their purpose of deterrence and punishment. Regardless of the origin or nature of common-law punitive damages in a particular case, their primary purpose is completely unrelated to compensation and is totally frustrated by insurance coverage.

In many of the judicial opinions concluding punitive damages are insurable, the courts express concern that punitive damage awards threaten to render tortfeasors insolvent for conduct which is less grievous than intentional conduct, such as where the conduct is wanton or reckless.<sup>91</sup> The Wisconsin Supreme Court in *Cieslewicz* refers to the "devastating financial impact" that statutory multiple damages may have on particular individuals.<sup>92</sup> Because of this concern, courts seem more motivated to permit coverage. However, this motivation is ill-

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87. See text accompanying notes 42-45 *supra*.

88. See Note, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431, 441-43 (1976).

89. Brief of Plaintiffs—Respondents at 10-11, *Cieslewicz v. Mutual Serv. Cas. Ins. Co.*, 84 Wis. 2d 91, 267 N.W.2d 595 (1978). See also J. GHIARDI, PERSONAL INJURY DAMAGES IN WISCONSIN § 3.04, at 42-43 (1964).

90. See Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411, 412 (1972).

91. See, e.g., *Harrell v. Travelers Indem. Co.*, 279 Or. at 215, 567 P.2d at 1020-21.

92. 84 Wis. 2d at 104, 267 N.W.2d at 601.

founded because the doctrine of punitive damages permits the jury to consider the wealth of the tortfeasor in determining the sufficiency of the punishment, and a defendant may introduce evidence of his or her limited financial resources.<sup>93</sup> Even if the threat of insolvency were a valid concern, it would not favor coverage of punitive damages, but rather would challenge the wisdom of the punitive damages doctrine itself.

The contention that insurance coverage for punitive damages unfairly shifts the penalty to the insurance companies and the public<sup>94</sup> is often countered by the reasoning that the penalty is not unfairly shifted to the insurance company because it has received a premium with which to pay for such damages. In *Harrell v. Travelers Indemnity Co.*, the Oregon court stated that the insurer is free to include or exclude coverage for punitive damages and correspondingly adjust the premium.<sup>95</sup> Thus, the burden is placed upon a separate fund of moneys collected by the company from those who desire such coverage. In *Cieslewicz* the Wisconsin Supreme Court commented that coverage for statutory multiple damages for dog bites would result in persons similarly situated, dog owners, paying higher premiums and sharing the burden.<sup>96</sup> Based on this reasoning it could be argued that the policyholders in general do not have to subsidize those guilty of aggravated conduct and thus are not unfairly strapped with the burden of punitive damages. This reasoning, however, ignores several practical considerations. Appleman, in a leading treatise on insurance law, has noted that the public would soon render unsaleable an insurance policy exclusion of punitive damages: "The author does not expect many decisions upon similar clauses in the future, because as soon as the public became educated by competing agents to the limitations upon that policy, the public would refuse to accept it, and it would be unsaleable."<sup>97</sup> After all, will insureds be willing to accept and share the risk of damages determined on the basis of another's intentional or outrageous

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93. *Dalton v. Meister*, 52 Wis. 2d 173, 181-82, 188 N.W.2d 494, 499 (1971); *Jones v. Fisher*, 42 Wis. 2d 209, 220-21, 166 N.W.2d 175, 181 (1969); *Fuchs v. Kupper*, 22 Wis. 2d 107, 111-12, 125 N.W.2d 360, 363 (1963); Ghiardi, *Punitive Damages in Wisconsin*, 60 MARQ. L. REV. 753, 767-69 (1977).

94. See *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 440-41 (5th Cir. 1962).

95. 279 Or. at 213, 567 P.2d at 1019-20.

96. 84 Wis. 2d at 103-04, 267 N.W.2d at 601.

97. 7 J. APPLEMAN, INSURANCE LAW AND PRACTICE, § 4312, at 137 (1962).

conduct; the amount of which is dependent on the coinsured's wealth? In fact, the insurance industry has, for practical reasons and because of its view that punitive damages are not presently covered by the general coverage clause, declined national utilization of such an exclusion in insurance policies.<sup>98</sup> The result, therefore, is that if coverage is permitted, the burden will not be restricted to those who specially pay for it, but rather will be placed upon all policyholders. Even more importantly, those who dispute the argument that insurance coverage will not shift the burden of punitive damages to the insurance companies and thus to the public, ignore the foundation of punitive damages: *i.e.*, that tortfeasors whose conduct justifies the imposition of punitive damages should not be permitted to spread the risk of what is intended to be personal punishment.

One of the major arguments in favor of coverage questions whether punitive damages actually serve as a deterrent. First raised in *Lazenby*, this argument reasons that since even criminal laws fail to slow the frequency of personal injury on the highways, how much less so can punitive damages serve as a deterrent.<sup>99</sup> At the outset, this contention sidesteps the insurability issue. The vitality of punitive damages depends upon their functioning as a deterrent. Wisconsin, in fact, has recognized that punitive damages do serve as a deterrent.<sup>100</sup> Absent this deterrent function, punitive damages themselves must be eliminated, or at least limited to cases where a deterrent effect can be assumed.<sup>101</sup> Certainly, if punitive damages are not paid by the tortfeasor, they fail to punish or deter the tortfeasor.

The position that punitive damages are not a deterrent carries more weight when applied to punitive damages awarded for unintentional conduct which is reckless, wanton or grossly negligent. In Wisconsin, however, because punitive damages are unavailable in actions based upon anything other than intentional conduct, this position has no application. Even assuming that punitive damages could be available in the future for unintentional acts, this lack of a deterrent function fails to

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98. See text accompanying notes 34-37 *supra*.

99. 214 Tenn. 639, 647, 383 S.W.2d 1, 5 (1964).

100. *Kink v. Combs*, 28 Wis. 2d 65, 81, 135 N.W.2d 789, 798 (1965). See also cases cited note 11 *supra*.

101. See *Harrell v. Travelers Indem. Co.*, 279 Or. at 223-25, 567 P.2d at 1025 (dissenting opinion); *American Sur. Co. v. Gold*, 375 F.2d 523, 527 (10th Cir. 1966).

address the insurance coverage issues.<sup>102</sup>

Some courts have also suggested that insurance coverage for punitive damages would not totally eliminate the punishment and deterrence intended to be effected.<sup>103</sup> It is noted that a tortfeasor, insured for punitive damages, may still be subject to criminal sanctions, increased insurance premiums and the threat that the damages will exceed the policy limits. The Wisconsin court cited similar factors in permitting coverage in *Cieslewicz*.<sup>104</sup> However, the deterrence effected by these long range possibilities would not be as great as it would be if the tortfeasor is required personally to pay the punitive damages. That such other deterrents are present, in any event, does not rationalize the emasculation of the doctrine of punitive damages by permitting the tortfeasor to deflect the punishment. The Wisconsin Supreme Court was previously advised: "Punitive damages ought to serve its purpose."<sup>105</sup> As Justice Holman stated in his dissent in *Harrell*: "The . . . arguments which seek to minimize the deterrence aspect of punitive damages, or to substitute deterrence from some other source, fail to recognize that if punitive damages are not themselves a deterrent, there is no rationale to support them in the first place."<sup>106</sup>

In virtually every decision where the court concludes in favor of coverage, the reasonable expectation of the insured is referred to as a major consideration of the court.<sup>107</sup> In *Cieslewicz* the Wisconsin court clearly placed great reliance upon the policy against voiding insurance coverage for which the insured presumably paid a premium.<sup>108</sup> The reasonable expectation of the insured, however, is primarily a rule for the construction of insurance policies. It is implemented in determining whether the contract between the insurer and insured

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102. In *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), the court doubted the deterrent effect of the doctrine of gross negligence was a factor in the abolition of the doctrine itself. *Id.* at 18, 114 N.W.2d at 113.

103. See, e.g., *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 487, 502 P.2d 522, 524 (1972); *Harrell v. Travelers Indem. Co.*, 279 Or. at 207-08, 567 P.2d at 1017.

104. 84 Wis. 2d at 103-04, 267 N.W.2d at 601.

105. *Malco, Inc. v. Midwest Aluminum Sales, Inc.*, 14 Wis. 2d 57, 66, 109 N.W.2d 516, 521 (1961).

106. 279 Or. at 228, 567 P.2d at 1027 (dissenting opinion).

107. 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. 639, 648, 383 S.W.2d 1, 5 (1964).

108. 84 Wis. 2d at 103, 267 N.W.2d at 601.

includes certain terms. Therefore, reliance upon the insured's reasonable expectations in public policy analysis is misplaced, because even where it may be assumed that the insurance contract language explicitly provided coverage for punitive damages, public policy would prohibit coverage, because the purpose of punitive damages demands they be paid by the tortfeasor. The classic analogy to be drawn is the situation of an insurance policy expressly covering an insured for liability for criminal fines. Undoubtedly such coverage would be void as against public policy, even though the insured paid for an expected coverage.<sup>109</sup> Likewise, a person has no right to contract for and expect insurance coverage which puts him or her above the law of punitive damages.<sup>110</sup>

One argument raised in favor of coverage by the court in *Lazenby*<sup>111</sup> and the majority in *Harrell*<sup>112</sup> is that it is too difficult to distinguish between the kinds of conduct which do and do not justify the award of punitive damages. The argument follows that since the distinction between ordinary negligence and wanton, reckless or grossly negligent conduct is blurred, the denial of coverage for punitive damages would be necessarily arbitrary. This argument, as noted above, was rebutted by the statement in *American Surety Co. of New York v. Gold* that it must be assumed the jury will accurately follow the law and properly distinguish the types of conduct.<sup>113</sup> Moreover, the contention that the jury will not be able to differentiate between conduct which is only simple negligence and that which justifies punitive damages is again an argument for the abolition or limitation of punitive damages. Underlying this argument is the fact that it is the imposition of punitive damages by the jury in the first place which would be arbitrary, not the denial of coverage. If a jury cannot rationally differentiate between the varying degrees of conduct, punitive damages should be eliminated or limited solely to intentional torts. An alternative remedy would be to abolish any differentiation between

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109. J. GHIARDI, PERSONAL INJURY DAMAGES IN WISCONSIN § 3.04, at 42-43 (1964); 7 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4252, at 5 (1962); 1 R. LONG, THE LAW OF LIABILITY INSURANCE § 1.26, at 1-78 (1976).

110. *Nicholson v. American Fire & Cas. Ins. Co.*, 177 So. 2d 52, 54 (Fla. Dist. Ct. App. 1965); *Harrell v. Travelers Indem. Co.*, 279 Or. at 222-23, 567 P.2d at 1024 (dissenting opinion).

111. 214 Tenn. at 648, 383 S.W.2d at 5.

112. 279 Or. at 208-12, 567 P.2d at 1017-19.

113. 375 F.2d 523, 527 (10th Cir. 1966).

"gross" and ordinary negligence. Such a course has already been adopted in Wisconsin.

A number of the above arguments which are made in favor of insurance coverage for punitive damages evidence concern for the insured tortfeasor in the gray area between intentional conduct, for which punitive damages are generally available, and ordinary negligence, for which punitive damages are unavailable. The concern is with the state of mind of one who acts recklessly, wantonly or grossly negligently. Although one who acts in such a fashion is presumed to have a certain amount of awareness of the flagrant nature of the conduct, this awareness does not approach the *mens rea* associated with intentional acts. With respect to this type of conduct, courts favor coverage because they are sympathetic to the tortfeasor's situation of personally incurring large punitive damages as a result of an unguarded moment in which he or she commits an act determined to be more than ordinary negligence. Under such circumstances, the courts also doubt that permitting coverage of punitive damages would frustrate the function of deterrence since the tortfeasor may have acted without thinking or, at least, acted unintentionally.

Therefore, it is apparent that courts would have no difficulty accepting a denial of insurance coverage for punitive damages where punitive damages are assessed as a result of intentional conduct. Indeed, most liability insurance policies exclude coverage for intentional acts; and at least one state by statute forbids coverage for intentional acts.<sup>114</sup> Moreover, it is recognized that public policy prohibits a person from protecting him or herself in advance by insurance against the consequences of intentional wrongdoing.<sup>115</sup> Again, any difficulty in

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114. See CAL. INS. CODE § 533 (West 1972).

115. 7 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4312, at 129 (1962). An interesting collateral issue, upon which one federal district court has recently ruled, is whether public policy forbids insurance against liability for racially discriminatory employment practices under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000e) and the Civil Rights Act of 1870 (42 U.S.C. § 1981). In *Union Camp Corp. v. Continental Cas. Co.*, No. CV476-167 (S.D. Ga., filed June 27, 1978) the court held public policy does not prohibit such coverage and denied a motion to dismiss the complaint of an employer against its insurer to recover, under an insurance policy, back pay awards incurred by the employer in settlement of a race discrimination class action. The insurance policy expressly provided coverage for discrimination. The holding of the court is primarily based upon the reasoning that the action for back pay against the employer was not based upon intentional discrimination, that it is only speculative that permitting coverage would encourage discrimination, and that allow-

the assessment of punitive damages as a result of conduct which falls between ordinary negligent acts and intentional acts is a defect in the doctrines of intentional versus negligent conduct and should be dealt with directly, not by providing insurance coverage for all punitive damages. If punitive damages were limited to intentional torts, the unsettled issue of insurance coverage for punitive damages would evaporate.

This problem should not arise in Wisconsin, because the state supreme court has, the authors believe, eliminated punitive damages for any conduct other than intentional wrongdoing. With the abolition of the doctrine of gross negligence in *Bielski v. Schulze*,<sup>116</sup> Wisconsin law now treats conduct previously labelled as wanton, reckless or grossly negligent as ordinary negligence. Thus, in Wisconsin the arguments in favor of insurance coverage which essentially grow out of a court's uneasiness in imposing punitive damages with respect to conduct which may be, in terms of culpability, more than simply negligent, but less than intentional, are not applicable.

The ways in which punitive damages differ from multiple statutory damages as noted by the Wisconsin Supreme Court in *Cieslewicz*<sup>117</sup> are significant in that they illustrate reasons why punitive damages should not be covered by insurance, whereas statutory multiple damages should be. First, the court noted that the imposition of the two types of damages differs in the necessary level of culpability of the tortfeasor. Under the multiple damages dog bite statute involved in that case, a tortfeasor is essentially guilty of statutorily defined negligence, while punitive damages are awarded for intentional torts which have the character of outrage frequently associated with crime. The state of mind of the tortfeasor liable for punitive damages calls for a greater amount of punishment and deterrence, making insurance coverage less desirable. Additionally, one liable for such multiple damages is probably unwittingly so, and a court is reluctant to impose such a punishment for less than a deliberate wrong.

The second and third distinctions between statutory multiple damages and punitive damages relate to how and to what

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ance of coverage would avoid financial ruin of the employer and supply the mandated compensation.

116. 16 Wis. 2d 1, 18, 114 N.W.2d 105, 113 (1962). See text accompanying notes 19-25 *supra*.

117. 84 Wis. 2d at 101-04, 267 N.W.2d at 600-01.



degree they are assessed. Multiple damages are under statute automatic in assessment and amount. A jury is not asked to assess an appropriate amount. The nature of this imposition of multiple damages is such that the less affluent defendant needs insurance coverage to avoid being financially ruined automatically. Punitive damages, on the other hand, are assessed in the jury's discretion, and upon proper instruction by the court, this method of assessment not only is designed to avoid an insolvency rendering verdict but also to impose an amount which appropriately punishes according to the defendant's wealth and conduct. Further, an excessive award of punitive damages is judicially reviewable both by the trial court and upon appeal, while the statutory assessment of multiple damages is not.

The purposes of punishment and deterrence are much more efficiently implemented by the assessment procedure for punitive damages than by that for statutory multiple damages. Therefore, while it is not so objectionable that the somewhat fortuitously imposed multiple damages be covered by insurance, it is senseless, as well as a frustration of the purpose of punitive damages, to permit an insurance company to pay this penalty specially tailored to the defendant and his or her conduct.

## VI. CONCLUSION

Historically Wisconsin has been a conservative jurisdiction in regard to the doctrine of punitive damages. The supreme court has consistently refused to extend the doctrine since its adoption. Whether punitive damages are available for conduct which is nonintentional has been stated to be an open question by the Wisconsin Supreme Court. Any uncertainty, however, appears to be due only to the fact that the precise issue has yet to be presented to the court. The unambiguous statement in *Bielski v. Schulze* that the abolition of gross negligence does away with the basis for punitive damages in negligence cases makes it clear that under the law of Wisconsin, punitive damages are limited to intentional torts, and were the court presented with the proper case, it would so rule. That decision would resolve the issue of insurance coverage for punitive damages, because intentional wrongdoing is not generally, and cannot be, insured against by a tortfeasor.

Most of the arguments in favor of insurance coverage for punitive damages actually are concerned with the difficulty in the operation of the doctrine of punitive damages itself in the

area of nonintentional conduct. Courts, thus concerned with the imposition of such damages upon an unwitting defendant, permit coverage to relieve the defendant of the burden, but thereby strip punitive damages of their purpose. Accordingly, in such cases, the punitive damages which are questionably imposed lack any justification and are therefore impotent. Thus, the elimination or limitation of the doctrine of punitive damages is the reasonable method by which the issue of coverage should be resolved.

If, however, punitive damages are available with respect to nonintentional torts, as they are in most jurisdictions, insurance coverage must not be permitted. Punitive damages cannot efficiently and effectively serve their intended purposes of punishment and deterrence if the wrongdoer is permitted to shift the burden to an insurer. The fact that the insured reasonably expects coverage is not pertinent to the public policy prohibiting such coverage. Coverage should be forbidden as it would if a liability policy provided coverage for criminal fines or injuries caused by the insured's intentional conduct.

If punitive damages are to be available in Wisconsin they must be implemented so as to serve their purpose. Insurance coverage, if permitted, would frustrate the only justification for the imposition of punitive damages. Insurance coverage would transform a doctrine of deterrence and punishment into one sanctioning awards of windfall amounts to an already adequately compensated third party. Such a result cannot be sanctioned.

