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INSURANCE COVERAGE OF PUNITIVE DAMAGES IN MONTANA

Scott H. Stanaway

I. INTRODUCTION

In two recent cases the Montana Supreme Court addressed the question of whether a liability insurance policy may cover punitive damages assessed against an insured. Holding in favor of coverage in both cases, the court answered the question on contract interpretation and public policy grounds. This comment discusses these cases and their implications for Montana. In addition, this comment analyzes the concept of punitive damages and the theories courts use in determining whether insurance policies cover punitive damages.

II. THE CONCEPT OF PUNITIVE DAMAGES: GENERALLY AND IN MONTANA

Punitive or exemplary damages are a class of money damages awarded to punish and deter a tortfeasor and others from similar tortious conduct. Virtually all jurisdictions in the United States allow an award of punitive damages over and above compensatory damages. Only four state courts have found punishment not proper for civil counts and, therefore, do not permit punitive damages except when explicitly allowed by statute. Three state courts have held that punitive damages are actually compensatory in nature and limit them accordingly. Furthermore, some courts disallow punitive damages if a criminal sanction could be imposed for the same conduct. With these exceptions, American courts generally hold that punitive damages are noncompensatory in nature and,

2. Restatement (Second) of Torts § 908 (1979).
5. See Glissman v. Rutt, 175 Ind. App. 493, 372 N.E.2d 1188 (1978). Indiana decisions were once grounded in the belief that if punitive damages were allowed, then a defendant may be subject to double jeopardy, which is constitutionally prohibited. See Aldridge, The Indiana Doctrine of Exemplary Damages and Double Jeopardy, 20 IND. L.J. 123 (1945).
therefore, award them in addition to full compensation. Conduct that will justify an award of punitive damages usually involves elements such as willfulness, wantonness, oppression, outrageous conduct, indignity, insult, fraud, recklessness, or malice.  

The Montana Supreme Court has consistently emphasized that the primary purpose of assessing punitive damages is to punish the wrongdoer and through that punishment to deter future unlawful conduct of the tortfeasor and others: "To perform its office as a deterrent, punitive damages when awarded should be of such a significant amount as will serve the office of deterrence by punishing the defendant and as will warn others."  

In recent years, the Montana Supreme Court has expanded the availability of punitive damage awards. The court stated that the malice in law which would support a claim for punitive damages may be found where a defendant's conduct is "unjustifiable." Because of confusion regarding what conduct was "unjustifiable," the court recently attempted to come to grips with the problem of uncertainty in the area of punitive damages. In Owens v. Parker Drilling Co., the court acknowledged the expanded availability of punitive damage awards based on concepts like gross negligence, recklessness, and unjustifiability, and adopted the following standard:

When a person knows or has reason to know of facts which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the standard of willful, wanton, and/or reckless to which the law of this State will allow imposition of punitive damages on the basis of presumed malice.

This standard further expanded the types of conduct giving rise to punitive damage awards, and prompted litigation concerning whether insurance liability policies covered punitive damage

7. Gibson v. Western Fire Ins. Co.,__ Mont. ___, 682 P.2d 725, 740 (1984). This same rationale is found in the Montana Code Annotated which states: In any action for a breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.
10. Id. at ___, 676 P.2d at 164.
awards against the insured in Montana. Although such litigation is recent in Montana, a somewhat substantial body of law has developed in other jurisdictions.\textsuperscript{11}

III. \textbf{The Issue of Punitive Damage Coverage Throughout the Country}

A. Introduction

Although some liability insurance policies expressly cover punitive damages by defining "loss" to include punitive damages, most policies are unclear as to coverage. Most policies neither specifically include nor exclude coverage. A typical liability insurance policy obligates the insurer to pay all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage.\textsuperscript{12} In addressing whether such policies cover punitive damages, courts analyze the issue on two grounds: 1) whether the contract language includes punitive damages coverage; and 2) if there is coverage, whether the coverage is against public policy.\textsuperscript{13}

B. \textit{Holdings Based Upon Insurance Contract Interpretation}

In determining whether the liability insurance contract language covers punitive damages, courts often look to the contract in issue. In doing so, courts usually rule on the basis of the ambiguity of the contract language or the reasonable expectations of the parties. An analysis of the decisions indicates that the same argu-

\textsuperscript{11} Annot., 16 A.L.R.4th 11 (1982).
\textsuperscript{13} A third ground courts often consider is whether the principles of vicarious liability permit coverage. Nearly all of the state courts which have considered this question have held in favor of allowing coverage. Annot., 16 A.L.R.4th 11 (1982). These courts reason that since vicarious liability under the doctrine of \textit{respondeat superior} is imposed even if the employer is not at fault, public policy is best served by allowing coverage. Punishing an innocent employer is pointless. Consequently, the innocent employer should not be subject to liability for punitive damages and should be allowed to insure against such liability assessed vicariously. Norfolk & W. Ry. Co. v. Hartford Accident & Indem. Co., 470 F. Supp. 92 (N.D. Ind. 1976).

In \textit{Norfolk}, an employee of the insured had been in an automobile accident which resulted in a punitive damages award against the employer. The employer paid the punitive damages and brought an action against its insurance carrier to recover the amount. The court recognized that punitive damages are to deter an insured's wrongful conduct and that an insured should not avoid the penalty by means of insurance. However, it noted a distinction between liability for punitive damages directly imposed and such liability when vicariously imposed. Accordingly, it granted a motion for summary judgment in favor of the employer-insured. \textit{Id.}
ments produce different results in different jurisdictions.

Courts holding that punitive damages are not covered usually reason that the contract is not ambiguous and that punitive damages are not damages for "bodily injury" or "property damage." The most recent decision based on such reasoning is *Schnuck Markets, Inc. v. Transamerica Insurance Co.* There, the court interpreted a policy containing language that the "company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage . . . ." The court held that punitive damages were not in the category of damages for "bodily injury" or "personal injury" but rather for punishment when the actor's conduct displays the requisite malice. Thus, the insurance company was not required to cover the punitive damages assessed against the insured.

On the other hand, the majority of courts stress the phrase "all sums." Ignoring the phrases "bodily injury" or "property damage," they hold that "all sums" includes coverage for punitive damages. The Oregon court in *Harrell v. Travelers Indemnity Co.*, succinctly stated the majority's position in favor of coverage: "the policy unambiguously covers 'all sums.' Punitive damages are a form of damages; when liquidated by a judgment, they are a


15. 652 S.W.2d 206 (Mo. App. 1983).

16. *Id.* at 209, 210 (citing Cavin's, Inc. v. Allstate Mut. Ins. Co., 27 N.C. App. 698, 701, 220 S.E.2d 403, 406 (1975)). There, the court stated:

Punitive damages are never awarded merely because of a personal injury inflicted nor are they measured by the extent of the injury; they are awarded because of the outrageous nature of the wrongdoer's conduct. Being awarded solely as punishment to be inflicted on the wrongdoer and as a deterrent to prevent others from engaging in similar wrongful conduct, punitive damages can in no proper sense be considered as being awarded "only with respect to personal injury" or as damages which are payable "because of personal injury." Compensatory damages, which are awarded to compensate and make whole the injured party and which are therefore to be measured by the extent of the injury, are the only damages which are payable "because of personal injury."

*Cavin's*, 27 N.C. App. at 701, 220 S.E.2d at 406.


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'sum.' 

Other courts have allowed coverage on the theory that the policy language is ambiguous and, therefore, should be construed in favor of the insured. These courts usually note that the insurance company could have removed the ambiguity easily by specifically excluding punitive damages from coverage. Still others rely on the argument that the contract was ambiguous and that the insured expected coverage to include punitive damages. The court in Harrell pointed out that business and professional persons constantly face the perils of punitive damages in their daily operations and stated that "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.'"

C. Holdings Based Upon Public Policy

The second major issue courts address when determining whether insurance policies cover punitive damages is public policy. Two landmark cases which reached opposite conclusions on the public policy issue are Northwestern National Casualty Co. v. McNulty and Lazenby v. Universal Underwriters Insurance Co.

In McNulty, the court held that public policy prohibited a liability insurer from paying punitive damages awarded against its insured. There, the intoxicated insured hit a car while driving at excessive speeds. The court reasoned that since punitive damages are awarded for punishment and deterrence, punitive damages would serve no useful purpose if a negligent insured were allowed to shift the punitive damages burden to an insurance company.

Furthermore, the court reasoned:

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

19. Id. at 203, 567 P.2d at 1014 (citing Norfolk, 420 F. Supp. at 94 n.1).
22. Harrell, 279 Or. at 204-05, 567 P.2d at 1015.
23. 307 F.2d 432 (5th Cir. 1962).
25. 307 F.2d at 434-35.
26. Id. at 440.
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 . . . . 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.27

Concluding, the court stated that there were especially strong public policy reasons not to allow irresponsible drivers guilty of reckless slaughter or maiming on the highway to escape punishment by shifting liability for punitive damages to their insurers.28 Within seven years after McNulty, courts in New Jersey,29 Missouri,30 Kansas,31 Pennsylvania,32 and New York,33 reached similar conclusions.

In contrast to McNulty, Lazenby is the leading case allowing coverage for punitive damages based upon public policy grounds. As in McNulty, the insured in Lazenby became intoxicated, was involved in an automobile accident, and brought suit against his insurer to cover a punitive damages award. The court quoted from McNulty extensively, but reached the opposite result for three reasons.

First, the court stated its opinion that making an insured pay punitive damages would not deter the insured’s wrongful conduct. The court reasoned that since criminal sanctions appeared to have little effect in deterring slaughter on the highways, placing liability on the insured would have no greater effect.34 The court concluded: "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."35

Second, the court expressed its opinion that the average policy holder expects to be protected against all claims not intentionally

27. Id. at 440-41.
28. Id.
34. Lazenby, 214 Tenn. at 647, 383 S.W.2d at 5.
35. Id.
inflicted. Finally, the court stated that the line of demarcation between actions supporting punitive damages and those not supporting such damages was too fine to allow coverage in some instances and not in others. This reason became a major factor in cases following *Lazenby*.

For example, in *Harrell*, the court acknowledged the fine line between cases giving rise to punitive damages and cases that do not. It feared that holding coverage for punitive damages to be against public policy would have far-reaching consequences in the business and professional communities. The court noted that a retail store owner who falsely arrests an individual, a doctor liable on a medical malpractice claim, and a creditor found to have wrongfully repossessed secured property could all find themselves subject to punitive damage awards with no insurance coverage. If such situations were excluded from coverage, the court considered the policy to be virtually worthless. Accordingly, it held that liability insurance covered punitive damage awards and that such coverage was not against public policy.

Since *Lazenby*, debate continues whether coverage for punitive damages violates public policy. The debate usually concerns whether an insured is deterred or punished if the insurance company covers the punitive damages award. In *Price v. Hartford Accident and Indemnity Co.*, the Arizona Supreme Court held that coverage did not violate public policy. The court refused to follow the *McNulty* court’s reasoning and recognized a number of effective punishments and deterrents to misconduct besides the imposition of punitive damages: 1) even though a person is insured for punitive damages, the insured cannot engage in wanton conduct without punishment because he may be liable for criminal penalties; 2) any act subjecting the insured to punitive damages will cause his insurance rates to soar; 3) most persons do not carry multimillion dollar liability policies and the possibility that punitive damages will exceed their policy limits will exercise a deterrent effect on them; and 4) there is no evidence that those states which deny coverage have accomplished any appreciable effect on the conduct of insureds.

Following *Price*, at least six previously uncommitted jurisdic-

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36. *Id.* at 648, 383 S.W.2d at 5.
37. *Id.*
38. *Harrell*, 279 Or. at 210-11, 567 P.2d at 1018.
39. *Id.* at 218, 567 P.2d at 1021.
41. *Id.* at 487, 502 P.2d at 524.
42. *Id.*
tions rejected McNulty and imposed the insured's liability for punitive damages on the insurers. These jurisdictions include Georgia, Idaho, Oregon, Texas, Virginia, and Montana.

IV. DECISIONS IN MONTANA

A. First Bank (N.A.)—Billings v. Transamerica Insurance Co.

In April, 1983, the Montana Supreme Court decided both the public policy issue and contract interpretation issue and held in favor of coverage. The court has not addressed whether the principles of vicarious liability permit coverage.

In First Bank the court found that providing insurance coverage for punitive damages was not contrary to public policy in Montana. This action arose after the insured had been named a defendant in three wrongful repossession cases. The insurer undertook the defense of its insured, but specifically denied any

49. Id. at —, 679 P.2d at 1223; Fitzgerald, — Mont. —, 679 P.2d at 792.
50. The Montana Supreme Court has not addressed the issue of vicarious liability for punitive damage awards. However, it has used reasoning similar to that used by courts to allow coverage for vicarious acts in White v. State, — Mont. —, 661 P.2d 1272 (1983). In White, the court upheld the constitutionality of a Montana statute creating immunity from punitive damages assessed against governmental entities. Id. at —, 661 P.2d at 1276. The reasoning the court used in determining governmental immunity parallels the reasoning courts use to allow coverage for vicarious acts. See supra note 13. First, the court recognized that punitive damages are to punish and deter. It then reasoned: 1) an award of punitive damages against a municipality punished only the taxpayers, who took no part in the commission of the tort; 2) punishing the innocent taxpayers is pointless; and 3) governmental entities, consequently, should not be subject to punitive damages liability. White, at —, 661 P.2d at 1276.

White involves the liability of a governmental entity which makes it distinguishable from situations involving other sorts of defendants. However, if the reasoning of White is followed, it is likely that the Montana Supreme Court will hold that coverage for punitive damages is permissible where an employer has been held liable for punitive damages solely due to the conduct of another under principles of vicarious liability: 1) an award of punitive damages against an employer punishes only the employer, who took no part in the commission of the tort; 2) punishing the innocent employer is pointless; and 3) consequently, employers should not be subject to punitive damages assessed vicariously. The holdings of First Bank and Fitzgerald buttress this conclusion since they seem to indicate that the court favors coverage.

51. First Bank, — Mont. —, 679 P.2d at 1223.
coverage for punitive damages under its liability insurance contract. Consequently, the insured filed suit against its insurance company in the United States District Court for the District of Montana to determine coverage. The United States District Court certified two questions to the Montana Supreme Court:

(1) Does the public policy of Montana permit insurance coverage of punitive damages?
(2) If the public policy of Montana does not generally permit insurance coverage of punitive damages, would it nevertheless permit coverage for punitive damages for which a banking corporation is or could be held liable by reason of the acts of its employees? 52

Since the Montana Supreme Court held that the public policy of Montana permits insurance coverage, 53 it did not address the second question. In its decision, the court first acknowledged that the major aims of awarding punitive damages are punishment and deterrence. However, it refused to follow McNulty. The court expressed its belief that the deterrent effect of punitive damages was minimal, and cited with approval the Lazenby court's discussion concerning the failure of civil and criminal sanctions to deter wrongful conduct on the highways.

Next, the court expressed a concern that an insured's contract will become virtually worthless if it does not cover punitive damages since punitive damages awards are often large and actual damages small. The court premised its discussion on the assumption that many insurance agreements include coverage for torts. Such torts may include false arrest, malicious prosecution, wrongful entry or eviction, libel and slander, racial or religious discrimination, and wrongful repossession. Since many verdicts resulting from such torts include minimal actual damages but substantial punitive damages, 54 the court reasoned that an insured's contract would become worthless if punitive damage coverage were disallowed. 55

Finally, citing Harrell, the court pointed out that punishment in the context of punitive damages may come as a wholly unanticipated aspect of one's conduct because of the fine line between ac-

52. Id. at ___, 679 P.2d at 1218.
53. Id. at ___, 679 P.2d at 1223.
54. A case illustrating the kind of exposure for punitive damages in commercial torts is Greenwood Cemetery, Inc. v. Travelers Indem. Co., 238 Ga. 313, 232 S.E.2d 910 (1977). There, a widow brought an action against a cemetery for the wrongful removal of a grave marker. The actual damages in such a case are minimal; the exposure is in punitive damages.
55. First Bank, ___ Mont. ___, 679 P.2d at 1221.
tions supporting and not supporting punitive damages. The court acknowledged that fact-finders wrestle with concepts like recklessness and reasonableness. Insureds may not know their conduct subjected them to punitive damages until after a trial. Consequently, the court declined to define limits of insurance coverage for punitive damages but seemed to narrow its holding by stating: "[T]he law is still in such a state of flux as to warrant caution on the issue of whether public policy prohibits coverage of punitive damages in all cases." 56

The court left the decisions of whether coverage would be permitted to the insurance carriers and their customers until the law of punitive damages was more certain or until the legislature altered the law of punitive damages or expressly declared a policy against coverage in all cases. The court concluded:

The problems posed by insurance coverage of punitive damages are unquestionably like those inherent in the Gordian Knot. Unlike Alexander the Great, however, we cannot make a clean slice through our version of the Knot, in order to unravel all the aspects of the question before us, without working an injustice to many policy holders. Alexander dealt only with an inanimate object; we deal with people. Use of the judicial sword therefore is inappropriate in this case. Here, we must "untie" the knot, painstaking as the process may be. 57

B. Fitzgerald v. Western Fire Insurance Co.

Three days after the decision in First Bank, the Montana Supreme Court addressed the contract interpretation issue and again held in favor of coverage. 58 The language of the policy at issue in Fitzgerald read: "The Western Fire Insurance Company . . . [a]grees . . . [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; b. property damage; arising out of the owner-

56. Id. at ___, 679 P.2d at 1222 (emphasis added).
57. First Bank, ___ Mont. ___, 679 P.2d at 1223. According to an early dictionary: The Gordian Knot in antiquity, [was] a knot in the leather or harness of Gordius, a king of Phrygia, so very intricate that there was no finding where it began or ended. An oracle declared that he who should untie this knot should be master of Asia. Alexander, fearing that his inability to untie it should prove an ill augury, cut it asunder with his sword. Hence, in modern language, a Gordian knot is an inextricable difficulty; and to cut the Gordian knot, is to remove a difficulty by bold or unusual measures. An American Dictionary of the English Language (1904).
58. Fitzgerald, ___ Mont. ___, 679 P.2d 792.
ship, maintenance or use of the automobile. 5

In Fitzgerald, the insured became involved in an automobile accident while driving his car at a high rate of speed after consuming a large quantity of alcohol. 6

A jury found the insured guilty of negligent driving and assessed a $5,000 punitive damages award. The court held that the language of the insurance contract provided coverage for punitive damages. 61 Quoting extensively from Harrell, the court based its opinion on three reasons: 1) where an ambiguity in an insurance contract exists, every doubt is to be resolved against the insurer; 62 2) a person insured by such a policy would have reason to suppose that he would be protected against liability for punitive damages; 63 and 3) the insurance company could have removed the contract ambiguity by including an express exclusion from liability for punitive damages but chose not to do so. 64

The court refused to discuss whether public policy excluded coverage in the case as it considered First Bank controlling.

V. ANALYSIS AND IMPACT OF FIRST BANK AND FITZGERALD

A. Analysis

In First Bank the court based its decision on its previous discussions of deterrence and punishment. The court reasoned that since many kinds of conduct are never successfully deterred by punitive damage awards, punishment was left as the only effective realizable goal. Since it is uncertain what conduct gives rise to punitive damages in Montana, the court reasoned that one should not be punished for conduct not considered or known to be wrongful. Thus, the court expressed its "caution on the issue of whether pub-

59. Id. at ___, 679 P.2d at 791.
60. Id.
61. Id. at ___, 679 P.2d at 792.
62. Id.
63. Id. Fitzgerald is not the only recent Montana case in which the Montana Supreme Court relied on the reasonable expectations of an insurance contract purchaser. In Transamerica Ins. Co. v. Royle, Mont. 656 P.2d 820 (1983), the court stated: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Mont. 656 P.2d at 824 (quoting Keeton, Insurance Rights at Variance with Policy Provisions, 83 HARV. L. REV. 961, 967 (1970). In response to such statements, one court has stated: "We believe that a person has no right to expect the law to allow him to place responsibility for his reckless and wanton actions on someone else." Nicholson v. American Fire & Casualty Ins. Co., 177 So. 2d 53, 54 (Fla. 1965).
64. Fitzgerald, Mont. 679 P.2d at 792.
lic policy prohibits coverage of punitive damages in all cases."

The court's reasoning seemed to hint that there were in fact cases where it would be proper to prohibit coverage, but that First Bank was not such a case. It implied that one whose conduct was certain to give rise to punitive damages and known to be wrongful should not be permitted to hide behind the shield of his insurer. The person whose conduct invariably results in punitive damages should be punished by being required to pay such damages.

The drunk driving case would appear to be just such a case. Counsel for a plaintiff in a drunk driving case commonly pleads two counts. The first count requests compensatory damages arising out of the negligence of the defendant. The second count pleads "recklessness or gross negligence" and requests punitive damages. The drunk driver's conduct is certain to give rise to punitive damages and known to be wrongful. However, the court in Fitzgerald dispelled any flicker of hope the insurance industry might have had that the Montana Supreme Court would indeed attempt to find fact situations in which it would be proper to prohibit coverage and, thus, "untie the knot, painstaking as the process may be."

In Fitzgerald, the court appeared to settle the issue by favoring coverage in all cases. There, the insurance company attempted to argue that the court should exercise caution and not allow coverage for punitive damages in all cases. However, the court made little of the argument that public policy would be violated if a drunk driver was able to shift the burden of his negligence to the insurance company by stating: "Because [First Bank] deals in detail with the [public policy] issues raised by appellant [Western Fire] we need not make any further comment.""67

The problems inherent in insurance coverage for punitive damages are indeed, like the Gordian Knot, difficult to unravel. In First Bank and Fitzgerald, the Montana Supreme Court attempted to solve the problems by favoring coverage in all circumstances. Its holdings raise additional difficult issues which will impact Montana. These issues include the rationale behind punitive damages in Montana, the introduction into evidence of insurance coverage, further possibilities of fraudulent claims, and the response of the insurance industry.

65. First Bank, ____ Mont. ___, 679 P.2d at 1222 (emphasis added).
66. Id.
67. Fitzgerald, ____ Mont. ___, 679 P.2d at 792.
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B. Impact

1. Blow to the Theory Behind Punitive Damages

The holdings of First Bank and Fitzgerald dealt a death blow to the theory behind punitive damages in Montana. The Montana Supreme Court has long held that the purposes of punitive damages are punishment and deterrence. Yet, in First Bank, the court announced that many kinds of conduct are never successfully deterred. The court failed to realize that the purpose of punitive damages is not only to deter the wrongdoer but to deter others. Recent studies show that strong sanctions against drunk drivers may have a deterrent effect on alcohol-related deaths and accidents on the highways. Criminal charges, convictions, and fines may not be a complete answer. These sanctions may be some reparation to society, but they may not have maximum deterrent effect on others. Therefore, punitive damages are necessary to provide all possible means of deterring drunk driving. The drunk driver should not be allowed to transfer his punitive damage responsibility. As the Oregon Supreme Court stated:

It may be debatable whether either awards of punitive damages or the imposition of criminal penalties will effectively deter persons from driving after drinking. However, in the absence of a showing of substantial evidence to the contrary, we are not prepared to hold that law enforcement officials and courts, who have a heavy responsibility in this area, are wrong in their present apparent assumption that both criminal penalties and awards of punitive damages may have at least some deterrent effect in dealing with this serious problem.

The rebuttal to this argument is: 1) that a judgment for punitive damages will deter reckless driving even if the insurance company covers punitive damages since increased insurance rates will punish and deter the offending driver; and 2) that the possibility of liability in excess of policy limits will adequately deter. Such deterrence is far less than it would otherwise be if punitive damages could not be covered by insurance. Maximum deterrence should be

69. See Ross, Prevention and Deterrence, ALCOHOL HEALTH AND RESEARCH WORLD 26 (Fall 1982).
the goal. The fact that the drunk driver causes many serious accidents is strong evidence supporting the need for all possible means of deterring drunk driving. Exposing the insured to punitive damage awards is one such means.

The court in First Bank raises further doubts as to the theory behind punitive damages when it concludes that since some individuals may be willing to pay higher premiums for coverage of punitive damages, insurance carriers may be convinced to extend coverage in some situations. Allowing purchase of protection for punitive damages punishes no one. If punitive damages do not deter, and can be insured against, the rationale to support the imposition of them disappears.

2. Allowing the Introduction of Insurance Coverage into Evidence

In First Bank the court considered punishment as "perhaps the only effectively realizable goal of awarding punitive damages." This goal raises questions regarding proof of wealth and allowing the introduction of insurance coverage into evidence.

The Montana Supreme Court and virtually every other jurisdiction recognize that the jury may consider the defendant's

72. See Harrell, 279 Or. 199, 219, 567 P.2d 1013, 1022 (Holman, J., dissenting).
73. First Bank, ___ Mont. ___, 679 P.2d at 1222.
74. Such reasoning prompted the Oregon Supreme Court to offer other alternatives:
   (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.

A unique alternative calls for holding punitive damages insurable and changing the Internal Revenue Code:
(1) Amend section 61 to clearly include in the income of the taxpayer all amounts paid to or on behalf of the taxpayer by an insurer unless otherwise excluded by another provision.
(2) Add to the language of section 162(f) a further clause providing that a deduction be allowed for all amounts characterized by the awarding court or the settlement agreement of the parties as "punitive damages."
(3) Add a new exclusion for all amounts paid to or on behalf of a taxpayer as compensatory damage regardless of whether such damage would have been deductible under existing law had it been paid directly by the taxpayer.

King, The Insurability of Punitive Damages: A New Solution to an Old Dilemma, 16 WAKE FOREST L. REV. 345, 374 (1980).
75. First Bank, ___ Mont. ___, 679 P.2d at 1221.
wealth in fixing the amount of punitive damages. The purpose of admitting evidence of a defendant's net worth is to apprise the jury of the information needed to assess an award which will adequately punish the defendant. On the other hand, the Montana Supreme Court also holds that evidence of liability insurance is generally not admissible and that injection of such evidence, directly, indirectly, by evidence, argument, or remarks, constitutes reversible error.

Since the court considers punishment as the only effectively realizable goal of awarding punitive damages, it logically follows that the court should include the amount of the insurance policy as an asset of the insured and allow it to be introduced into evidence. The jury would then have the information necessary to adequately assess a punitive damage award which would have the effect of punishment. Consequently, although the introduction of insurance into evidence is contrary to present Montana law, it may be necessary to allow such evidence to maintain the rationale behind punitive damage awards.

3. The Possibility of Fraudulent Claims

Another implication arising out of the First Bank and Fitzgerald cases is the further possibility of fraudulent claims. In the recent case of Transamerica Insurance Co. v. Royle the court held that a parent is not immune from suit brought by his unemancipated child. This problem results from the court's holdings in First Bank and Fitzgerald that liability insurance covers punitive damages awards. First Bank, Mont. 679 P.2d at 1223. Fitzgerald, Mont. 679 P.2d at 792. Other courts when faced with this problem have held firmly to their jurisdiction's rules of not allowing the introduction of insurance into evidence but support their reasoning with weak arguments. For example, the Arizona Supreme Court stated:

The plaintiff urges that unless he is allowed to comment on the defendant's insurance coverage, the defendant will be able to mislead the jury with evidence of his impecuniousness when, in fact, he does have "assets" that will pay for punitive damages. We reject the plaintiff's assertion that the insurance policy is an asset of the defendant, which the plaintiff can introduce into evidence. The defendant does not have at his disposal the dollars that the policy represents. Instead, he merely owns a piece of paper that evidences an insurer's promise to pay any punitive damages that result from an assessment of his own financial position.

pated child in cases involving parental negligence in the operation of a motor vehicle. Such negligence subjects the parents to an award of punitive damages. Under Montana’s Mandatory Liability Protection statutes, every owner of a motor vehicle shall “continuously provide insurance against loss resulting from liability imposed by law for bodily injury . . . or damage to property . . . .” Since First Bank and Fitzgerald conclude that the language of such an automobile liability policy covers awards for punitive damages, an unemancipated child could theoretically recover punitive damages from his parents. Transamerica coupled with First Bank and Fitzgerald provides unscrupulous families with ample incentive to recover unjustified awards from insurance companies by bringing fraudulent claims.

4. The Insurance Industry is Unlikely to Respond

The Montana Supreme Court has left it up to the insurance industry to take action if it does not wish to cover punitive damages. The court acknowledged that a likely response of the insurance carriers to the holding of First Bank would be to draft specific exclusions of coverage of punitive damages. Over twenty years have passed since the court in Lazenby held in favor of coverage for punitive damage awards. Yet, today the insurance industry in general has not promulgated policy provisions excluding punitive damages coverage.

Requiring the insurance industry to change its policies would no doubt cause a complete change in premium structures. This would be a large burden on the industry. However, considering the lack of unanimity among the states on the coverage issue, one won-

81. Id. at ----, 656 P.2d at 824. The court’s holding in Transamerica is limited to the negligent operation of a car.
85. The Kansas Supreme Court has professed an ability of the judicial process to discover fraudulent claims in Nocktonick v. Nocktonick, 227 Kan. 758, 768-69, 611 P.2d 135, 142 (1980):

[T]he possibility of collusion exists to a certain extent in any case. Every day we depend on juries and trial judges to sift evidence in order to determine the facts and arrive at proper verdicts. Experience has shown that the courts are quite adequate for this task. In litigation between parent and child, judges and juries would naturally be mindful of the relationship and would be even more on the alert for improper conduct. We further must recognize that, under provisions ordinarily included in an insurance policy, the insurance company has the right to disclaim liability when there is lack of cooperation with the insurance company on the part of the insured.
ders how the companies' risk tables can be projected accurately at the present time. If in fact the companies' premiums have been based on their assumption that the policies do not cover punitive damages, then the companies have been sustaining losses since at least 1923. Although it is true that only in recent years have courts awarded punitive damages in large amounts, the insurance industry is not going to sit idly by and sustain losses which become increasingly larger each year as more jurisdictions impute coverage into their policies. One has to wonder whether premium payers have not been paying for coverage against punitive damages all along.

In 1977 the Insurance Service Office [I.S.O.] introduced a policy endorsement stating: "regardless of any other provisions of this policy, this policy does not apply to punitive or exemplary damages." The insurance industry gave the I.S.O.'s endorsement a mixed reception and many of I.S.O.'s member companies dissented. Consequently, the I.S.O. announced its withdrawal of the endorsement in 1978. The I.S.O. action seems to have been the last industry effort to specifically exclude punitive damages. However, in 1982 the I.S.O. circulated a Commercial General Liability Policy draft which narrowed the "shall pay all sums" language and included a detailed definition of damages.

Although the definition made no specific reference to punitive damages, the comments accompanying the draft specifically stated that the definition of damages "is non-restrictive, i.e., it does not

88. GHIARDI & KIRCHER, supra note 12, § 7.10 at 28. In March of 1978 when the I.S.O. announced its withdrawal of the endorsement, thirty-three jurisdictions had approved it, eight had disapproved it, and the issue was pending in nine jurisdictions. Id.
89. The draft provided:

Coverage A—Definition of Damages

"Damages" include damages for (1) care, loss of services or consortium or death resulting at any time from bodily injury and, (2) loss of use of tangible property that has been physically injured.

"Damages" do not include:
(a) fines or penalties;
(b) obligations of an insured under a workers' compensation, disability benefits or unemployment compensation law, or under a law of like kind;
(c) loss, cost or expense to which the Business Risk Exclusion, as set forth in Section 12, applies; or
(d) damages because of covered personal injury or covered advertising injury which the insured is liable to pay solely by reason of the assumption of liability in a contract or agreement.

Schloerb & Chapin, Punitive Damages: Touring the U.S. for Some Answers, RISK MANAGEMENT 34 (December 1982).
embrace all elements of 'damages' which are payable under the policy.” Thus, whether the draft covered punitive damages appeared to revolve around each state's position on the public policy issue.

In First Bank, the court left the final decision regarding coverage to the insurance industry. If the insurance industry wished to exclude coverage from punitive damages in all cases, the court urged it to do so expressly in the policy language. If the response of the insurance industry in the past twenty years is any indication, industry-wide exclusions of punitive damage awards are unlikely. Thus, Montanans will see few new exclusions in their liability insurance policies and can presume that their premiums cover them against punitive damage awards.

VI. Conclusion

The Montana Supreme Court indicated its approval of coverage for punitive damages in liability insurance policies on both public policy and contractual grounds. The court relied on the expectation of the insured and urged the insurance industry to use policy language expressly excluding punitive damages. The court expressed its opinion that punitive damages only minimally deter wrongful conduct. As a result, it cast serious doubt upon the theory behind punitive damages in Montana. Individual Montanans can rest assured that their liability insurance policies cover them against punitive damage awards. However, litigation concerning fraudulent claims and the introduction of insurance coverage into evidence can be anticipated.

90. Id.
91. First Bank, Mont. 679 P.2d at 1223.