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INSURANCE

Is the Liability Carrier Liable for Punitive Damages Awarded by the Jury?

Holding an insurance company liable for punitive damages levied against the insured policy holder was recently held to be against public policy in *Northwestern National Casualty Company v. McNulty*.¹ The case arose out of an accident that occurred in Florida in which a Virginia resident, driving recklessly struck and injured the defendant. The insurance contract had been issued in Virginia. The jury awarded \$57,000 to the injured plaintiff of which \$20,000 was for punitive damages. The Fifth Circuit Court of Appeals overruled the verdict as to punitive damages and affirmed the verdict as to compensatory damages.

This is the first case in which common law punitive damages levied against the tortfeasor were held not covered by a general automobile liability policy while compensatory damages arising from the same accident were covered. An earlier Connecticut case upon which the court relied was *Tedisco v. Maryland Casualty Co.*² The court distinguished this case from the instant case, however, since Connecticut does not recognize common law punitive damages. Instead Connecticut has its own statutory system of awarding double and treble damages in cases of serious violations of the criminal law. The Connecticut court held that these statutory damages could not be collected from the insurance company because they were imposed for a violation of criminal law and it would be against public policy to allow such recovery. The court in *dictum* conceded, however, that the insurer would be responsible for common law punitive damages if previous decisions were followed.³

Here it is important to consider the nature of punitive or exemplary damages as defined by Florida and Virginia. Virginia has held that they are awarded to signify the jury's desire

¹ 307 F.2d 432 (5th Cir. 1962).

² 127 Conn. 533, 18 A.2d 357 (1941).

³ *Ohio Casualty Insurance Co. v. Welfare Finance Co.*, 75 F.2d 58 (8th Cir. 1934).

to punish the defendant for his conduct and to give the plaintiff "smart money" to compensate for any injury that may have been inflicted on his reputation.⁴ They are not given to the plaintiff as a matter of right or to compensate his loss as much as to warn others, and the jury is usually permitted to take into consideration the defendant's financial condition.⁵ Florida follows the majority view and indeed the Virginia view concerning the nature of punitive damages.⁶

The leading case cited by courts which previously awarded punitive damages against an insurance company was *Ohio Casualty Insurance Company v. Welfare Finance Company*.⁷ Without attempting to overrule this decision, the instant case said the *Ohio Casualty* decision involved the doctrine of respondeat superior, because there the servant drove so negligently, punitive damages were levied against him, and his master was held jointly liable. The master then was permitted to recover from his insurance company. The Fifth Circuit Court said that holding the insurance company there did not violate public policy because there is a difference between insuring ones self to protect against liability for his own wrongdoing and insuring where the only liability arises out of the relation of master and servant.

Some sources have relied on this case to come to the conclusion that "liability insurance which includes punitive damage recovered for injuries caused by insured's servants or employees is not against public policy".⁸ It has also been stated that where a policy agreeing to pay all the liability imposed by law is issued it is said to be broad enough to include the assessment of exemplary damages.⁹

There have been a number of cases where juries have returned a general verdict including some punitive damages as asked for by the plaintiff's instructions, but have not de-

⁴ *Ramsay v. Harrison*, 119 Va. 682, 89 S.E. 977 (1916).

⁵ *Wright v. Everett*, 197 Va. 608, 90 S.E.2d 855 (1956).

⁶ *Dr. P. Phillips & Sons, Inc. v. Kilgore*, 152 Fla. 578, 12 So.2d 465 (1943).

⁷ *Ohio Casualty Insurance Co. v. Welfare Finance Co.*, 75 F.2d 58 (8th Cir. 1934).

⁸ 44 C.J.S., *Insurance* § 242 (1945).

⁹ 45 C.J.S., *Insurance* § 827, n. 45 (1946).

clared how much was awarded as punitive and how much as compensatory damages.¹⁰ The courts have always refused petitions by the insurance companies to have these general verdicts set aside because they allowed some punitive damages. In upholding such lump sum awards the courts have relied on the *Ohio Casualty* case which according to the instant case has been erroneously stretched to include all punitive damage cases.

While *Northwestern Casualty Co.* seems to have overthrown the few cases that have actually been decided, it is directly in line with the current trend of opinions expressed by text-writers.¹¹ They feel it is undesirable for the insured to become aware that he is completely covered for punitive damages, as well as compensatory damages, for he will quite naturally use a lesser degree of care in his association with his fellow men.¹² The only major dissenting voice has been Appleman's.¹³ His reasoning follows the view that when one buys insurance he reasonably expects to be covered against all claims of any character. In presenting this view it seems that Appleman avoids the entire question at hand: Is it desirable to have an insurance company pay that which has been levied by a jury to punish and deter the tortfeasor? What deterrence is there if the tortfeasor knows this civil monetary punishment is to be paid by an insurance company?

Thus, attorneys for plaintiffs in actions for damages where recovery is ultimately to be sought from an insurance company must weigh two possible jury instructions. If actual damages are slight or chances for recovering money damages from the defendant rather than his insurer are good then claimant's

¹⁰ *Morrell v. LaLonde*, 45 R.I. 112, 120 A. 435 (1923). (Malpractice suit. Lump sum verdict included punitive damages); *Pennsylvania Mutual Casualty Insurance Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957). (Automobile accident, jury returned lump sum verdict obviously including punitive damages).

¹¹ Fischer, *Insurance Coverage and the Punitive Award in the Automobile Accident Suit*, 19 U. PITT. L. REV. 144 (1957).

¹² Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957).

¹³ 7 APPLEMAN, INSURANCE LAW AND PRACTICE, § 4312, p. 132 (1962).

counsel may wish to ask for a punitive damage instruction to the jury. On the other hand if the plaintiff can prove great pain and suffering and can also prove that the wrongdoer acted criminally and recklessly, the verdict is likely to be substantial whether or not words are included in a jury charge permitting an addition of punitive damages to the various items of compensation described and discussed. The theory of punitive damages is built into the average juror's value system and claimant who asks for punitive damages in such a case may unnecessarily run a risk that the punitive verdict may not be recovered from the insurance company and thus lose part of an award that he would have gotten as compensatory damages had he not formally asked for punitive damages.

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