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Damages--Liability Insurance and Punitive Damages

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It would seem, on the basis of the requirements set forth in West Virginia with respect to the concept of punishment, the reasonable relationship between actual damages and exemplary damages, and the consideration of the defendant's wealth, that in principle, at least, we would be in accord with the view of the dissent.

_Eugene Triplett Hague, Jr._

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**Damages—Liability Insurance and Punitive Damages**

_P_ brought suit against insured for injuries received in an automobile collision and recovered a judgment consisting of compensatory and punitive damages. Insurer denied liability for the punitive damages. _P_ and insurer brought an ancillary garnishment action against insurer to recover on the automobile liability policy. The district court allowed recovery against the insurer for both the compensatory and the punitive damages. **Held,** affirmed as to the compensatory damages; reversed as to the punitive damages. Public policy prohibits construction of an automobile liability policy as covering liability for punitive damages. _Northwestern Nat'l Cas. Co. v. McNulty_, 307 F.2d 432 (5th Cir. 1962).

Since _Mayer v. Frobe_, 40 W. Va. 246, 22 S.E. 58 (1895), West Virginia has upheld the awarding of punitive damages to the plaintiff where the defendant's conduct has warranted punishment. The expressed sole purpose of the court in allowing punitive damages is to punish the defendant and to deter others from committing like offenses. _McCoy v. Price_, 91 W. Va. 10, 112 S.E. 186 (1922); _Hess v. Marinari_, 81 W. Va. 500, 510, 94 S.E. 968, 971 (1918); _Mayer v. Frobe supra_. These damages are not the necessary and natural result of the tort pleaded, nor are they something to which the plaintiff is entitled as compensation, either for any actual loss or any pain suffered. _O'Brien v. Snodgrass_, 123 W. Va. 483, 487, 16 S.E.2d 621, 623 (1941); _Hess v. Marinari, supra_ at 503. In order to recover punitive damages in any action, the plaintiff must show that the acts complained of were done maliciously, wantonly, mischievously, or with a reckless disregard of the plaintiff's rights. _Peck v. Bez_, 129 W. Va. 247, 258, 40 S.E. 2d 1, 9 (1946); _McCoy v. Price, supra_; _Pendleton v. Railway Co._, 82 W. Va. 270, 95 S.E. 941 (1918).
Although most of the West Virginia cases in which punitive damages have been awarded have been actions for intentional assault, the court has indicated that such damages would also be proper where the act was not intentional but where the defendant's conduct was wanton, willful, or reckless, *Mayer v. Frobe*, *supra*, or where there was willful neglect of a duty causing the injury. *Talbott v. Railway Co.*, 42 W. Va. 560, 26 S.E. 311 (1896). No reported West Virginia decisions have expressly permitted a plaintiff to recover punitive damages in an automobile accident case, but such a recovery would seem to be but a logical extension of the established theory of punitive damages. Note, *Punitive Damages and Their Possible Application in Automobile Accident Litigation*, 46 Va. L. Rev. 1036 (1960). Many other jurisdictions have awarded punitive damages in automobile accident cases where the defendant's conduct was characterized as willful, wanton, or reckless. Annot., 62 A.L.R.2d 813 (1958).

The liability of an insurer, under an automobile liability policy, for punitive damages assessed against the insured is an issue which has yet to be decided in West Virginia. The cases in other jurisdictions which have considered this problem have resulted in a split of authority. 5A Am. Jur. *Automobile Insurance* § 166 (1936); Annot., 132 A.L.R. 1259 (1941).

One group of cases holds the insurer liable for punitive damages on the theory that punitive damages are part of the losses resulting from the negligent acts of the insured, and that all such losses are within the coverage of the liability policy. *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934); *American Fid. & Cas. Co. v. Werfel*, 230 Ala. 552, 160 So. 103 (1935).

Other cases, including the principal case, have resolved the question on the basis of public policy, reasoning that the insurance company should not be held liable for a fine imposed on the insured for his conduct. *Tedesco v. Maryland Cas. Co.*, 127 Conn. 533, 18 A.2d 357 (1941).

The question of liability insurance coverage of punitive damages is not likely to arise often in West Virginia. In most cases the awarding of compensatory damages will constitute a complete settlement of the action because punitive damages are allowed only when the compensatory damages are not adequate to punish the defendant. *Ennis v. Brawley*, 129 W. Va. 621, 629, 41 S.E.2d 680, 685
However, in those instances where the compensatory damages are not adequate to punish the defendant, punitive damages will also be assessed to deter others from pursuing a similar course of conduct and to serve as a warning of the possible consequences of willful or reckless conduct. To hold the insurer liable for these additional damages would seem to defeat the purpose of the court in assessing them. The insured would be allowed to protect himself from civil punishment by obtaining liability insurance. The most effective way to punish the defendant would be to make him personally responsible for the payment of the punitive damages by excluding them from automobile accident liability coverage.

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Evidence—Attorney-Corporation Client Privilege

Files of documents from a law firm were examined during pre-trial discovery. It was contended that the information contained in the files was obtained by the law firm in its capacity as attorneys for D corporation and that the attorney-client privilege was applicable thereto. Held, a corporation is not entitled to claim the attorney-client privilege because, historically, it was created for natural persons only, and it is unrealistic to believe that confidentiality can be preserved for a corporation. Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771 (N.D. Ill. 1962).

The decision in the principal case will, no doubt, cause much activity among corporations and research by their attorneys for reasons and arguments in opposition to the court's conclusions. The court placed much emphasis on the idea that the privilege has been taken for granted without a proper reliance on precedent. The instant case has already been challenged in Philadelphia v. Westinghouse Corp., 31 U.S.L. Week 2202 (E.D. Pa. Oct. 19, 1962). Although admitting that the principal case was supported by logic, it was unable to accept the result and reasoned that the availability of the privilege has gone unchallenged so long and has been so generally accepted that it must be recognized to exist.

The attorney-client privilege, dating back to the reign of Elizabeth I, is the oldest of the privileges for confidential communications.