The Insurability of Punitive Damages in Louisiana

C. Caldwell Herget Huckabay
THE INSURABILITY OF PUNITIVE DAMAGES IN LOUISIANA

I. INTRODUCTION

A drunk driver careens down the highway at an excessive rate of speed, weaving in and out of his lane. He finds himself behind a slow moving vehicle which he is determined to pass. He swerves into the opposite lane to see if he can pass the vehicle in front of him. As a result of his intoxicated state, the driver thinks that he can pass the car ahead of him without colliding head-on with the oncoming car he sees in the distance. He pulls into the left lane and accelerates, but the alcohol has dimmed his perceptions. The oncoming car is upon the intoxicated driver too quickly, and a violent head-on collision ensues. The driver of the car which the drunk driver hit head-on brings suit against the intoxicated driver, claiming compensatory damages for the actual harm she has sustained as well as demanding the recovery of punitive damages.

At trial the defendant is found guilty of wanton negligence and the jury awards the plaintiff $30,000 in compensatory damages and $5,000 in punitive damages. The defendant has an automobile insurance policy with liability coverage up to $50,000, yet the insurance company refuses to pay the $5,000 of punitive damages. The obvious question then arises: Under the “standard” automobile liability policy will the insurance company be legally obligated to pay its insured’s punitive damages under Louisiana Civil Code article 2315.4?

This comment will delve into the issue of the insurability of punitive damages rendered against an insured in Louisiana. First, a brief glimpse at the background of punitive damages will be taken. Then this comment will consider the issues involved in the question of the insurability of punitive damages. An analysis will be made as to whether the language of a standard automobile liability insurance policy will permit coverage of these damages. Next, the public policy issues surrounding insurance coverage of punitive damage awards will be discussed. Finally, the

---

1. La. Civ. Code art. 2315.4 provides:
   In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries.
comment will discuss whether or not Louisiana courts should allow the
insuring against punitive damages.

II. BACKGROUND

The doctrine of punitive damages was first developed in the eighteenth century common law of England. The case of Huckle v. Money is generally considered as the earliest jurisprudential reference to punitive damages. Although punitive damages were used by some courts to punish and deter, they were also used by many courts to compensate plaintiffs who were unable to recover for non-pecuniary damages such as mental anguish. Thus, when the concept of punitive damages found its way into the jurisprudence of the United States, courts were divided as to its purpose and use.

In Louisiana, references can be found to punitive damages as far back as the 1836 case of Summers v. Baumgard, in which the defendant was accused of illegally seizing and detaining the plaintiff's horse and dray. The court in determining that the defendant should be assessed punitive damages for his acts stated:

The necessity of seizing the horse and dray in the first instance, in order to get possession of his truant apprentice boy, is not very obvious; but the detention of them after repeated demands, and the offer on the part of the plaintiff to give him ample security to make good any damage for which he might be justly liable, evince such an obstinate determination on the part of the defendant to take justice into his own hands, as fully authorized the jury to make him pay something in the shape of smart money.

The Summers case involving wrongful seizure can be contrasted with Hill v. The New Orleans, Opelousas and Great Western Railroad Co.

2. Punitive damages are also known as exemplary damages, vindictive damages and smart money. See Boulard v. Calhoun, 13 La. Ann. 445, 448 (1858).
3. 95 Eng. Rep. 768 (K.B. 1763). Huckle involved an action for trespass, assault and false imprisonment arising out of the plaintiff's arrest by the defendant. Although the plaintiff had only been imprisoned for a short time and had not been mistreated, the jury awarded a verdict of 300 pounds. The defendant's motion for a new trial on the grounds of excessive damages was refused by Lord Camden who stated that in view of the abuse of power by the defendant, an officer of the king, the jury had "done right in giving exemplary damages." Id. at 769.
6. 9 La. 161 (1836).
7. Id. at 163.
which was a personal injury case. Suit was brought to recover damages from the company for injuries sustained by the plaintiff. The plaintiff, a passenger on the railroad, was injured when the engineer ran over a blind horse on the tracks. This collision caused injury to Hill, who either jumped or was thrown from the car. In discussing whether the defendant company should be liable for punitive damages, the court stated that "[i]n actions of this kind it is not within the province of the jury, although the negligence is clearly proven, to give vindictive damages, as is sometimes allowed in cases of wilful or malicious injuries." Thus, courts draw the apparent distinction between personal injury cases and certain cases involving property rights, cases which would now be brought under theories of wrongful seizure and mental anguish. Punitive damages were not permitted in the former situation, whereas such damages were permitted in the wrongful seizure cases. Since the driver in \textit{Hill} was found to be negligent, but not to have intentionally caused the accident, no punitive damages were awarded.

Some years later, in \textit{McCoy v. Arkansas Natural Gas Co.}, the Louisiana Supreme Court articulated the state's position regarding punitive damages. \textit{McCoy} involved a dispute in which landowners sued the defendant alleging that the casing on defendant's gas well had broken because of the negligence of the defendant, which resulted in a leakage of gas. In their petition, the plaintiffs charged that their gas rights had been impaired and the subsurface structure of their land was damaged, causing the plaintiffs serious harm. In discussing the plaintiffs' claim for punitive damages, the court stated that in Louisiana punitive damages could not be granted in any case unless the damages could be assessed for some particular wrong for which punitive damages have been expressly provided for by statute. The court, finding no statute permitting

\begin{itemize}
  \item 9. Id. at 294.
  \item 10. 175 La. 487, 143 So. 383 (1932).
  \item 11. Id. at 385-86. For other references to punitive damages in early Louisiana jurisprudence, see Patterson v. New Orleans & C.R., Light & Power Co., 110 La. 797, 34 So. 782 (1903) (punitive damages not allowed in personal injury suit where plaintiff, a passenger on the defendant's streetcar was injured when the driver of the defendant's streetcar struck another streetcar, even though driver of defendant's streetcar was intoxicated); Bentley v. Fischer Lumber & Mfg. Co., 51 La. Ann. 451, 25 So. 262 (1899) (punitive damages not allowed against defendant's streetcar which was subsequently destroyed by a mob, and for destruction of plaintiff's crops in the ensuing flood); Graham v. St. Charles St. R.R. Co., 47 La. Ann. 1656, 18 So. 707 (1895) (punitive damages not allowed against railroad whose foreman threatened to fire any employee who frequented the plaintiff's store); Edwards v. Ricks, 30 La. Ann. 926 (1878) (punitive damages not allowed against heirs of deceased tortfeasor who took plaintiff's house); Burkett v. Lanata, 15 La. Ann. 337 (1860) (punitive damages allowed for malicious arrest and imprisonment); Boulard v. Calhoun, 13 La. Ann. 445 (1858) (punitive damages not allowed for burning of a house by defendant's slave); and Grant v. McDonogh, 7 La. Ann. 447 (1852) (punitive damages allowed for flooding of plaintiff's property by defendant in two successive years).
\end{itemize}
punitive damages nor any right or cause of action, dismissed the plaintif£t's claim. However, in 1984 the Louisiana legislature imposed, by statute, sanctions of punitive damages for the wanton and reckless handling of toxic substances, and also for the wanton disregard for the safety of others by an intoxicated driver whose intoxication was a cause in fact of the plaintiff's injuries.\textsuperscript{12}

Although Louisiana now has statutes which provide for punitive damage awards, the issue of whether insurance should be allowed to cover this liability is unresolved. Currently, twenty-one states allow the insurability of punitive damages,\textsuperscript{13} while six states permit insuring against punitive damages in situations of vicarious liability only,\textsuperscript{14} and eight states have taken the position that such damages are not insurable.\textsuperscript{15} Additionally, five states do not recognize punitive damages at all,\textsuperscript{16} and ten states have not yet resolved the issue of the insurability of punitive damages.\textsuperscript{17}

\section*{III. Issues Involved in the Insurability of Punitive Damage Awards}

The insurability of punitive damages involves two basic issues: 1) Does the language of the automobile insurance contract cover such damages; and 2) If the insurance contract language does permit the insurance of such damages, will the contract be deemed void as against public policy?

\begin{enumerate}
\item \textsuperscript{12} La. Civ. Code art. 2315.3 added by 1984 La. Acts No. 335 § 1 provides: “In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances.” For the text of La. Civ. Code art. 2315.4, which was added by 1984 La. Acts No. 511, § 1, see note supra 1.
\item \textsuperscript{13} Those states allowing the insurability of punitive damages are: Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Iowa, Kentucky, Maryland, Mississippi, New Hampshire, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia and Wisconsin. See Schumaier & McKinsey, The Insurability of Punitive Damages, 71 A.B.A. J. 68 (Mar. 1, 1986).
\item \textsuperscript{14} States allowing insurance of punitive damages in situations of vicarious liability only are: Florida, Illinois, Indiana, New Jersey, Oklahoma and Pennsylvania. Id.
\item \textsuperscript{15} The states which do not permit such insurance are: California, Colorado, Kansas, Maine, Minnesota, New York, North Dakota and Ohio. Id.
\item \textsuperscript{16} Those states which do not recognize punitive damages are: Massachusetts, Michigan, Nebraska, Virginia and Washington. Id.
\item \textsuperscript{17} Those states in which the issue is unresolved are: Alaska, Hawaii, Louisiana, Missouri, Montana, Nevada, North Carolina, South Dakota, Utah and Wyoming. Id.
\end{enumerate}
A. Does the Automobile Insurance Policy Language Permit the Coverage of Punitive Damages?

The leading case in favor of the insurability of punitive damages is the Tennessee case of *Lazenby v. Universal Underwriters Insurance Co.* In this case, the insurance policy in question had language which is very similar to most standard automobile liability policies. The policy under scrutiny in *Lazenby* provided coverage as follows: "Coverage A—Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by accident and arising out of ownership, maintenance or use of the automobile." In resolving the issue of whether the insurance contract language could be construed to provide for coverage of punitive damages, the Tennessee Supreme Court found that most courts have construed the language in similar liability policies to cover both compensatory and punitive damages. The court further reasoned that since much of the jurisprudence has construed such policy language to cover punitive damages, then the average policyholder reading such language would expect to be protected against all claims which were not intentionally inflicted.

This argument rests on the premise that the punitive damages arise as a result of the physical injuries sustained in an automobile accident. Covered damages are those which the insured is legally obligated to pay because of bodily injury caused by the accident and arising out of the use of the automobile. Therefore, under this theory, punitive damages fall within the policy language. Even if punitive damages are not clearly within that language, the policy still must be construed in favor of the

18. 383 S.W.2d 1 (Tenn. 1964).
19. Id. at 2.
22. See Carroway v. Johnson, 139 S.E.2d 908 (S.C. 1965) (obligation of an insurer under an automobile liability policy requiring it to pay all sums which the insured should become legally obligated to pay as damages encompassed the obligation to pay an award for punitive damages).
insured when there is an ambiguity. Another argument in favor of finding coverage is that, given the insurance policy's failure to specifically exclude punitive damages, it is the intent of the insurance company to insure its policyholders against punitive damages.

The argument against construing the policy language to protect the insured against punitive damages is best illustrated in the landmark case of Northwestern National Casualty Co. v. McNulty. In this case, a drunk driver, traveling at a high rate of speed while attempting to pass the automobile in front of him, lost control of his vehicle and smashed into the rear of McNulty's car. The intoxicated driver had an insurance policy which was very similar to that in Lazenby, and the insurance company refused to pay the judgment for punitive damages. In denying its liability for this part of the judgment, the insurance company urged that a claim for punitive damages was not one for "bodily injury" because "by definition punitive damages go beyond compensation for bodily injury." It further asserted that the "wilful, reckless or wantonly negligent conduct" of the defendant necessary under Florida law as a predicate for the granting of punitive damages is essentially an intentional tort which is expressly excluded under all insurance policies as being against public policy. The court agreed with the insurance company's argument and held that under Florida and Virginia law, public policy

23. See R. Keeton, Basic Text on Insurance Law § 6.3(a) at 351 (1977). The insured is covered according to this argument, provided that the total of the compensatory and punitive damages falls within the policy coverage limits.

24. See, e.g., Hensley v. Erie Ins. Co., 283 S.E.2d 227 (W. Va. 1981) (which held that (1) public policy in West Virginia does not preclude insurance coverage for punitive damages arising from gross, reckless or wanton negligence and (2) plaintiffs may recover punitive damages awarded against the insured upon gross, reckless or wanton negligence).

Also in support of the notion that the policy language provides coverage of punitive damages is Appleman who has stated, "it is clear that the average insured contemplates protection against claims of any character caused by his operation of an automobile, not intentionally inflicted." 7 Appleman, Insurance Law and Practice 152, § 4312 (1962), in Harrell v. Travelers Indem. Co., 567 P.2d at 1015.

25. 307 F.2d 432 (5th Cir. 1962).

26. 383 S.W.2d 1 (Tenn. 1964). The McNulty policy provided that the insurer agreed "[t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: A. bodily injury ..." 307 F.2d at 433. The policy excluded coverage for "bodily injury or property damage caused intentionally by or at the direction of the insured." Id.

27. McNulty, 307 F.2d at 433. See also the definition of punitive damages in Restatement (Second) of Torts 2d § 908, at 464: "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."

28. McNulty, 307 F.2d at 433-34.

29. See infra note 51.
prohibited construction of the automobile liability policy to cover liability for punitive damages.

Under this theory, punitive damages are assessed against a defendant whose conduct is so morally reprehensible that it is likened to an intentional tort. Since it is closely akin to an intentional tort, and since the insured's conduct is so morally reprehensible, coverage should be denied under the policy language.

The issue of whether the language of a liability policy would cover punitive damages has been addressed several times in Louisiana. In *Fagot v. Ciravola*, the question was whether or not insurance should cover an award of punitive damages in a section 1983 action. The plaintiff was arrested without probable cause by the two defendants, and the jury subsequently assessed the defendants with $10,000 general damages and $10,000 punitive damages.

The professional liability policy in question provided that "[t]he company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of, but not limited to, negligent acts. . . ." The policy provided coverage for personal injury claims and included in the definitions of personal injury were false arrest, battery, assault, libel, slander, and "deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States. . . ." In construing the policy, Judge Rubin determined that the policy language would be "highly misleading" if the policy was not intended to provide insurance for jury awards of punitive damages. Therefore, he concluded that, as a matter of law, the policy as issued covered punitive damages.

The second case dealing with this issue is the state trial court decision of *Beard v. Allstate*, which was recently handed down. In that case, the trial court, in construing an automobile liability policy, determined that the policy language did provide for the coverage of punitive dam-

---

   Every person who under color of any statute ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
Under § 1983, punitive damages are a permissible award.
33. Id.
34. Id.
35. 16th Judicial Court, No. 59, 872 Div. G.
ages. In making this determination, the trial court used the presumption that ambiguous insurance contracts are to be construed in favor of providing coverage for the insured.

The third opinion facing the issue of the insurability of punitive damages in Louisiana is the recent decision of Creech v. Aetna Casualty & Surety Co. In this case, the plaintiff was suing for exemplary damages as a result of an automobile accident with an intoxicated driver insured by Aetna. The court of appeal found that there were two issues in this case. The first question was whether liability policies provide coverage for exemplary damages which are awarded under Louisiana Civil Code article 2315.4. If coverage can be found under such insurance policies, the second issue is whether Louisiana public policy precludes such coverage.

In addressing the first issue, the court in Creech noted that the first policy in question provided that the insurer would pay "all sums the insured legally must pay as damages because of bodily injury or property damage ... caused by an accident and resulting from ... use of a covered auto." The second policy provided that the insurer would pay for "loss ... which the insured shall become legally obligated to pay as damages because of A. Personal injury ..." Based upon the policy language and the fact that punitive damages under Louisiana Civil Code article 2315.4 can only be awarded because of injuries, the court determined that if the exemplary damages are owed because of injury resulting from the conduct described in the article, then the insured is legally obligated to pay such damages. The court further noted that the insurance company could have easily avoided responsibility for exemplary damages by excluding them from coverage under the policies. Finally, the court pointed out the settled rule that insurance policies are to be construed "broadly in favor of coverage ... and that ambiguities are to be construed against the insurer." Based on this reasoning, the court held that the policies in question provided coverage.

36. 516 So. 2d 1168 (La. App. 2d Cir. 1987).
37. Id. at 1170.
38. Id. at 1171.
39. Id.
40. Id.
41. Id.
42. Id. at 1172.
43. Id.
B. Does Insuring Against Punitive Damages Violate Public Policy?

Once it is determined that the policy does in fact provide coverage for the insured's punitive damages, the court must then determine whether insuring against punitive damages violates public policy. Therefore, the court in Creech, after determining that the policies provided coverage, turned to the issue of whether Louisiana public policy precluded the insurance of punitive damages. The court agreed with Aetna that the article was enacted to deter drunk driving, but disagreed that permitting insuring against punitive damages would violate public policy. After referring to McNulty, Lazenby, Harrell, and Hensley, the court stated that allowing insurance coverage for punitive damages would not "increase the frequency of such acts any more than permitting insurance coverage for ordinary negligent acts increases their frequency." The court concluded that wanton negligence is negligence all the same, and public policy required that it not be precluded from insurance coverage.

The court recognized that punitive damages have for their purpose punishment and deterrence, but explained that they also provide additional compensation to the plaintiff for the wrong that has been done to him. The court noted that punishment and deterrence are not the only public policies involved. Another important public policy is that insurance companies should honor their obligations when they accept premiums for insuring the insured against all liability for damages. In the end, the court found that public policy does not preclude such insurance and stated that "public policy is better served by giving effect to the insurance contract rather than by creating an exclusion based on a judicial perception of public policy not expressed by the legislature."

Leading the charge in opposition to the insurability of punitive damages is the case of Northwestern National Casualty Co. v. McNulty in which the Fifth Circuit based its decision on public policy. This was a drunk driver case, the fact of which may have influenced the court's decision. Indeed, Judge Wisdom stated that "it [was] unnecessary to construe the contract," and held that if a policy should provide specifically for such coverage, then it would contravene public policy. In
determining what the Florida position on punitive damages had been historically, the court found that Florida cases have followed the traditional notion that punitive damages exist to punish the defendant, to deter similar conduct in the future, and not to compensate the victim. The court also noted that no one would dispute the fact that a person cannot insure himself against the risk of criminal fines or penalties because such insurance coverage is against public policy. It then reasoned that the same public policy should render void any insurance contract against the civil punishment represented by punitive damages.

The court continued its public policy argument by positing that allowing one to insure himself against punitive damages would contravene the punishment goal of imposing punitive damages. The court stated this argument as follows:

The policy considerations in a state where . . . punitive damages are awarded for punishment and deterrence, would seem to require that 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 . . . 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.

This argument rests upon the basic notion that punitive damages are meant to punish and deter rather than compensate. This concept of punishment does not serve its intended purpose if the tortfeasor is allowed to insure away the risk of this punishment. Indeed, by allowing

52. Note that the accident occurred in Florida; thus Florida law imposed the punitive damages. However, the insurance contract was made and issued in Virginia, and, as such, Virginia law governed the question of whether insuring against punitive damages contravened public policy. However, the issue had not been resolved in Virginia so the court looked "to the law imposing the punitive damages" (Florida law), to determine how the Virginia courts would decide the issue. Id.

53. Id. at 435.

54. Id. at 440.

55. Id. at 440-41. See also Crull v. Gleb, 382 S.W.2d 17 (Mo. Ct. App. 1964) (where the court used almost the exact same logic to deny the insurability of punitive damages); Universal Indem. Ins. Co. v. Tenery, 39 P.2d 776 (Colo. 1934) (where the court stated that since the insurance company did not participate in this wrong, the insured person should not be allowed to recover from the innocent third party insurance company).
the insurability of punitive damages, the dual legislative intent of punishment and deterrence is defeated. In the end, it is the innocent purchaser of liability insurance who is ultimately punished because all insurance rates are raised to compensate for the added risk associated with punitive damages. Therefore, the only way to enforce the punishment and deterrence policies behind the concept of punitive damages is to deny the tortfeasor access to insurance to insulate against such a penalty.

On the opposite side of the issue is Lazenby v. Universal Underwriters Insurance Co.,56 which is the leading case in favor of public policy allowing the insurability of punitive damages. After quoting the McNulty opinion at length,57 the Lazenby court offered a three-pronged analysis for its opinion. In the first place, the court acknowledged the fact that many automobile accidents are caused by drunk drivers, but the court disagreed that the closing of the insurance market to these drunk drivers would actually deter them in their wrongful conduct.58

The court further asserted:

This State . . . 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.

The second prong of the opinion focused on interpreting the policy language to provide coverage for punitive damages.60 The third basis of the court's decision rested on the notion that there is a "fine line" between simple, ordinary negligence and the type of negligence that will allow an award of punitive damages. As a result of this fine line, a person actually guilty of only simple negligence could be found guilty of a higher degree of negligence and assessed with punitive damages. Due to the risk that a person guilty of simple negligence could be assessed punitive damages, the court determined that the insurance contract must harm the public good or violate the Constitution to be void as against public policy. Since the court determined that the insurance contract did not harm the public good, the policy was not void as against public policy.61

56. 383 S.W.2d 1 (Tenn. 1964).
57. Id. at 3-4.
58. Id. at 5.
59. Id.
60. See supra text accompanying notes 18-21 for a discussion of this issue.
61. Lazenby, 383 S.W.2d at 5. The third prong of the Lazenby court's test is rather poorly worded and one must infer that this is what the court intended.
Similarly, the Arizona Supreme Court in determining that Arizona law permits insuring against punitive damages followed the argument of Lazenby by stating "there is no evidence that those states which deny coverage have accomplished any appreciable effect on the slaughter on their highways." Thus the Arizona Supreme Court held in Price v. Hartford Accident & Indemnity Co. that the clear, unequivocal language of the policy required the insurance company to defend an action based on the accident and to pay a judgment resulting therefrom, even if such judgment includes an award of punitive damages.

The Oregon Supreme Court expanded on the Lazenby theory in Harrell v. Travelers Indemnity Co. by expressing the fear that even gross negligence has been found to merit an award of punitive damages in Oregon. The court expressed the legitimate fear that punitive damages would be assessed against people guilty of acts of negligence that fall below the "wanton or reckless disregard" standard, thus exposing people to punitive damage liability much more frequently. Consequently, because of the fear that people would be liable for punitive damages much more often than under the wanton or reckless disregard standard, the court held that punitive damages are insurable in Oregon.

Later in the opinion, the Harrell court, after quoting from McNulty, determined that it was "naive at least, if not pure fiction" to believe that insuring against punitive damages violates public policy, because the actual burden of the punitive damages is shifted to the insurance company and eventually to the consumer. Instead, the court said that insurance companies are free to charge additional premiums for those people who choose to buy punitive damage insurance. However, because insurance companies do not offer a special punitive damages insurance policy, the court determined that the standard automobile policy provided coverage for punitive damages. The court further reasoned that gross, reckless, and wanton negligence were nonetheless types of negligence, and that a person should be allowed to insure against his negligence. The argument assumes that there is no indication that increased recklessness will result by allowing people to insure against punitive damages.

63. Id.
64. 279 Or. 199, 567 P.2d 1013 (1977).
65. Id. at 209, 567 P.2d at 1018. See also the resemblance to the third prong of the Lazenby opinion.
66. Id. at 211, 567 P.2d at 1018-19. See the standard of conduct required for an award of punitive damages in La. Civ. Code arts. 2315.3 and 2315.4.
67. Harrel, 279 Or. at 213, 567 P.2d at 1019.
68. Id.
Indeed, for years people have been allowed to insure against their own negligence and this has not resulted in more negligent conduct.69

The court’s opinion in *Hensley v. Erie Insurance Co.*70 provides another viable reason to allow the insurability of punitive damages. After discussing the arguments provided in *Lazenby, Price,* and *Harrell,* the West Virginia Supreme Court refused to find that West Virginia public policy precluded insurance coverage for punitive damages which arose from gross, reckless or wanton negligence.71 The court noted that an insurance company is free to decline coverage for punitive damages, and, even if they do provide such coverage, the insurance company will still be liable only to the extent of its policy limits. However, the court finally rested its decision upon the belief that it is unrealistic to argue that punitive damages are assessed only to punish the defendant and deter others in the future from engaging in similar behavior. The court recognized that, in West Virginia, punitive damages are of a compensatory nature, and to disallow the defendant’s ability to insure himself against such damages would jeopardize the plaintiff’s right to recover such damages.72

Therefore, the argument in favor of allowing the insurability of punitive damages is essentially based on the notion that these damages are granted in favor of the plaintiff and he should be able to recover such an award. Additionally, not interfering with valid contracts unless they violate some public policy is also a major plank in this argument. This position provides that there is no valid public policy which would support changing the terms of the contract, particularly to the disadvantage of the insured. Therefore the terms of the insurance contract should not be disturbed. Finally, this argument relies on a somewhat negative response to the *McNulty* decision that there is no proof that disallowing the insurability of punitive damages has, in fact, actually punished the particular defendant and deterred others in the future from engaging in similar conduct. Since there are many criminal statutes which attempt to punish and deter without any results, this leads to the belief that forbidding insurance to cover the imposition of a civil penalty will not actually punish and deter.

IV. SHOULD LOUISIANA COURTS ALLOW THE INSURABILITY OF PUNITIVE DAMAGES?

In order to determine whether the courts of Louisiana should allow insurance of punitive damages, a bifurcated analysis should be used.

69. Id. at 207-08, 567 P.2d at 1017.
71. Id. at 233.
72. Id.
The primary question to be asked is whether typical policy language would provide for such damages. A very strong argument could be made for the proposition that the typical policy language does, in fact, cover exemplary damages. Most policies provide basically that the insurer will "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of" bodily injury. Punitive damages are sums which the insured is legally obligated to pay as damages because they are money awards rendered against the insured as damages by a court of law. The insured is required to pay an award because he physically harmed the plaintiff, however slightly, and because this injury gave rise to a cause of action against the tortfeasor-insured. Even if it is determined that the phrase in the policy is ambiguous, it is a basic rule in the construction of such a contract, that ambiguities in an insurance policy are construed in favor of providing coverage for the insured. Therefore, it can be seen that in all likelihood the policy language provides for such damages.74

The strongest argument in favor of allowing the insurability of punitive damages is provided in Creech. There the court very persuasively argued that if the legislature had intended to deny insurance coverage for punitive damages, then it would have stated so in Louisiana Civil Code article 2315.4.75 However, in the absence of a stated legislative intent to the contrary, punitive damages, as damages caused by an accident resulting in injury, are covered under the policy language.

Another argument in favor of allowing the insurability of punitive damages is that the intent of these damages is to compensate the victim rather than simply to punish the defendant. Indeed, this position was espoused in Fagot v. Ciravola76 where the court stated: "Indeed, to the extent that Louisiana permits damage awards that other states would term 'exemplary' or 'punitive,' Louisiana has relied on what may often be viewed as the compensatory nature of even punitive damages."77 This argument provides that if the insurability of punitive damages is disallowed, then, in all likelihood, the plaintiff will not recover this element of damages. The obvious question then becomes if the plaintiff was not intended to receive the award, why was it granted to him in the first

73. See the policy in question in Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 433 (5th Cir. 1962).
74. It should also be noted that, as stated in Lazenby, most courts, as a matter of contractual interpretation of the language of the policy, construe the policy language to cover both compensatory and punitive damages.
77. Id. at 345.
place. These exemplary damages have not been designated for any special fund but rather they are given to the plaintiff because of his injuries. Since these damages are given to the plaintiff as an element of his damages, then he should not be denied the access to the insurance company for recovery.

A third argument in favor of permitting the insurability of punitive damages is the strong public policy of granting the victim access to a pool of funds by way of the Louisiana Direct Action Statute. The Direct Action Statute embodies a very strong public policy in favor of the injured party because although the statute states the purpose of all liability policies is to give protection and coverage to the insured, such policies are executed in favor of injured persons. This illustrates the paramount public policy in Louisiana that liability insurance is intended to benefit the injured.

Another argument favoring insurability is the problem of the definitions of “wanton” and “reckless disregard” used in Louisiana Civil Code articles 2315.3 and 2315.4. As illustrated by the Oregon Supreme Court in Harrell v. Traveler’s Indemnity Co., there is much confusion over what constitutes wanton behavior or reckless behavior. It is possible that a person actually guilty of gross negligence could be liable for punitive damages because the fact finder decided that the tortfeasor’s conduct constituted wanton disregard for the safety of others. The language is too ambiguous to deny a defendant liability insurance coverage for his negligence. The fact remains that whatever modifier is chosen, the person is still only guilty of negligence. Negligence has long since been insurable and there is no reason to begin to attempt to decide which types of negligence are insurable and which types are not.

Following the reasoning of the Arizona Supreme Court in Price, there is no public policy to deny insurance coverage for these damages.

78. La. R.S. 22:655 (1978) provides in pertinent part:

The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido

It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds . . . for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy.


There is no proof that denying this insurance coverage will lead to less drinking and driving or fewer hazardous waste accidents. Indeed, the majority of states allow such insurance and there has neither been a sudden carnage on their streets nor has hazardous waste suddenly been handled with callous disregard for others. No such carnage has occurred because when people commit such wrongs, their insurance rates go up or their insurance policy is cancelled. The threat of having one's insurance premiums raised is enough of a deterrent to make most people act more responsibly. As the Lazenby court stated, if criminal statutes do not deter people how can one realistically expect civil statutes to punish and deter bad conduct?

The argument in favor of disallowing the insurability of punitive damages looks first to the history of punitive damages in Louisiana. One must consider the Summers and Hill cases in which the respective courts referred to exemplary damages in a punitive sense. In Summers v. Baumgard, the court stated that in illegally seizing and detaining the plaintiff's horse and dray the defendant evinced "such an obstinate determination . . . to take justice into his own hands, as fully authorised [sic] the jury to make him pay something in the shape of smart money."81 In Hill v. The New Orleans, Opelousas and Great Western Railroad Co., the court makes reference to "vindictive damages, as is sometimes allowed in cases of wilful or malicious injuries."82 These two cases illustrate that since exemplary damages were introduced into the Louisiana jurisprudence, they have been used to punish people for reprehensible conduct. To rebut the argument made in Fagot that exemplary damages are of a compensatory nature in Louisiana, the case which was cited to stand for this proposition need only be read. The case cited was Loeblich v. Garnier83 which discussed awarding mental anguish damages under the title of punitive damages. Today mental anguish is compensable, and thus, it does not need to hide under the guise of exemplary damages. Therefore, the actual history of exemplary damages in Louisiana illustrates the punishment theory behind the award of such damages.

Another argument favoring the denial of insurability is to simply read the language of the two statutes. Both Louisiana Civil Code articles 2315.3 and 2315.4 begin with the phrase, "[i]n addition to general and special damages, exemplary damages may be awarded . . . ."84 This phrase should dissipate all notions that exemplary damages in Louisiana

81. 9 La. 161, 163 (1836).
83. 113 So. 2d 95 (La. App. 1st Cir. 1959).
84. For full text of La. Civ. Code arts. 2315.3 and 2315.4 see supra notes 1 and 12.
have any compensatory nature. The plaintiff is compensated for his injuries through general and special damages. The exemplary damages are awarded over and above the plaintiff's compensatory damages. The restatement of torts also provides that punitive damages are those other than compensatory damages and are awarded against a person to punish him for his outrageous conduct and to deter him and others from engaging in similar future conduct. If the definitions of punitive damages and compensatory damages are perused, it becomes apparent that exemplary or punitive damages have no compensatory nature.

A look at the legislative intent behind this article will also determine the nature of these damages. When Louisiana Civil Code article 2315.4 was proposed and presented to the House Committee on Civil Law and Procedure, the bill's sponsor noted that many criminal statutes in the past few years had been passed attempting to handle the problem of the drunk driver. However, he lamented that Louisiana had not imposed any civil penalties to attempt to sanction drunk drivers. House Bill 1051 which once enacted became Louisiana Civil Code article 2315.4 was designed to provide for civil penalties.

---

85. See supra note 72.
86. According to Black's Law Dictionary (5th Ed. 1979), compensatory and exemplary damages are defined as follows:

**Compensatory damages.** Compensatory damages are such as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury. Damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him.

**Exemplary or punitive damages.** Exemplary damages are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages. Unlike compensatory or actual damages, punitive or exemplary damages are based upon an entirely different public policy consideration—that of punishing the defendant or of setting an example for similar wrongdoers, as above noted. In cases in which it is proved that a defendant has acted willfully, maliciously, or fraudulently, a plaintiff may be awarded exemplary damages in addition to compensatory or actual damages. Damages other than compensatory damages which may be awarded against a person to punish him for outrageous conduct.

87. H.R. 1051, Reg. Sess. 1984 La. Acts No. 511. Rep. Bolin introduced House Bill No. 1051 to the House Committee on Civil Law and Procedure and stated the following: You know, the Legislature has passed many criminal statutes in the last years attempting to help, or attempting to address a problem with the intoxicated driver on highway[s]; however, we have failed to pass any type of legislation
Finally, in support of denying the insurability of punitive damages in Louisiana, the solid reasoning provided for in *McNulty* should be considered again. The court found that the underlying theory of punitive damages in Florida is punishment and deterrence. The court went on to state that if one is permitted to insure himself against punitive damages then the basic premise behind such damages is destroyed. The tortfeasor will not be punished because he does not have to pay any penalty. Similarly, other drunk drivers in the future would continue to menace the highways because they have not been deterred. The people who are actually punished are the consumers whose rates would continue to rise.

Of course one can argue, as did the *Lazenby* court, that no one has proven that denying insurance coverage for punitive damages has actually served as a punishment or deterrence. However, it seems more logical and consistent with the nature of punishments for the courts to require proof that insurance coverage does not hinder the objectives of punishment and deterrence of punitive damages before it allows one to acquire such coverage.\(^8\) Also, as seen in *McNulty*, no one would argue that a person can and should be allowed to insure himself against criminal penalties since that would defeat the whole purpose of imposing such a penalty. The same logic should be employed when discussing punitive damages because they are civil penalties imposed for the purpose of punishment. Like criminal penalties, punitive damages are imposed because society is outraged by the defendant’s conduct and does not want the defendant nor others in the future to commit the same offense. If a person is permitted to insure himself against such damages, then the policies of imposing a punishment and deterring similar future conduct would be rendered impotent.

In determining whether Louisiana public policy would or would not permit insuring against exemplary damages, the two punitive damages statutes must be considered separately. Louisiana Civil Code article 2315.4 deals with conduct of the drunk driver for which society deems punishment is warranted. On the other hand, Louisiana Civil Code article 2315.3 involves, in all probability, a corporate defendant thus encompassing the notion of vicarious liability and the issue of assessing corporations with punitive or exemplary damages.\(^9\)

---

\(^8\) See Comment, Torts—Insurance Coverage and Scope of Liability for Punitive Damages, 58 Or. L. Rev. 263, 269 (1979).

\(^9\) In the situation of hazardous waste accidents, the plaintiff would likely not even join the defendant employee in the suit because of the vicarious liability of the employer.
If the purpose of assessing these damages is to punish and deter then that policy can be accomplished much better in the Louisiana Civil Code article 2315.4 situation because it involves one defendant engaged in the conduct. However, with the corporate defendant, there is some question as to whether an entity that is not even animate may be actually punished. The actual individual tortfeasor would not necessarily be punished because it may not even be known who that is. The wanton or reckless disregard for the public safety could be in a faulty decision making process, or it could be in only one truck driver. Either way, a corporation will ultimately be found liable, and forced to pay the exemplary damages. Is it fair to deny insurance to a defendant whose only reason for being liable is its relationship to the actual tortfeasor?

If the policies behind the exemplary damages are punishment and deterrence then it makes more sense when applied to the individual. In this situation, there is one person guilty of culpable conduct and the person assessed with the damages will be the one who actually committed the wrong. He would actually be punished for his wrong and others like him may well be deterred. It seems that article 2315.4 differs substantially from article 2315.3 dealing with hazardous waste. In the first situation a guilty tortfeasor is being assessed with the damages and in the latter an entity is being assessed for the wrongs of one of its employees. If punishment and deterrence are the goals of these articles then the two code articles seem to be at war with each other. The punitive nature of the damages seems entirely logical when dealing with the intoxicated, guilty tortfeasor, yet it seems far from equitable to attempt to punish a vicariously liable, non-negligent defendant. What conduct is the corporation being punished for? What future conduct is being deterred?

The root of the problem is in determining the policy behind the assessment of exemplary damages. If these damages are to be labelled as punitive damages, then they should be used to punish. A person cannot be truly punished if he is allowed to insure himself against such punishment. If the Louisiana legislature does not want to assess a hazardous waste corporation with a penalty that the corporation cannot buy insurance for, then the legislature should call these damages by a different name or they should do away with punitive damages for negligence in handling hazardous waste.

However, if the legislature intends to punish these corporations for the negligence of corporate employees, then Louisiana Civil Code article 2315.3 should remain on the books, but it must be remembered that it is not the corporation who actually committed the wrong. Regardless, this discussion should be reserved for the legislature.90

90. Another issue arises when one contemplates what instructions should be given to
It is this writer's opinion that the legislature enacted punitive damages in order to punish people for anti-social behavior and to deter others from engaging in similar behavior in the future. Even the Creech court admitted that the purpose of Louisiana Civil Code article 2315.4 is to punish and deter. Therefore this public policy should be implemented. The best way to punish these tortfeasors and to deter others in the future is to deny insurance coverage for these damages. The contrary argument is that if criminal statutes do not deter people, then the denial of insurance coverage cannot satisfy this policy of deterrence. This argument is blind to the theory behind denial of insurance in this situation. Instead of arguing that denial of insurance for punitive damages will not deter people because criminal statutes do not deter this conduct, the argument should be that although criminal statutes have not completely deterred this behavior, the denial of insurance for punitive damages may well deter this conduct. There is not one iota of evidence to prove that denial of insurance for punitive damages does not deter drunk driving. However, in this writer's view, it is fairly certain that if Louisiana permits the insurability of punitive damages, this conduct will not be deterred. Individuals have been permitted to insure against all damages arising out of automobile accidents in the past, so there is no reason to think that additional damages by another name will act as a deterrent when this risk can also be insured against.

The courts of Louisiana should not simply throw their hands up in the air and declare that drunk driving is a problem that cannot be solved, and instead simply allow people to insure themselves against these damages. Surely this was not the intent of the legislature when it enacted Louisiana Civil Code article 2315.4, nor is this the manner in which the courts have traditionally resolved complex issues. On the contrary, the legislature clearly intended the article to punish and deter, thus the courts should implement this legislative intent. There can be no doubt that the most logical, reasonable, and realistic method of implementing that intent of the legislature is through the denial of insurance to those found liable for punitive damages under Louisiana Civil Code article 2315.4.

C. Caldwell Herget Huckabay

the jury. Such issue merits extensive discussion thus it will be reserved for the legislature or another comment.