Punitive Damages Insurance: Why Some Courts Take the Smart out of "Smart Money"

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CASE COMMENT

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I. INTRODUCTION

It is surprising that, while many courts are loathe to abolish the doctrine of punitive damages for fear of violating legislative prerogative, they have no perceptible qualms about emasculating the doctrine through the allowance of punitive damages insurance. To the

1. Harrell v. Travelers Indem. Co., 279 Or. 199, 216, 567 P.2d 1013, 1021 (1977) (Limiting or abolishing punitive damages “might more appropriately be considered by the legislature, rather than by the courts.”); Templeton v. Graves, 59 Wis. 95, 98, 17 N.W. 672, 672 (1883) (citing Bass v. Chicago & N.W. Ry., 42 Wis. 654 (1877), for the proposition that abolition of punitive damages is for the legislature alone); Ghiardi, Punitive Damages in Wisconsin, 60 MARQ. L. REV. 753, 773 (1977) (citing Bass); Comment, Insurance Coverage of Punitive Damages in Montana, 46 MONT. L. REV. 77, 90 & n.74 (1985); see also Taylor v. Superior Ct., 24 Cal. 3d 890, 910-11, 598 P.2d 854, 866, 157 Cal. Rptr. 693, 706 (1979) (Clark, J., dissenting) (arguing that changes in public policy are for the legislature); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 281-82, 294 N.W.2d 437, 449 (1980) (citing cases in which the Supreme Court of Wisconsin expressly refused to abolish the doctrine of punitive damages); Note, Insurer's Liability for Aggravated Misconduct—Punitive Damages, 1 WILLAMETTE L.J. 640, 653 (1961) (asserting that only legislative action can effectively resolve the insurability dilemma); cf. MONT. CODE ANN. § 27-1-221(6)(b) (1985) (limiting punitive awards to the greater of $25,000 or one percent of the defendant's net worth for cases in which the defendant’s wrongful conduct does not rise to actual fraud or actual malice). But see Harrell, 279 Or. at 225-26, 567 P.2d at 1026 (Holman, J., dissenting) (noting that the majority “paid lip service” to eliminating the doctrine, which the court had created and therefore could eliminate as well); cf. Tuttle v. Raymond, 494 A.2d 1353, 1361-63 (Me. 1985) (raising the burden of persuasion necessary for an award to one of “clear and convincing evidence” and raising the standard of conduct necessary to one of “malice,” though refusing to abolish punitive damages); Wangen, 97 Wis. at 300-01, 294 N.W.2d at 458 (raising the burden of persuasion, though refusing to abolish the doctrine in products liability cases).
extent that one accepts the proposition that punitive damages effectively punish and deter undesirable conduct, he should necessarily conclude that allowing punitive damages insurance negates these societal benefits. Therefore, insurance of punitive damages contravenes public policy. Paradoxically, a growing majority of courts, by allowing insurability, has ignored or denied the plain logic of this conclusion. The trend toward insurability has manifested itself most recently in \textit{Brown v. Maxey}, a Supreme Court of Wisconsin decision that yields valuable insight into the foibles and tensions underlying the doctrine itself. This comment proposes that it is not the persuasiveness of the pro-coverage arguments which has impelled these courts to allow insurability. Rather, this phenomenon is a function either of a fundamental judicial skepticism or even hostility to the doctrine in its entirety, or of a suspicion that courts are incapable of defining and applying a standard of conduct for the doctrine which will not be unfairly overbroad.

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2. See infra notes 43-44, 92, 178 and accompanying text.

For the purposes of this comment, the word "insurability" refers to the insuring of punitive damages liability; a "pro-coverage" court is one that allows insurability, and an "anti-coverage" court is one that does not; the phrase "the doctrine" refers to the doctrine of punitive damages; finally, "standard" or "standard of conduct" refers to conduct that demonstrates the specified threshold level of culpability necessary to sustain a punitive damages award.

The essence of the anti-coverage position is that the doctrine primarily benefits society by punishing and deterring those who engage in undesirable conduct. See infra notes 43, 92, 178 and accompanying text. The argument is that when the law permits a defendant to divert his financial penalty obligation to an insurer, in effect, the insurance shields the culpable party from the penalty. Consequently, the doctrine neither punishes the defendant, nor is it likely to deter future misbehavior. Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962). See infra notes 85-101 and accompanying text.

5. 124 Wis. 2d 426, 369 N.W.2d 677 (1985).
6. The pro-coverage argument denies that insurability significantly reduces any of the doctrine's societal benefits. See infra notes 102-123.
7. For a detailed analysis of the most common criticisms of the doctrine, see infra notes 40-41 and accompanying text.
8. For an explanation of the usage of this term within this comment, see supra note 3.
9. See infra notes 47-75, 119-120 and accompanying text. See also Harrell v. Travelers Indem. Co., 279 Or. 199, 209-10, 567 P.2d 1013, 1018 (1977) (allowing insurability and questioning the wisdom and efficiency of applying the doctrine to relatively nonculpable conduct arising in the ordinary course of "well-established" businesses); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 647, 383 S.W.2d 1, 5 (1964) (allowing insurability and questioning the deterrent value of punitive damages in the drunk-driving context); Ellis,
Despite their opposition to the doctrine, these courts perceive themselves as unable either to do away with the doctrine entirely, or to improve significantly the objectionable incidents of the doctrine. Courts apparently do not regard judicial abolition as a viable alternative, but rather concede that abolition of the doctrine is exclusively within legislative prerogative. Over a century of piecemeal legislative responses has frustrated critics favoring this solution. Consequent fairness and efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1 passim (1982) (Volume 56, number 1 of this periodical presents a symposium on punitive damages.) But cf. Harrell v. Travelers Indem. Co., 279 Or. 199, 223, 567 P.2d 1013, 1025 (1977) (Holman, J., dissenting) (quoting Harrell v. Ames, 265 Or. 183, 190-91, 508 P.2d 211, 215 (1973)). In Harrell v. Ames, the Supreme Court of Oregon approved of the doctrine as a deterrent of a particular type of reckless conduct—drunk-driving. In the second supreme court case arising out of the same automobile accident, Harrell v. Travelers Indem. Co., the court allowed Harrell to sue Ames's insurer for payment of Ames's punitive damages liability. The court indicated that the doctrine's overbreadth was a key factor in its pro-coverage decision. See Harrell, 279 Or. 199, 208-12, 218 n.22, 567 P.2d 1013, 1017-19, 1022 n.22 (1977).

10. See supra note 1.

11. Although the Supreme Court of Wisconsin regretted the creation of the doctrine as early as 1877, it deferred to the legislature for its repeal. Bass v. Chicago & N.W. Ry. Co., 42 Wis. 654, 672-73 (1877) (citing McWilliams v. Bragg, 3 Wis. 424 (1854), as the origin of common law punitive damages in Wisconsin); cf. Cays v. McDaniel, 204 Or. 449, 456, 283 P.2d 658, 661-62 (1955) (holding that intentional misrepresentation of used automobile as new did not merit an award of punitive damages, which are "not a favorite of the law"). But cf. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 282, 294 N.W.2d 437, 449 (1980) (stating that the Supreme Court of Wisconsin "has extended the doctrine" (emphasis added)); infra note 78 and accompanying text.

12. With few exceptions, existing punitive damages legislation simply fails to assuage judicial misgivings about the doctrine's overbreadth. There exists but scant legislation comprehensively limiting the doctrine. To the contrary, most punitive damages legislation creates or identifies statutory causes of action for specific paradigms of misconduct, thereby lifting such causes from the "disfavored" epithet of the common law doctrine. See infra note 11. Although statutes creating rights to double or treble damages arguably are somewhat restrictive, these statutes generally lack a state-of-mind requirement for recovery and are, therefore, somewhat expansive at the same time. See infra notes 150-52 and accompanying text.

For representative state legislation creating or identifying statutory causes of action for punitive or multiple damages, see CAL. CIV. CODE § 987 (West Supp. 1986) (allowing punitive damages for the destruction or alteration of works of art); KAN. STAT. ANN. § 83-140 (1984) (awarding treble damages for value of grain wrongfully and knowingly withheld from grain purchaser); KY. REV. STAT. ANN. § 364.130 (Bobbs-Merrill 1984) (allowing punitive damages for entering property and cutting down timber); ILL. ANN. STAT. ch. 48, § 1012 (Smith-Hurd Supp. 1985) (allowing punitive damages in action for underpayment of wages); OKLA. STAT. ANN. tit. 23, § 68 (1955) (allowing punitive damages for willful or grossly negligent injury to animals).

Other statutes set forth a standard of conduct that triggers a right to punitive damages on the part of an injured party. These often exclude actions for breach of contract. See GA. CODE ANN. § 105-2002 [51-12-5] (Harrison Supp. 1982) (codifying the common law standard as "aggravating circumstances, in either the act or the intention," and allowing the jury to award additional damages for purposes of deterrence, or of compensation for "wounded feelings"); id. § 105-2003 [51-12-6] (leaving assessment of intangible injuries entirely to the jury's discretion, "unless the court suspects bias or prejudice from its excess or its
quently, the sole direct option remaining within the dominion of a critical judiciary is to redefine and limit the standard of conduct so as to prevent the unfair or inefficient imposition of punitive awards upon undeserving defendants.

Critical jurists also may perceive themselves as doomed to failure because imprecise and overbroad application is a necessary concomitant of any linguistic standard; attempts to eliminate all traces of unfairness by narrowly redefining the standard are quixotic at best.\footnote{In Smith v. Wade, the Supreme Court candidly articulated the common denominator inadequacy \textquotedblright; id. § 20-1405 [13-6-10] (Harrison Supp. 1984) (disallowing exemplary damages in contract, unless otherwise provided by law); Minn. Stat. Ann. § 549.20(1) (West Supp. 1986) (establishing \textquotedblleft clear and convincing evidence\textquotedblright\ as the burden of persuasion and \textquotedblleft wilfull indifference to the rights or safety of others\textquotedblright\ as the standard triggering a punitive award); Id. § 549.20(3) (setting forth factors for measuring size of a punitive award); Nev. Rev. Stat. § 42.010 (1981) (prohibiting punitive damages in contract, but allowing them for \textquotedblleft oppression, fraud or malice, express or implied,\textquotedblright\ or for drunk-driving resulting in injury for purposes of punishment and deterrence); N.D. Cent. Code § 32-03-07 (Supp. 1985) (allowing jury to award punitive damages, except in contract, to punish and deter \textquotedblleft oppression, fraud, or malice, actual or presumed\textquotedblright\); S.D. Codified Laws Ann. § 21-3-2 (1979) (same, and additionally, allowing punitive damages for \textquotedblleft wrongful mistreatment of animals\textquotedblright\); see also Note, Punitive Damages in California Under the Malice Standard: Defining Conscious Disregard, 57 S. Cal. L. Rev. 1065, 1065-67 (1984) (exploring the impact of the amended definition of \textquotedblleft malice\textquotedblright\ on the doctrine); cf. Cal. Civ. Code § 3294 (West Supp. 1986) (broadening the statutory definition of \textquotedblleft malice\textquotedblright\ necessary for a punitive award to include \textquotedblleft conscious disregard of the rights and safety of others,\textquotedblright\ and thereby expanding the doctrine's scope).}

On the other hand, some restrictive punitive damages legislation does exist. The Delaware legislature has attempted to limit the doctrine in the context of medical malpractice by disallowing punitive damages for unforeseen injury in the absence of actual malice. See Del. Code Ann. tit. 18, § 6855 (Supp. 1984). Some statutes disallow punitive damages for specific types of conduct. See, e.g., Ill. Ann. Stat. ch. 40, § 1953 (Smith-Hurd 1980) (disallowing punitive damages for criminal conversation, that is, adultery). The Indiana legislature has raised the burden of persuasion needed to sustain a punitive award to one of \textquotedblleft clear and convincing evidence\textquotedblright. See Ind. Code Ann. § 34-4-34-2 (Burns Supp. 1985).

Another restrictive approach is to establish a monetary maximum, or \textquotedblleft cap\textquotedblright\ for punitive awards, which in effect limits the jury's discretion. See Fla. Stat. § 713.31 (1980) (limiting punitive damages available for fraudulent filing of mechanics lien to the difference between the amount fraudulently claimed and that legitimately due); Mont. Code Ann. § 27-1-221(6)(b) (1985) (limiting punitive awards to the greater of $25,000 or one percent of the defendant's net worth for cases in which the defendant's culpability falls short of actual fraud or actual malice); Wash. Rev. Code Ann. § 9A.36.080 (Supp. 1986) (allowing a civil cause of action for malicious harrassment, including punitive damages \textquotedblleft of up to ten thousand dollars\textquotedblright\).


See also K. Redden, Punitive Damages § 5.2 (1980 & Supp. 1985) (L. Schlueter coauthored supplement) (jurisdictional analysis of state punitive damages law, including statutory material).
Even if it were possible to overcome this difficulty at the definitional level, the fact remains that the ultimate application of any punitive damages standard often devolves upon the jury. Critical jurists often voice the concern that the infamous "passion and prejudice" of the jury leads to unfair and unpredictable results in the doctrine's application; thus, the jury's broad discretion substantially exacerbates judicial misgivings about the doctrine.

The ostensible lack of a direct remedy for the perceived shortcomings of the doctrine has prompted courts to resort to an indirect solution—insurability. At first glance, insurability appears attractive: it removes the doctrine's punch without violating legislative prerogative; it eases the impact of overbroad application; and it is ecumenical in its tendency to placate critics advocating complete abolition of the doctrine as well as those insisting merely on its limitation.

Under closer scrutiny, however, the unsoundness of insurability
comes into focus. It does more than merely counteract what critics view as the doctrine's most objectionable shortcoming, overbreadth: insurability frustrates the doctrine's primary benefits while retaining and even exacerbating certain of the doctrine's shortcomings. That a pro-coverage advocate defends the wisdom of this trade-off is evidence that he has determined that what he considers to be the primary shortcomings of the doctrine outweigh its primary benefits. Under analysis, the essence of such an evaluation is but an argument for abolition of the doctrine. Because courts perceive themselves to be at the mercy of legislatures which tend to ignore the doctrine, they are forced to turn to an indirect and inexpedient means of abolition which is fraught with drawbacks.

To understand better how the doctrine's infirmities culminate in insurability, it is instructive to look to the evolution of punitive damages in Wisconsin. The authors of a well-reasoned 1978 article

20. Insurability removes the primary benefits of the doctrine—punishment and deterrence. Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962). For a detailed presentation of this anti-coverage argument, see infra notes 85-101 and accompanying text. Additionally, pro-coverage advocates may argue that other benefits of the doctrine remain despite insurability. They argue that the doctrine complements an often insufficient compensatory damages award, and thus serves a quasi-compensatory function; it encourages reluctant plaintiffs to prosecute those crimes that the overburdened criminal justice system simply cannot (often referred to as the "private attorney general" theory); finally, it serves to discourage private (and often violent) retribution by providing plaintiffs with an enhanced sense of vindication. See infra notes 44-45, 150-53 and accompanying text. For a general analysis of the pro-coverage position, see infra notes 102-139 and accompanying text.

However valid these alternate rationales may be, the fact remains that insurability frustrates what most jurisdictions consider the doctrine's primary purposes—punishment and deterrence. See infra notes 43, 92, 178 and accompanying text. But cf. infra note 45 and accompanying text (arguing that insurability is reasonable when implementing the doctrine primarily for rationales other than punishment and deterrence).

Moreover, to the extent that the doctrine provides unjustifiable windfalls, insurability magnifies this negative aspect by assuring an ever-present "deep pocket" for the plaintiff. Although this may encourage legitimate claims, it invites illegitimate claims as well. Insurers will pass the cost of punitive damages judgments back to the public by means of increased premiums. Thus, insurability not only relieves the actual wrongdoer of his punishment, but it may shift the punishment to society as a whole. Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 440-41 (5th Cir. 1962). See infra text accompanying notes 99-100. Moreover, insurability better enables a potential tortfeasor to appraise the costs of his conduct in advance and thus facilitates a "cost-benefit" analysis whereby the tortfeasor may determine that misconduct is a financially sound course of action. Therefore, insurability may have the unfortunate effect of encouraging undesirable behavior. See infra notes 200-02 and accompanying text.


22. See supra note 11. For a sampling of legislative treatment of the doctrine, see supra note 12 and accompanying text.

23. For a detailed description and history of the doctrine in Wisconsin, see K. REDDEN, supra note 12, at § 5.2(A)(49); Burrell & Young, supra note 3, at 4-7; Ghiardi, supra note 1, at 753; Ghiardi & Koehn, Punitive Damages in Strict Liability Cases, 61 MARQ. L. REV. 245, 245-49 (1977-1978); Hartman, Exemplary Damages a Deformity in Our Law, 2 MARQ. L. REV. 185, 185.
predicted that Wisconsin courts would not allow insurability\textsuperscript{25} based upon the authors' analysis of Wisconsin's punitive damages law and upon their perceptive distillation of the insurability controversy. Because their prediction recently proved incorrect in \textit{Brown v. Maxey},\textsuperscript{26} their analysis becomes of special interest. Their prediction began with the axiom that Wisconsin sanctions punitive damages primarily to punish and deter undesirable conduct.\textsuperscript{27} Next, the authors reasoned that insurability would defeat the punitive and deterrent benefits of the doctrine and, therefore, would be contrary to public policy.\textsuperscript{28} The authors observed that, despite these public policy concerns, courts tend to allow insurability when they deem the standard to be too broad; that is, the "over-availability" of punitive damages is the pivotal consideration motivating pro-coverage courts.\textsuperscript{29} The authors confidently proposed that the Wisconsin standard was an extremely narrow one, namely "intent," and, therefore, precluded assessment of punitive awards against "undeserving" defendants.\textsuperscript{30} Consequently, they predicted that, when the issue arose, Wisconsin courts would perceive no need to allow insurability.\textsuperscript{31}

Significantly, however, the authors failed to make an accurate prediction \textit{not} because of defective reasoning, but rather because they failed to anticipate the effects of the Wisconsin Supreme Court's fickle treatment of the doctrine. Before \textit{Brown}, one reasonably could have inferred that the then current case law prescribed "intent" as the standard,\textsuperscript{32} although it would have been impossible to articulate the Wis-
consin standard with comfortable certainty.\textsuperscript{33} In fact, the supreme court's undeniably inconsistent treatment of the doctrine reveals that the court itself was unable to fix the standard.\textsuperscript{34} The only possible consistent interpretation of the supreme court's standard is that sometimes—\textit{but not always}—punitive damages should be available for conduct less culpable than intentional misconduct.\textsuperscript{35} Before deciding the insurability issue in \textit{Brown}, the court had to harmonize its inconsistent precedent\textsuperscript{36} and commit itself to a definitive standard—either intent, which would be at times too narrow, or "less-than-intent," which would be at times too broad.\textsuperscript{37} Because the court opted for the latter, the consequent possibility of unfair application became a material concern to the court, and insurance became the solution. Had the authors applied their test to \textit{this} scenario, they might have correctly predicted the result in \textit{Brown}, although they certainly would not have sanctioned it.\textsuperscript{38} The Supreme Court of Wisconsin resorted to insura-
bility to temper the doctrine's overbreadth although it had arguably better alternatives at its disposal. This comment examines the tensions underlying the doctrine of punitive damages and demonstrates that it is these tensions which ultimately prompt courts to make the pro-coverage choice.

II. PERSPECTIVE: PUNITIVE DAMAGES

A basic introduction to the doctrine of punitive damages is a prerequisite to a full understanding of the insurability issue. From its inception, the doctrine has been the subject of controversy. Jurists have differed as to the doctrine's propriety, scope, and even its purpose. Because of this longstanding controversy, the doctrine's status is ill-defined and uncertain in some jurisdictions.

39. A detailed history and review of punitive damages is beyond the scope of this note. For authorities presenting theoretical and historical overviews of the doctrine, see Smith v. Wade, 461 U.S. 30 (1983); Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980); J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE (1984); C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 77-85 (1935); K. REDDEN, supra note 23, at §§ 2.1-2.9; id. at 45-46 (for a bibliography of legal periodicals on the subject); Belli, Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society, 49 UMKC L. REV. 1 (1980); Ellis, supra note 9, at 3-20; Long, Punitive Damages: An Unsettled Doctrine, 25 DRAKE L. REV. 870, 890-92 (1975-1976) (presenting an extensive bibliography on the doctrine); Mallor & Roberts, supra note 15, at 642-50; Morris, Punitive Damages in Tort Cases, 44 HARV. L. REV. 1173 (1931); Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517 (1957); see also supra note 23 (listing authorities on the doctrine within Wisconsin).


41. Once a court accepts the propriety of punitive damages as a doctrine, the next inquiry necessarily involves determining when such awards are proper. This leads to two areas of dispute: (a) denomiating the particular "type" of conduct for which an award of punitive damages is proper, that is, the "standard," and, (b) deciding whether an existing denomination actually encompasses, or should encompass, a particular example of conduct such that punitive damages would be proper.
Notwithstanding this debate, the vast majority of American jurisdictions implement the doctrine primarily for the purposes of punishment and deterrence. A few jurisdictions view the doctrine as having additional or different rationales, such as compensation or a “spur to litigation.” The doctrine’s asserted purpose bears directly upon the insurability issue: courts that do not assert punishment and deterrence as the bases of the doctrine are less inclined to force a defendant to pay a punitive award out of his own pocket. For these courts, it is crucial that the plaintiff receive the award, whether from the defendant, or from the defendant’s insurer.

42. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (“Punitive damages are . . . 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.”); see Smith v. Wade, 461 U.S. 30, 46-47 (1983) (citing with approval RESTATEMENT (SECOND) OF TORTS § 908 (1979)); id. at 54 (Rehnquist, J., dissenting); Brown v. Maxey, 124 Wis. 2d 426, 433, 369 N.W.2d 677, 681 (1985); Ellis, supra note 9, at 4-10; Morris, supra note 39, at 1185-88; Note, supra note 39, at 522-25. But see Harris v. County of Racine, 512 F. Supp. 1273, 1282-83 (E.D. Wis. 1981) (contending that despite Wisconsin’s traditional view of punitive damages, civil rights actions impart a compensatory function to the doctrine).

43. A few jurisdictions treat punitive damages as being compensatory in nature: Connecticut, Iowa, Michigan, and New Hampshire. In these jurisdictions, the doctrine functions to compensate plaintiffs either for intangible injuries for which traditional causes of action provide insufficient redress, or for attorneys fees and other expenses of litigation. See Tedesco v. Maryland Casualty Co., 127 Conn. 533, 18 A.2d 357 (1941); Brause v. Brause, 190 Iowa 329, 177 N.W. 65 (1920); Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922); Fay v. Parker, 53 N.H. 343, 382 (1873); Note, supra note 39, at 520-21 & n.32 (1956-1957); see also GA. CODE ANN. § 105-2002 [51-12-5] (Harrison 1984) (allowing the jury to award additional damages for purposes of deterrence, or of compensation for “wounded” feelings).

Courts have set forth two additional rationales for punitive damages: (a) revenge (Gostowski v. Roman Catholic Church of the Sacred Hearts, 262 N.Y. 320, 324-25, 186 N.E. 798, 800 (1933)) and (b) incentive for plaintiffs to bring actions to justice which promise little in way of compensatory damages (the “private attorney-general” or the spur-to-litigation function) (Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co., 95 Idaho 501, 511 P.2d 783, 791 (1973) (Donaldson, C.J., concurring); Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497 (1961); Kink v. Combs, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965)).

44. Jurisdictions which view punitive awards as wholly or partly compensatory will tend to allow insurability more readily than jurisdictions which take a traditional view. “The rationale of compensatory damages is not so much a policy that the responsible party should pay; it is more a policy that the wholly innocent party should not pay. Insurance against compensatory liability therefore does not frustrate the reason for imposing the liability.” Northwestern Nat’l Casualty Co. v. McNulty, 307 F.2d 432, 438 (5th Cir. 1962). The court distinguished several cases allowing insurance on the ground that punitive damages serve a compensatory function for the particular jurisdictions with respect to the particular cause of action. Id. at 438-39. See also Wojcik v. Northern Package Corp., 310 N.W.2d 675 (Minn. 1981) (punitive damages distinguished from multiple statutory damages on ground that the latter are awarded for less-culpable conduct than are the former, and have a rationale beyond punishment and deterrence; therefore, public policy prohibits insurance only of the former); Cieslewicz v. Mutual Serv. Casualty Ins. Co., 84 Wis. 2d 91, 267 N.W.2d 595 (1978) (same); Burrell & Young, supra note 3, at 33; cf. Fagot v. Ciravola, 445 F. Supp. 342 (E.D. La. 1978) (allowing insurability because of compensatory aspect of punitive damages in § 1983 litigation and noting that Louisiana does not approve of civil damages for a purely punitive purpose);
The scope of the doctrine has had an even more profound impact on the insurability analysis. As a predicate for a punitive damages award, courts insist that a defendant possess a certain minimum standard of culpable conduct. The predicate has been anything but standard. Courts have fostered confusion by adopting an overgenerous assortment of incongruous standards demarcating the requisite conduct. Further, even when jurists concur as to terminology, they often diverge as to the quantum of culpability which the term contemplates. Because of this incongruity, there can be no unanimity.


The need to treat varying “types” of conduct differently generates a search for appropriate terminology. This confounds matters: “The courts are constantly confused and frustrated by the over-generous employment of adjectives in describing wrongful conduct, and the difficulty becomes well-nigh insurmountable when the attempt must be made to draw the line which marks the boundaries of different kinds of liability.” Harrell v. Travelers Indem. Co., 279 Or. 199, 212 n.14, 567 P.2d 1013, 1019 n.14 (1977) (quoting Cook v. Kinzua Pine Mills Co., 207 Or. 34, 58, 293 P.2d 717, 728 (1956)); see also Ellis, supra note 9, at 52-53; Owen, Punitive Damages in Products Liability Litigation, 74 MICH. L. REV. 1257, 1283 n.135 (1976); Note, Those Weasel Words—“Wilful and Wanton,” 92 U. PA. L. REV. 431 (1944). For ample testimony as to the chaotic state of predicate conduct terminology, see Smith v. Wade, 461 U.S. 30 (1983).

46. Writing for the Supreme Court in Steamboat New World v. King, Justice Curtis recognized the inherent difficulty in defining and applying classifications of culpability:

The theory that there are three degrees of negligence, described by the terms light, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable to distinguish them. Their signification necessarily varies according to circumstances to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation. If the law furnishes no definition of the terms . . . which can be applied in practice, but leaves [such determinations] to the jury . . . , it would seem that imperfect and confessedly unsuccessful [attempted definitions] . . . had better be abandoned.
among courts in their selection of a single standard; some degree of disapproval is unavoidable. Even when judges accept the doctrine in principle, they often question the fairness and wisdom of its widening application.\textsuperscript{47} The inconsistent and arguably overbroad application of the doctrine may be the key to untying the "Gordian Knot"\textsuperscript{48} which the insurability issue presents: courts that allow insurability have restricted indirectly the doctrine's overbreadth, thus obviating the need to abrogate entirely or to limit explicitly this longstanding doctrine's triggering standard. Untying this "knot," then, demands an examination of the ill-fated search for the ideal punitive damages standard.\textsuperscript{49}


What the law giveth, however, the law taketh away. This broadened scope has elicited responses limiting the applicability or strength of the doctrine, such as insurability and stricter burdens of proof for awards. See Tuttle v. Raymond, 494 A.2d 1353 (Me. 1983); Harrell v. Travelers Indem. Co., 279 Or. 199, 216-17, 567 P.2d 1013, 1021 (1979); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 299, 294 N.W.2d 437, 457 (1980).

48. A commentator defined "Gordian knot":
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.


49. See supra note 13 and accompanying text.

In order to conduct a meaningful inquiry as to whether insurability contravenes public
Such an ideal standard cannot exist. The problem arises from the attempt to impose concrete classifications upon something as abstract as culpability: it seems more equitable to impose punitive damages for conduct because it satisfies a “wanton and willful” standard, for example, than simply because it seems “intuitively wrong.” It offends one’s sense of rational justice to acknowledge reliance on so subjective a standard. Nevertheless, attempts to measure culpability necessarily rest on an examination of the defendant’s subjective state of mind. It is out of devotion to objectivity that courts attempt to stratify states of mind into discrete levels of culpability.

Insistence upon discrete objective standards may be unrealistic and impracticable; the distinctions often dissolve upon application. The Second Restatement of Torts divides culpable states of mind into three strata: intent, recklessness, and negligence. Each of these

50. Tuttle v. Raymond, 494 A.2d 1353, 1360 (Me. 1985). Otherwise, there would be no public policy for insurance to contravene in the first place.


52. As stated previously, courts have been overgenerous in the provision of applicable terminology: denominations include intent (actual and constructive), malice (actual and implied), recklessness, wanton/willfulness, insult, oppression, contumely, conscious indifference—the list continues. For purposes of simplicity, this discussion will focus on the “three-tiered” Restatement approach to culpability. See infra notes 54-56.
strata subjects an actor to a different degree of liability. In practice, however, these three standards are not distinct at all, but rather shade into one another to comprise a continuum of culpability. A single act may subject an actor to any of the three levels of liability for the consequences of his act. The determinative factors are the extent of the risk of harm and the actor's knowledge of the extent of the risk.

throughout the Restatement of this Subject to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it.” One must note that “intent” refers only to the consequences of the act: not to the act itself. Id. comment a. An act must be “volitional” for an actor to be “subject to liability.” Id. § 2 comment a (1965).

54. Restatement (Second) of Torts § 500 (1965).

The actor’s conduct is in reckless disregard of the safety of another if he . . . [acts] knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id. Comment f of this section distinguishes intent from recklessness: the former demands knowledge to a “substantial certainty,” while the latter requires the less stringent “strong probability.” Id. comment f. Further, section 8A, defining intent, requires that the actor “believe” that there is substantial certainty of harm, whereas for recklessness the actor need not actually realize the strong probability of harm so long as he has information from which a reasonable person could infer such a probability. Id. §§ 8(A), 12(1), & 500 comment c (1965).

55. Negligence is seemingly more elusive than “intent” or “recklessness”; accordingly, numerous Restatement (Second) provisions apply. For the purposes of this discussion, it is sufficient to distinguish “negligence” from the next-higher degree of culpability, “recklessness.” Section 500 of the Restatement (Second) implies that, although both involve conduct which presents an “unreasonable risk” of harm to another, recklessness entails an unreasonable risk that reaches a “strong probability” of harm, whereas negligence encompasses an unreasonable risk of less than a strong probability of harm. See Restatement (Second) of Torts § 282 comment e (1965); supra note 34.

It is also noteworthy that for negligence a tortfeasor is held, at minimum, to the risk of harm that a reasonable person would have perceived under the circumstances (§§ 289-290) in determining whether the conduct was negligent in presenting an “unreasonable” risk (§§ 291-296). In contrast, recklessness involves, at minimum, a subjective inquiry as to the actor’s having information (reason to know) from which a reasonable person would realize the strong probability of harm. Id. § 500 comment b (1965).

56. The Restatement (Second) provides in part:

Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than [a] substantial certainty, the actor’s conduct loses the character of intent, and becomes mere recklessness, as defined in § 500. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282. All three have their important place in the law of torts, but the liability attached to them will differ.

Id. § 8A comment b (1965).

57. In recklessness, constructive knowledge arguably may satisfy the knowledge requirement; that is, a jury also may find an actor reckless if he had “reason to know of facts which would lead a reasonable man to realize” the extent of the risk of unreasonable harm. Id.
Thus, an actor who believes that particular consequences are "substantially certain" to result from his act is held to the highest level of culpability, that of intent, whereas knowledge of a "strong probability" subjects the actor to a lower level of culpability, recklessness. Similarly, as the probability of harm decreases further, the conduct approaches the lowest level of culpability, negligence.

This approach presents difficulty when an actor's state of mind falls into a "gray area" of culpability. As an illustration, suppose that an actor is driving briskly along a narrow road through a wooded area. He admits that he knew that he was approaching a bend in the road, and that an elementary school was located along the bend; no other homes or establishments are in the vicinity. Nevertheless, as he rounds the bend, he strikes a child whom he is unable to see standing at the roadside. In order to assess the probability or risk that harm would result from this conduct, it is essential to consider the time element. If the act occurred at 3:00 p.m., a jury could readily find that the actor was substantially certain that children would be near the roadside and in his path. Thus, a jury might hold the actor to the highest level of culpability—intent. An analysis of the same events, but set at 3:05, would probably point to the same conclusion; however, as the time frame continues to shift, the likelihood of the child's presence will lessen. Eventually, perhaps at 8:00 p.m. or at 3:00 a.m., a jury might find that the risk of harm was less than a "strong probability," subjecting the actor to the lowest level of culpability—negligence, or, perhaps, to no culpability at all. Obviously, at numerous, if not at most, points in time, the probability of harm, and thus the actor's culpability, would be subject to dispute: when does an "unreasonable risk" become a "strong probability" of harm? Because culpability does not make a quantum leap from one stratum to the next, a somewhat uncertain inquiry becomes necessary. The potential for interpretational dispute and linguistic gymnastics is enormous,
The opinion of the Supreme Court of the United States in *Smith v. Wade* demonstrates that this confusion exists even at, what some might label, the highest plane of American jurisprudence. The Justices' exhaustive manipulation of authority in support of their respective positions proved neither illuminating nor dispositive of the issue; in fact, the majority ultimately did not rely upon "weight of authority" as a rationale for its holding. After reasserting that the purpose of punitive damages is to punish and deter "outrageous" conduct, Justice Brennan articulated the majority's perception of the real issue:

The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages . . . . To put it differently, society has an interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault.

This language candidly sets forth the underlying inquiry common to all punitive damages standards, irrespective of legal jargon: does this particular conduct "call for" the degree of punishment and deterrence that punitive damages are designed to provide? So stated,
the question implies the answer that punitive damages are appropriate for conduct that deserves them. Essentially, the dispute in Smith concerned the location of the point along the "continuum of culpability" at which punitive damages would be appropriate. The Supreme Court allowed a punitive damages award for a lower threshold of culpability—recklessness—because a five-to-four majority thought it appropriate. Then, by stating that society has an interest in punishing and deterring reckless conduct and proffering this interest as justification for the imposition of punitive damages, the majority contrived an ostensibly objective rule of law as an underpinning for an unavoidably subjective evaluation. The kernel of this analysis is that one often employs objective standards in a circular fashion to justify subjective judgments of culpability. Discomforting though it may be, there are ultimately no objective guidelines; conduct is as culpable as we think it is.


65. One may dispute the extent of this subjectivity by asserting the existence of a qualitative difference between negligence and recklessness, as opposed to a simple difference in degree. Arguably, negligence and recklessness qualitatively differ in two areas: (1) the extent of the risk of harm, and (2) the actor's state of mind:

(1) The extent of the risk of harm: Obviously, assessing the extent of the risk of harm is also subject to a continuum analysis and, therefore, is highly subjective. One may interpret loosely the "strong probability" of harm requirement of recklessness so as to subsume conduct that most would characterize as mere negligence. See Ellis, supra note 9, at 37. If a court is predisposed toward punishing and deterring a certain type of conduct, it may pronounce that the conduct under scrutiny poses the requisite risk of harm and, therefore, rises to the level of recklessness. Thus, the court may convincingly hold out a "qualitatively" distinct standard to legitimize what is essentially a highly subjective and circular analysis. Compare Taylor v. Superior Court, 24 Cal. 3d 890, 899, 598 P.2d 854, 859, 157 Cal. Rptr. 693, 698 (1979) (recognizing the concern that "[d]runken drivers are extremely dangerous people" and asserting the need to punish and deter such conduct) with id. at 907, 598 P.2d at 864, 157 Cal. Rptr. at 704 (Clark, J., dissenting) (protesting that drunk driving does not present a great enough risk of harm so as to amount to recklessness).

The use of "outrageousness" as a standard for intentional infliction of emotional distress is analogous:

Liability has been found only where the conduct has been so outrageous... as to... be regarded as... utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965). See also Smith v. Wade, 461 U.S. 30, 54 (1983) (citing with approval RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) and
Critics of the doctrine may suffer further discomfort because the major portion of this subjective evaluation falls within the dominion of the jury. Once the trial court determines that, as a matter of law, the facts of the case at bar could warrant a punitive award, the court places the punitive damages issue into the jury's hands. The jury's function is twofold: it decides whether the defendant's conduct actually merits punitive liability, and, if so, it assesses an appropriate award in dollar terms. Although the jury traditionally has broad discretion in the performance of these two functions, judges very

contending that punitive damages are appropriate for conduct that calls for punishment and deterrence; Brown v. Maxey, 124 Wis. 2d 426, 431-32, 369 N.W.2d 677, 680-81 (1985) ("outrageous" is an "abbreviation" for the punitive damages standard); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 268, 294 N.W.2d 437, 442 (1980) (same); Givelber, supra note 51, at 52-53 & nn.52-59 (noting that § 46 offers no guidelines: "Outrageous conduct . . . is conduct that is outrageous."); id. at 53 n.54 (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) wherein Justice Stewart issued the following standard for "hard core" pornography: "I know it when I see it . . .").

(2) The actor's state of mind: At first glance, the two standards appear to differ inasmuch as negligence encompasses a duty to investigate, whereas recklessness depends on actual knowledge (either of the risk or of facts that would lead a reasonable person to perceive the risk). See supra note 58 and accompanying text. Nevertheless, this qualitative distinction also falters upon analysis. "Knowledge" is necessarily an elusive element of any cause of action. Two "continuum" problems arise within the knowledge context. First, how much actual knowledge or information would lead a reasonable person to perceive the risk of harm? If we return briefly to the hypothetical described above, see supra p. 115, and we withdraw the assumption as to the driver's specific knowledge of the school's existence, these knowledge issues become critical. Need the driver have seen a sign proclaiming the location of the approaching school in order to support a finding of recklessness? Or, perhaps a jury would find that a mere billboard announcing a nearby restaurant would lead a reasonable person to recognize the risk of harm? If we return briefly to the hypothetical described above, see supra p. 115, and we withdraw the assumption as to the driver's specific knowledge of the school's existence, these knowledge issues become critical. Need the driver have seen a sign proclaiming the location of the school in order to support a finding of recklessness? Or, perhaps a jury would find that a mere billboard announcing a nearby restaurant would lead a reasonable person to recognize the risk of harm? Second, how egregious must a situation be before a factfinder will assume knowledge on the part of the actor? Similarly, what if the driver had passed two school signs, but on both occasions, claims to have been preoccupied with a faulty windshield wiper? Were a jury to refuse this explanation, in effect, the jury would be finding the driver reckless on the basis of constructive knowledge. Would the jury make the same finding if the driver had passed only a single sign? Subjectivity is unavoidable.

66. Soderbeck v. Burnett County, 752 F.2d 285, 291 (7th Cir. 1985); Wackenhut Corp. v. Canty, 359 So. 2d 430, 435-36 (Fla. 1978); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 298, 294 N.W.2d 437, 457 (1980); Topolewski v. Plankinton Packing Co., 143 Wis. 52, 71, 126 N.W.2d 554, 561 (1963); K. REDDEN, supra note 12, § 3.4, at 56 n.73.


68. Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 302, 294 N.W.2d 437, 458-59 (1980).

69. See Reynolds v. Pegler, 123 F. Supp. 36, 38-39 (S.D.N.Y. 1954) (contrasting compensatory damages with punitive damages, which by their nature, do not permit objective assessment and, therefore, necessarily vest the jury with broad discretion as to both allowance and amount), aff'd, 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955); Goddard v. Grand Trunk Ry., 57 Me. 202, 227 (1869) (in assessing punitive damages, reasonable men may differ and, therefore, this discretion is entrusted to the jury to the extent that it does not act dishonestly); Sandifer Oil Co. v. Dew, 220 Miss. 609, 624, 71 So. 2d 752, 755 (1954) (assessing amount of punitive awards is solely within the jury's discretion).
frequently disapprove of the jury's discretion in this context.\(^7\) Courts and commentators express concern that, in light of jurors' lack of expertise, this discretion is excessive, permitting of capricious, undeserved, and unrestrained awards.\(^7\) They argue that an improper assessment or application of the doctrine could easily lead to a defendant's financial ruin.\(^7\) In fact, as Professor Ellis noted, "[t]he combination of vague terminology and jury discretion has several

70. Schwarz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 S. Cal. L. Rev. 133, 146-47 (1982) (judges find jury discretion troublesome in punitive damages context). Professor Schwarz contributed to the preparation of a questionnaire which the California Legislature's Joint Committee on Tort Liability submitted to California's 500 Superior Court judges, almost half of whom responded. The following responses are excerpts from this survey:

Question III-B-1-1.
Do you regard the jury's pain-and-suffering calculations as:
- a. Almost always sensible. 8.4%
- b. Generally sensible. 63.2%
- c. Sometimes sensible, sometimes not. 24.3%
- d. Generally not sensible. 4.2%
- e. Almost always not sensible. 0%

Question III-B-2-2.
Do you regard the jury's assessment of the amount of punitive damages as:
- a. Almost always sensible. 3.2%
- b. Generally sensible. 35.2%
- c. Sometimes sensible, sometimes not. 45.4%
- d. Generally not sensible. 15.7%
- e. Almost always not sensible. 0.5%

\(^{71}\). Id. In response to Question III-B-2-6, 56% of the judges supported divesting the jury of its discretion to determine both "the allowance and amount of punitive damages," and revesting this discretion in the trial court. \(^{Id.}\)

71. See Smith v. Wade, 461 U.S. 30, 88 (1983) (Rehnquist, J., dissenting) (expressing concern that "elastic" recklessness standard gives "free reign to the biases and prejudices of juries"); Moore v. Remington Arms, 100 Ill. App. 3d 1102, 1114-15, 427 N.E.2d 608, 617 (1981) (redefining the standard for punitive awards in products liability context because of the "need for tight judicial control" of awards); Spokane Truck & Dray Co. v. Hoenfer, 2 Wash. 45, 54-55, 25 P. 1072, 1074 (1891) (partially premising its decision to abolish the doctrine on "the unguided judgment of the jury"); C. McCormick, supra note 39, at 276 ("exemplary damages are limited only by the caprice of the jurors"); Brandwen, Punitive-Exemplary Damages in Labor Relations Litigation, 29 U. Chi. L. Rev. 460, 466-69 nn.35-51 (1962) (because juries are unable to apply standards predictably, the jury's broad discretion should be vested in the judge); Ellis, supra note 9, at 38 (the jury is vested with broad discretion to apply standards which it generally does not understand); Walther & Plein, Punitive Damages: A Critical Analysis, 49 Marq. L. Rev. 369 (1965) (noting that prejudice and caprice often motivate jurors in assessing punitive damages); Note, The Publicly Held Corporation and the Insurability of Punitive Damages, 53 Fordham L. Rev. 1383 & n.42 (1985) (citing Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control, 52 Fordham L. Rev. 37, 49-50 (1983) for the proposition that juries lack experience to assess appropriate awards).

ramifications. There is little assurance that those upon whom punitive damages are assessed committed a wrongful act, or that those not assessed therein did not, however ‘wrongful act’ may be defined.”

A court that regards these as valid criticisms may stem such harsh and unjust applications of the doctrine by allowing insurability. This concern appears to be a recurring theme in the insurability decisions and highly persuasive among those courts allowing coverage.

III. Insurability: Public Policy and the Insurance Policy

An insurance policy is a type of contract to which all the general principles and limitations of contract law apply, as well as some principles peculiar to the law of insurance. Thus, in view of the long-
standing public policy favoring freedom of contract, courts endeavor to enforce an insurance policy whenever possible. Courts, however, tend to void insurance contracts that controvert other “overriding” public policies. Courts generally agree that overriding public policy considerations prohibit insurability of criminal fines and damages for intentional harm. Often, however, evaluating and construction of ambiguous terms that insurance policies are distinct from ordinary contracts; it is generally presumed that the insurer, as the party of greater expertise, and as the drafting party, has the opportunity to draft a clear policy so as not to disappoint the reasonable expectations of the insured. Therefore, courts usually construe ambiguous terms in an insurance policy against the insurer. Skyline Harvestore Sys. Inc. v. Centennial Ins. Co., 331 N.W.2d 106, 107 (Iowa 1983); Harrell v. Travelers Indem. Co., 279 Or. 199, 204, 567 P.2d 1013, 1015 (1977); Carroway v. Johnson, 245 S.C. 200, 203-04, 139 S.E.2d 908, 909-10 (1965); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 648, 383 S.W.2d 1, 5 (1964); Hensley v. Erie Ins. Co., 283 S.E.2d 227, 228-29 (W. Va. 1981); Brown v. Maxey, 124 Wis. 2d 426, 442, 369 N.W.2d 677, 685-686 (1985) (quoting from Kremers- Urban Co. v. American Employers Ins. Co., 119 Wis. 2d 722, 735-36, 351 N.W.2d 156, 163 (1984)), cf. Sun Oil Co. v. Vickers Ref. Co., 414 F.2d 383, 390 (8th Cir. 1969) (disfavoring voiding contracts because of presumption of ambiguous terms' legality); Tedesco v. Maryland Casualty Co., 127 Conn. 553, 557, 18 A.2d 357, 359 (1941) (where policy language is open to two reasonable interpretations, one of which contravenes public policy, that interpretation should be avoided); Nicholson v. American Fire & Casualty Ins. Co., 177 So. 2d 52, 54 (Fla. 2d DCA 1965) (regardless of policy language, insured had no right to expect certain coverage in the first place) (cited with approval in American Sur. Co. v. Gold, 375 F.2d 523, 526 (10th Cir. 1966)); Harrell, 279 Or. at 223, 567 P.2d at 1024 (Holman, J., dissenting) (an insured's expectation of “being above the law of punitive damages” cannot be reasonable).


balancing competing public policies produces less-uniform results. Determining whether a contract contradicts public policy often becomes a vague inquiry as to whether or not such contracts work against the public welfare. Thus, a court predisposed to uphold a particular contract may require that the violation of public policy be a “clear one,” and absent such a showing, the court will prefer the competing policy which favors freedom to contract. Without controlling authority, courts can easily manipulate these amorphous public policy arguments to support their conclusions.

It is important to bear this in mind in analyzing how courts treat the issue of punitive damages insurability. If public policy questions depend upon subjective judicial determinations as to public welfare, then deciding whether insuring against punitive damages liability contravenes public policy involves nothing more than a subjective evaluation of the punitive damages doctrine itself. Some courts simply doubt that the doctrine, in its present state, significantly serves public policy. In these courts, the public policy favoring the freedom to contract will prevail. It is from this perspective that the analysis of the insurability issue will proceed.

IV. THE ANTI-COVERAGE POSITION: THE McNulty APPROACH

The leading case supporting the proposition that insurance coverage of punitive damages liability contravenes public policy is Northwestern National Casualty Co. v. McNulty. In McNulty, the victim

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81. See In re Adoption of MM, 652 P.2d 974, 978 (Wyo. 1982).
82. See National Mill Supply Co. v. State ex rel. Morton, 211 Ind. 243, 249, 6 N.E.2d 543, 545-46 (1937); Harrell v. Travelers Indem. Co., 279 Or. 199, 206-07, 567 P.2d 1013, 1016-17 (1977); Wallihan v. Hughes, 196 Va. 117, 124-25, 82 S.E.2d 553, 558 (1954). A court that is uneasy with the application of punitive damages or dubious as to its societal value is unlikely to recognize the existence of a “clear” public policy against insurability.
84. 307 F.2d 432 (5th Cir. 1962). Courts considering the insurability issue frequently adopt or refute the majority's language and arguments from this opinion. For authorities adhering to the anti-coverage position, see Brown v. Chaffee, 612 F.2d 497 (10th Cir. 1979); Caplan v. Johnson, 414 F.2d 615 (5th Cir. 1969); American Sur. Co. v. Gold, 375 F.2d 523 (10th Cir. 1966); American Ins. Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965); Peterson v. Superior Court, 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982); Gleason v. Fryer, 30 Colo. App. 106, 491 P.2d 85 (1971); Tedesco v. Maryland Casualty Co., 127 Conn. 533, 18
of a car accident sued the insurer of the drunken driver who had recklessly injured him. The plaintiff sought to recover the punitive damages award which the state court had previously levied against the insured driver.\(^{85}\) The inquiry was whether public policy would permit such coverage.\(^{86}\) The McNulty court held that to allow the driver to

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85. McNulty, 307 F.2d at 433.
86. Id. at 436-37 & n.11.
use insurance to deflect his punitive liability would frustrate the societal benefits of the doctrine—punishment and deterrence.\footnote{Id. at 435 & n.6 (citing Comment, Factors Affecting Punitive Damages, 7 Miami L.Q. 517 (1953)). The McNulty court also noted that other jurisdictions applied the doctrine for other purposes. Id. at 434 & n.3. Therefore, the court limited its holding to cases in which the doctrine’s primary purposes are punishment and deterrence. Id. at 442.} Public policy demanded that the driver—not the insurer—be directly responsible for such an award.\footnote{Id. at 441-42.} The court avoided any discussion of whether the contract provided such coverage, regarding the terms of the contract as irrelevant: even if the contract contemplated such coverage, it would be void.\footnote{Id. at 434; Harrell v. Travelers Indem. Co., 279 Or. 199, 222, 567 P.2d 1013, 1024 (1977) (Holman, J., dissenting) (citing United States v. White, 401 U.S. 745, 786 (1971), for the proposition that the court’s function is not to determine merely coverage, but also whether the allowance of such coverage is socially desirable); see also American Sur. Co. v. Gold, 375 F.2d 523, 526 (10th Cir. 1966) (ignoring contract analysis because insured “has no right to expect the law to allow him to place responsibility for his reckless and wanton actions on someone else,” and citing Nicholson v. American Fire & Casualty Co., 177 So. 2d 52, 54 (Fla. 2d DCA 1965)).} The court recognized that a strong public policy favored deterring and punishing reckless “slaughter or maiming” on the highways,\footnote{McNulty, 307 F.2d at 441 & n.17; see also Taylor v. Superior Court, 24 Cal. 3d 890, 899, 598 P.2d 854, 859, 157 Cal. Rptr. 693, 698 (1979) (recognizing that “drunken drivers are extremely dangerous people”); Harrell v. Travelers Indem. Co., 279 Or. 199, 219-20, 567 P.2d 1013, 1023 (1977) (Holman, J., dissenting) (citing Harrell v. Ames, 265 Or. 183, 190, 508 P.2d 211, 214-15 (1973), wherein the Supreme Court of Oregon had recognized a strong need to use “all possible means” of deterring drunk-driving—including punitive damages.). But cf. Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 487, 502 P.2d 522, 524 (1972) (no evidence that uninsured awards deter drunk-driving); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 647, 383 S.W.2d 1, 5 (1964) (recognizing the severity of the drunk-driving problem, but doubting whether punitive damages is the solution).} and that the purpose of punitive damages is to punish and deter such undesirable conduct, especially when criminal sanctions appear insufficient for this purpose.\footnote{Kink v. Combs, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965). It is significant that courts interpret the absence of empirical data as to the deterrence of punitive damages in different ways. First, anti-coverage courts claim that criminal sanctions are insufficient and courts must use all available means of deterrence. Second, some pro-coverage courts contend that criminal sanctions appear to be an ineffective deterrent, and therefore, to assert that civil penalties would succeed where criminal sanctions had failed would be pure “speculation.” See, e.g., Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 647, 383 S.W.2d 1, 5 (1964). This argument, however, assumes that criminal fines are inherently more effective as a deterrent force than are potentially large punitive damage awards. Inasmuch as severe criminal penalties for drunk-driving constitute a recent phenomenon, this argument may rest on an unsound assumption. Third, other pro-coverage courts claim that the existence of criminal penalties provides an alternate source of deterrence, thereby justifying the softened impact of the actual award that results from allowing insurance. See, e.g., Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 487, 502 P.2d 522, 524 (1972) (suggesting that criminal penalties, including possible loss of license and compulsory attendance at traffic school provide a sufficient substitute). It is curious that pro-coverage courts espouse both of the latter mutually inconsistent interpretations. Some pro-coverage courts recognize the insufficiency of criminal penalties to deter drunk-driving in a manner similar to anti-coverage courts. See, e.g., Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 487, 502 P.2d 522, 524 (1972).}
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 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.92

The court cited *Tedesco v. Maryland Casualty Co.*93 for the undisputed proposition that insuring against a criminal fine is against legislated public policy.94 The court extended this reasoning by stating that there is “no difference in principle between public policy as established by the legislature and public policy established by the judiciary.”95 Essentially, the court looked favorably upon punitive damages, especially in the context of highway safety; any practice that prevented the doctrine from punishing and deterring “highway slaughter” was detrimental to the general welfare, and therefore, contravened public policy. The court in *McNulty* saw “no point in punishing the insurance company [which had] done no wrong.”96 Insurability also would have the illogical effect of allowing the wrongdoer to satisfy his “smart money”97 obligation without feeling the smart. The court found the following economic argument persuasive: insurability ultimately would punish the public because insurers would shift their loss to the public by means of inflated premiums. Thus, insurability would cause punitive damages to punish the public for whose benefit they had been imposed. Such an absurd result would completely defeat the purpose of awarding the damages,98 while retaining the doctrine’s often-criticized “windfall” aspect.99 Although it set forth additional misgivings100 about insurability, these...
concerns were paramount to the *McNulty* court.

**V. THE PRO-COVERAGE POSITION: THE *Lazenby* APPROACH**

Two years after *McNulty*, the Supreme Court of Tennessee had before it a case with a very similar set of facts. Because this court recognized similar highway safety policy concerns, and agreed as to the purpose of punitive damages, it easily could have adopted the reasoning and result of the *McNulty* court. Because the court refused to do so, *Lazenby v. Universal Underwriters Insurance Co.* became the leading case in the pro-coverage line of authority. The court based its maverick decision on three grounds:

1) it questioned the actual deterrent value of the doctrine, arguing that because criminal sanctions had failed to deter highway accidents, it would be speculative to presume that disallowing punitive damages insurance would be any more effective;

2) it sought to protect the insured's reasonable expectations of coverage from the menace of ambiguous drafting;

3) the court expressed concern that "[t]here is often a fine line between simple negligence and negligence upon which an award for punitive damages can be made."

Because both courts recognized similar policy concerns, the real difference between the orientation of the two courts can be reduced to the respective court's assessment of the punitive damages doctrine and its application. This necessitates "reading between the lines" of a particular decision.

The first concern of the *Lazenby* court is simply illogical as
phrased: *McNulty* explicitly stated that punitive damages were necessary because available criminal sanctions were an inadequate deterrent.\(^{108}\) The *Lazenby* court suggested that it was speculative to hope that punitive damages could deter when criminal sanctions apparently had failed to do so. This puts the *Lazenby* court in agreement with *McNulty* as to the inadequacy of criminal sanctions, and simply calls into doubt the purported punitive and deterrent effect of punitive damages.\(^{109}\) *Lazenby* and its progeny also proposed that additional increments of punishment and deterrence exist which compensate for the dilution of the doctrine: defendants may suffer increased insurance premiums, or may not carry any insurance, or find themselves unable to renew their policies;\(^{110}\) defendants may incur punitive liability in excess of policy limits;\(^{111}\) or, defendants may be subject to criminal sanctions as well as civil.\(^{112}\) Yet, despite the proposed alternative deterrents, none appears to offer any increment of punishment and deterrence over and above that which a compensatory award would provide alone: any of these suggested alternatives is as likely to supplement a large compensatory award as a punitive award.

The court's second concern is somewhat circular. *Lazenby* and its progeny emphasized the existence of a competing public policy, namely, that of protecting the freedom to contract and, with it, the reasonable expectations of contracting parties.\(^{113}\) It is noteworthy

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109. But see *American Sur. Co. v. Gold*, 375 F.2d 523, 527 (10th Cir. 1966) (arguing that although it might be speculative to assume that the doctrine is an effective deterrent, to hold a nonculpable third party, the insurer, liable for the penalty is even less than speculative: there is no possibility of achieving deterrence); see also supra notes 91-92 (discussing the possible interpretations of the lack of empirical documentation of the doctrine's effectiveness).
111. *Brown v. Maxey*, 124 Wis. 2d 426, 447, 369 N.W.2d 677, 688 (1985); *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 487, 502 P.2d 522, 524 (1972); cf. *Cieslewicz v. Mutual Serv. Casualty Ins. Co.*, 84 Wis. 2d 91, 104, 267 N.W.2d 595, 601 (1978) (making the same "alternate source" arguments in the context of multiple damages). But see *Harrell v. Travelers Indem. Co.*, 279 Or. 199, 220, 567 P.2d 1013, 1023 (1977) (Holman, J., dissenting) ("The jury was told to award an amount which it thought proper to deter, and it decided on the amount of $25,000, not the amount of an insurance premium."); *Brown*, 124 Wis. 2d at 452, 369 N.W.2d at 690-91 (Steinmetz, J., dissenting) (noting that the court had previously supposed that it was a direct penalty on the pocketbook itself that deters wrongdoing—not an indirect sanction through insurance premiums).
that most of the anti-coverage opinions did not consider contract language.\textsuperscript{114} In determining whether to void a contract as against public policy, the inquiry is, notwithstanding society's interest in enforcing contracts as written, whether the terms of the contract are violative of a separate societal interest to such a degree that the dissolution of the contract would best serve the public. That society has an interest in preserving the freedom to contract is a basic assumption of all such inquiries; yet, it is not a license for the blanket validation of contracts.\textsuperscript{115} Thus, an implicit evaluation and weighing of the public policies underlying punitive damages necessarily preceded the invocation of the freedom to contract doctrine. The question was not whether the parties intended or expected to transact punitive damages coverage, but rather whether they could so contract; by focusing on contractual language, a pro-coverage court has implicitly answered the first question affirmatively. This demonstrates that the \textit{Lazenby} court either doubted the effectiveness of the doctrine itself, or recognized a competing public policy base for the restriction of the doctrine.\textsuperscript{116}

The third, and possibly the most pivotal, concern of the \textit{Lazenby} court focuses on a converse public policy base: society has an interest in assuring that relatively innocent conduct not receive undue punishment. The court was troubled by the "fine line" between conduct for which punitive damages ought to lie and that for which such an award would be inappropriate.\textsuperscript{117} The \textit{Lazenby} court implied that the imprecise and elusive nature of punitive damages standards made it likely that juries would levy awards against conduct which the court itself might not deem sufficiently culpable to merit such sanction; allowing coverage in such a case would not violate public policy. Therefore, the court would not hold as a matter of law that coverage

\textsuperscript{114} See \textit{supra} notes 76, 90 and accompanying text. Although a few anti-coverage cases disallow insurability either partly or wholly on contract analysis, these cases constitute a minority. See \textit{Brown v. Western Casualty & Sur. Co.}, 484 P.2d 1252 (Colo. Ct. App. 1971); \textit{Schnuck Markets, Inc. v. Transamerica Ins. Co.}, 652 S.W.2d 206 (Mo. Ct. App. 1983); \textit{Caspersen v. Webber}, 298 Minn. 93, 213 N.W.2d 327 (1973).

\textsuperscript{115} "Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society." \textit{United States v. White}, 401 U.S. 745, 786 (1971); \textit{supra} note 90.

\textsuperscript{116} The majority in \textit{Lazenby} would not have asserted (indeed, no court would) that the public policy favoring "freedom to contract" outweighed that opposing insurance against criminal fines. See \textit{supra} note 80 and accompanying text. That the court would prefer freedom to contract over punitive damages, but \textit{not} over criminal fines, demonstrates that it deemed the policy underlying punitive damages less deserving of protection than the policy favoring freedom to contract.

\textsuperscript{117} \textit{Lazenby}, 214 Tenn. at 648, 383 S.W.2d at 5.
of punitive damages liability was necessarily against public policy.\textsuperscript{118} Similarly, in \textit{Harrell v. Travelers Indemnity Co.}, in allowing punitive damages coverage, the Supreme Court of Oregon stated, "Suffice to say, that the essence of our disagreement arises from the fact that awards of punitive damages are not limited to wanton or intentional misconduct, but extend to conduct that is grossly negligent or reckless."\textsuperscript{119} In two of the leading opinions in this line of authority then, the potential for overbroad application of the doctrine seems to have motivated, at least partially, the allowance of insurance coverage of punitive damages.

Therefore, although some courts advance other arguments,\textsuperscript{120} the primary concerns among courts allowing punitive damage insurance remain whether punitive damages provide any real benefit to society, and whether the possibility of overapplication outweighs any such societal benefit.\textsuperscript{121} Insurability remains what courts perceive to be the most accessible means by which to assuage these concerns.\textsuperscript{122}

\textsuperscript{118} See \textit{supra} notes 28-29. Several courts have made punitive damages insurability valid per se out of concern that to hold it invalid per se would be unfair to defendants who had been "merely reckless." Allowing coverage, however, overcompensates by neutralizing the doctrine's effects in all cases.

Some judges have offered suggestions for a middle ground. See Greenwood Cemetery, Inc. v. The Travelers Indem. Co., 238 Ga. 313, 320, 232 S.E.2d 910, 915 (1977) (Hill, J., dissenting) (suggesting that courts prohibit insurance only when such insurance will destroy the deterrent effect of a punitive damages award); Harrell v. Travelers Indem. Co., 279 Or. 199, 226, 567 P.2d 1013, 1026 (1977) (Holman, J., dissenting) (suggesting that courts limit the doctrine to cases where the doctrine would have a deterrent effect); id. at 231, 567 P.2d at 1029 (Linde, J., dissenting) (suggesting that courts prohibit insurance only when such insurance will destroy the deterrent effect of a punitive damages award).

\textsuperscript{119} Harrell v. Travelers Indem. Co., 279 Or. 199, 218 n.22, 567 P.2d 1013, 1022 n.22 (1977); \textit{supra} note 9 and accompanying text.

\textsuperscript{120} The court expressed concern for the victim in \textit{Lazenby}, 214 Tenn. at 645, 383 S.W.2d at 4 (citing \textit{McNulty}, 307 F.2d at 444 (Gewin, J., concurring)). A compensatory approach to punitive damages, however, ignores the doctrine's primary rationales—punishment and deterrence. See \textit{supra} note 45. But cf. \textit{King}, The Insurability of Punitive Damages: A New Solution to an Old Dilemma, 16 \textit{Wake Forest L. Rev.} 345, 362-65 (1980) (noting that plaintiffs often receive less than full compensation because of tax law and attorneys' fees).


\textsuperscript{121} See \textit{supra} notes 7, 9, 16 and accompanying text.

\textsuperscript{122} See \textit{supra} notes 1, 10, 11, 12-17 and accompanying text.
VI. PUNITIVE DAMAGES IN WISCONSIN

Whereas the judicial opinions of several jurisdictions suggest a discomfort and uncertainty toward the application of the doctrine of punitive damages, Wisconsin case law unambiguously demonstrates this judicial sentiment. Wisconsin has tended to be conservative in its application of the doctrine. Its opinions have expressed doubt as to the propriety of punitive damages from the doctrine's inception. The Supreme Court of Wisconsin has refused to abolish the doctrine on more than one occasion, however, explicitly observing that its abolition was a matter for the legislature.

Despite this conservative orientation, the recent trend in Wisconsin has been to broaden the range of culpable conduct for which an award of punitive damages will lie. Significantly, this trend seems to be in direct conflict with preexisting Wisconsin case law. In Bielski v. Schulze, the supreme court abolished the doctrine of gross negligence and stated, "We recognize the abolition of gross negligence does away with the basis for punitive damages in negligence cases." The court questioned the deterrent effect of punitive damages with respect to negligent conduct, noting that the availability of punitive damages insurance also seemed to reduce the effect of the doctrine. It further stated that criminal sanctions would best serve the goal of deterrence.

In Kink v. Combs, however, the supreme court stated that the threat of criminal prosecution proved an insufficient deterrent for certain types of conduct that "almost invariably go unpunished by the public prosecutor." The court explicitly refused to abolish the doctrine and reaffirmed the notion that punitive damages are a valid

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123. For a detailed description and history of the doctrine in Wisconsin, see authorities cited supra note 23.
125. Ghiardi, supra note 1, at 773 (citing Bass v. Chicago & N.W. Ry., 42 Wis. 654 (1877)). See also supra notes 1, 10 and accompanying text.
126. See Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980); supra note 48.
127. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
128. Bielski, 16 Wis. 2d at 18, 114 N.W.2d at 113.
129. Id. at 18 n.27, 114 N.W.2d at 113 n.27.
130. Id. at 18, 114 N.W.2d at 113-14.
131. 28 Wis. 2d 65, 135 N.W.2d 789 (1965).
132. Id. at 80, 135 N.W.2d at 798.
means of punishment and deterrence.  

The Bielski court purported to limit punitive damages to intentional torts by abolishing the doctrine of gross negligence. Yet, the supreme court subsequently viewed the issue as open to interpretation in light of Kink and commentators’ analyses of that opinion. In

133. Id. at 79-80, 135 N.W.2d at 797-98.
134. Burrell & Young, supra note 3, at 32-33.

The Bielski court, in deciding that gross negligence would not bar a joint-tortfeasor from seeking contribution from a merely negligent tortfeasor, explicitly abrogated the doctrine of gross negligence in its entirety. The court remarked:

"We recognize the abolition of gross negligence does away with the basis for punitive damages in negligence cases. . . . Wilful and intentional torts, of course, still exist, but should not be confused with negligence. . . . The protection of the public from such conduct or from reckless, wanton, or wilful conduct is best served by the criminal laws of the state.

Bielski, 16 Wis. 2d at 18, 114 N.W.2d at 113 (emphasis added) (citations omitted). Contra Wangen v. Ford Motor Co., 97 Wis. 2d 260, 272-77, 294 N.W.2d 437, 444-47 (1980). Wangen implicitly overruled Bielski to the extent that Bielski purported to limit the scope of the doctrine. Wangen, 97 Wis. 2d at 275, 294 N.W.2d at 446. Unfortunately, the Wangen court did not rely on concrete authority. First, the court termed the above-quoted language from Bielski "dicta." Id. at 272, 294 N.W.2d at 445. Whether that language is dicta is debatable because the Bielski court purported to abolish the gross negligence doctrine in its entirety. Second, the Wangen court inappropriately placed great emphasis on the language of Cieslewicz v. Mutual Serv. Casualty Ins. Co., 84 Wis. 2d 91, 267 N.W.2d 595 (1978). In allowing insurability for statutory multiple damages, the Cieslewicz court distinguished multiple from punitive damages and limited its holding to the former. Id. at 101-03, 267 N.W.2d at 599-600. The Wangen court quoted the following language from Cieslewicz:

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

Wangen, 97 Wis. 2d at 272-73, 294 N.W.2d at 445 (quoting Cieslewicz, 84 Wis. 2d at 101 n.4, 267 N.W.2d at 600) (emphasis added). Yet, the Cieslewicz court ignored the Bielski court’s expressed intent by stating that Bielski merely suggested that punitive damages would not be available in the negligence context. Moreover, the commentators to whom the Cieslewicz court deferred cited no Wisconsin authority justifying this reading of Bielski. Finally, Wangen’s reliance on Kink v. Combs, 28 Wis. 2d 65, 135 N.W.2d 789 (1965), is of dubious persuasiveness. In Kink, the court spoke of the utility of the doctrine in “bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor.” Kink, 28 Wis. 2d at 80, 135 N.W.2d at 798, cited in Wangen, 97 Wis. 2d at 274, 294 N.W.2d at 445. The Kink court was referring specifically to assault and battery—an intentional tort. Kink, then, stands for the specific proposition that an intentional or deliberate wrongdoing is of itself sufficient to support a punitive award, notwithstanding the absence of actual malice. Kink, 28 Wis. 2d at 79, 135 N.W.2d at 797. It is unlikely that the Kink court intended to overrule Bielski because Bielski never attempted to limit the doctrine in the context of intentional torts and because the Kink court never cited to Bielski; therefore, the language that the Wangen court quoted from Kink either was out of context or was mere dicta.
Wangen v. Ford Motor Co., the supreme court said that, notwithstanding Bielski, certain examples of conduct that might fall within the former definition of "gross negligence" could merit the imposition of punitive damages if sufficiently "outrageous." Thus, without expressly overruling Bielski, the Wangen court effectively lifted the limitation to the doctrine's application which the Bielski court had seen fit to impose, and employed instead a flexible "outrageousness" standard. Although Wisconsin had refused to abolish the doctrine, it had recognized the need to limit its application. Unfortunately, it ended up with an ambiguous, unrestricted, and subjective standard as a limitation. This inconsistent and unrestricted treatment of the doctrine parallels that criticized by the courts in Lazenby and Harrell, and which lies at the foundation of the holding in Brown v. Maxey.

VII. Punitive Damages Insurability in Wisconsin

A. Analysis of Precedent

It is necessary to consider Wisconsin's treatment of the doctrine in order to make sense of its disposition of the insurability issue. The insurability of common law punitive damages was an issue of first impression for Wisconsin's state courts; all available authority was purely persuasive in nature.

In reaching its decision on the public policy question in Brown, the supreme court relied almost entirely on Harris v. County of Racine and Cieslewicz v. Mutual Service Casualty Insurance Co. The court advanced little independent reasoning and avoided the fact that the authors of each of those opinions specifically had limited its holding.

In Cieslewicz, the supreme court held that insuring against liability for statutory multiple damages did not violate public policy.
The court, after acknowledging that insurance coverage might diminish the potency of the damages as a deterrent force, nonetheless allowed insurability. It based its decision on two primary factors: the need to protect the insured's reasonable expectations and the existence of alternative means of punishment and deterrence.

Although this reasoning parallels that of several courts which allow insurability of punitive damages, the Cieslewicz court approved of the reasoning only with respect to multiple statutory damages. The court persuasively distinguished multiple statutory damages from punitive damages, in that, unlike punitive damages: 1) they require no culpable state of mind; 2) they are given as a matter of right; and, 3) they are not tailored to the individual defendant's wealth. These distinguishing factors are significant. Although the purpose of multiple statutory damages is, to a limited extent, to punish and deter, this is true to a much lesser degree than is the case with punitive damages. The "private attorney general" rationale or a compensatory rationale seem to be more realistic purposes for these damages. Moreover, because the court asserted that the two types of damages "must be treated separately," it would seem that some additional analysis was required before the Brown court could "specifically adopt the reasoning employed therein to the facts in [Brown]."

145. Id. at 103, 267 N.W.2d at 601.
146. Id. at 97-99, 267 N.W.2d at 598-99; see also supra notes 76, 116-17.
147. Cieslewicz, 84 Wis. 2d at 103-04, 267 N.W.2d at 601 (arguing that possible increase in insurance premiums, liability in excess of policy limits, and destruction of dog adequately punish and deter owners of dogs that injure people). See supra notes 111, 112 and accompanying text. It is significant that Cieslewicz cites Price. Cieslewicz, 84 Wis. 2d at 103-04, 267 N.W.2d at 601 (citing Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 487, 502 P.2d 522, 524 (1972)). Brown quotes and explicitly adopts this language. 124 Wis. 2d at 446-47, 369 N.W.2d at 688. It is the only reference in the Brown opinion to any case in this line of authority. This emphasizes Brown's arguably misplaced reliance upon Cieslewicz, an opinion which distinguished itself from Brown at length.
148. Cieslewicz, 84 Wis. 2d at 101-02, 267 N.W.2d at 600-01.
149. See supra note 45.
150. Cieslewicz, 84 Wis. 2d at 99, 103, 267 N.W.2d at 599-601; Ghiardi, supra note 1, at 775-76.
151. See, e.g., Kink v. Combs, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965). See also supra notes 43-45 (discussing the doctrine's purposes, including the "private attorney general" rationale). This seems logical because multiple damages are a function neither of the defendant's wealth nor of his particular culpable state of mind; therefore, it is likely that an award of such damages will neither "smart" the defendant, nor be commensurate with his offense. The rationale that best survives this analysis is that such awards encourage plaintiffs to bring valid claims.

For the argument supporting insurability of statutory damages having a compensatory rationale, see Wojciak v. Northern Package Corp., 310 N.W.2d 675, 679-80 (Minn. 1981).
152. Cieslewicz, 84 Wis. 2d at 103, 267 N.W.2d at 601.
153. Brown, 124 Wis. 2d at 447, 369 N.W.2d at 688.
The second case on which the Brown court relied, Harris v. County of Racine,\textsuperscript{154} is also readily distinguishable from Brown. In Harris, a black police officer brought a section 1983\textsuperscript{155} action against a Wisconsin state judge for intentionally perpetrating a vindictive racist vendetta against the officer that culminated in the officer's discharge.\textsuperscript{156} The United States District Court for the Eastern District of Wisconsin held that allowing a government official to insure against punitive damage liability arising under a section 1983 civil rights action does not violate public policy. Writing for the court in Harris, Chief Judge Reynolds pointed out that punitive damages awards against government employees in civil rights cases are subject to a competing public policy consideration\textsuperscript{157} that normally does not inhere: holding public officials personally liable for punitive damages awards under section 1983 might have a "chilling effect" on these officials.\textsuperscript{158} The Harris court recognized that insurance would soften significantly the "blow" to the defendant, but justified this by asserting that the defendant had received punishment by alternate means\textsuperscript{159} and that competing policy considerations outweighed the need to punish the defendant.\textsuperscript{160} Further, the court stated that whereas Wisconsin courts do not impose punitive damages for compensatory purposes, in section 1983 actions, juries do tend to consider the plaintiff's intangible injuries in assessing punitive damages awards. Thus, even though the award is supposed to bear a reasonable relation to the defendant's wealth, in civil rights actions punitive damages awards may have a "devastating financial effect on particular individuals."\textsuperscript{161}

\begin{itemize}
\item \textsuperscript{154} 512 F. Supp. 1273 (E.D. Wis. 1981).
\item \textsuperscript{156} Harris, 512 F. Supp. at 1275.
\item \textsuperscript{157} Id. at 1284.
\item \textsuperscript{158} Id. at 1282. The classic "chilling effect" argument proposes that the public benefits from the ability of civil servants to act freely in the public's interest. If civil servants fear the uninsurable consequences of their acts, the argument continues, they "may choose not to act rather than to act in a matter potentially controversial." \textit{Id.} This would impede seriously the effectiveness of civil servants. \textit{Id.} at 1283.
\item \textsuperscript{159} Id. at 1282; see supra note 148 and accompanying text.
\item \textsuperscript{160} Harris, 512 F. Supp. at 1282. The court is really arguing that competing public policies militate against punishing and deterring the particular conduct under scrutiny to the extent of an unbridled punitive damages award. If such were the case, it would be more logical not to impose an award in the first place. A final award should signify that the court has weighed the policies and that the jury has fashioned an appropriate award to punish and deter the conduct in question. To sustain an award, the conduct must demonstrate a sufficiently culpable state of mind on the part of the defendant; an anti-coverage result need not "chill" civil servants because if they are acting in good faith, ideally, they have nothing to fear. Cf. Soderbeck v. Burnett County, 752 F.2d 285, 291 (7th Cir. 1985) (upholding the trial court's decision not to submit the punitive damages question to the jury in a § 1983 action because the defendant had had no knowledge that his actions were impinging upon the plaintiff's rights).
\item \textsuperscript{161} Cieslewicz, 84 Wis. 2d at 104, 267 N.W.2d at 601, cited in Harris, 512 F. Supp. at 1283,
Without considering the validity of these arguments, the fact remains that the *Harris* court specifically tailored these arguments to remedy the "occupational hazard" that civil rights litigation presents to public officials. The motivating concern underlying the *Harris* opinion is irrelevant under the facts of *Brown*; *Harris* presents a weak analogy at best.

**B. Brown v. Maxey**

Unlike the insurability decisions of most other jurisdictions, *Brown* was neither a drunk-driving case nor a section 1983 civil rights action. The case involved a suit by J.T. Brown, an injured tenant of a low-income housing project, against Maxey, the sole owner of the project, and State Farm Fire and Casualty Co., Maxey's insurer. Maxey's culpable conduct consisted of failing to provide security measures for his tenants, despite his knowledge of recurring incidents of breaking and entering, vandalism, and arson; Maxey's indifference afforded vandals and arsonists free access to the complex. One such arsonist set a fire just outside of Brown's door, severely burning him. Brown sued Maxey and State Farm in negligence for compensatory damages, and further demanded punitive damages, claiming that Brown's conduct reached the level of "outrageous" conduct and thus merited a punitive award under Wisconsin law. At trial, find-
ing Brown's argument persuasive, the jury awarded him $52,185 in compensatory damages and $200,000 in punitive damages.\(^{166}\)

The court of appeals affirmed the compensatory damages award, but reversed the punitive damages award, concluding that "punitive damages are not recoverable in a case of negligence."\(^{167}\) On review, the Supreme Court of Wisconsin reversed the appellate court, holding that punitive damages are available for outrageous conduct, irrespective of the classification of the underlying tort.\(^{168}\) The supreme court further held that it would consider an insurer who fails to unambiguously exclude punitive damages coverage from a liability policy to have extended such coverage.\(^{169}\) The court also upheld the punitive award as not excessive, although Brown had not submitted evidence of Maxey's net worth.\(^{170}\) Finally, the court asserted that insurability is compatible with public policy.\(^{171}\)

It is significant that five years after the Supreme Court of Wisconsin decided *Wangen v. Ford Motor Co.*,\(^{172}\) the Wisconsin appellate court in *Brown*, relying on that opinion, still could conclude that "punitive damages are not recoverable in a case of negligence."\(^{173}\) The *Wangen* court reasoned that the availability of punitive damages rests "not on the classification of the underlying tort justifying compensatory damages, but on the nature of the wrongdoer's conduct."\(^{174}\) This, however, was not consistent with prior Wisconsin opinions that had attempted to place limitations on the availability of punitive damages. Instead, *Wangen* made punitive damages available in any tort action upon a showing that the defendant's conduct was "outrageous."\(^{175}\) The appellate court in *Brown* apparently either misunderstood or rejected such an expansive application of the doctrine. As a result, the supreme court majority in *Brown* found it necessary to restate and reaffirm the holding of the *Wangen* court.\(^{176}\)

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166. *Id.*
167. *Id.*
168. *Id.* at 429, 369 N.W.2d at 679.
169. *Id.* at 441-43, 369 N.W.2d at 685-86.
170. *Id.* at 439-40, 369 N.W.2d at 684-85.
171. *Id.* at 444-45, 369 N.W.2d at 686-88.
172. 97 Wis. 2d 260, 294 N.W.2d 437 (1980).
173. 124 Wis. 2d at 430-31, 369 N.W.2d at 680.
174. *Id.* (citing *Wangen*, 97 Wis. 2d at 266, 294 N.W.2d at 442).
175. 124 Wis. 2d at 431 & n.1, 369 N.W.2d at 680 & n.1; *Wangen*, 97 Wis. 2d at 260, 298, 299 N.W.2d at 442, 457. See supra notes 66, 139 and accompanying text.
176. The appellate court candidly stated:
   
   We believe that . . . [the supreme court's opinion in *Wangen*] may be sending mixed messages to the trial bench. . . . Therefore, it is conceivable that a trial court could interpret *Wangen* as meaning that punitive damages are recoverable anytime aggravating circumstances are present. Based on the history of punitive
The Brown court reasserted that the purpose of punitive damages in Wisconsin is to punish and deter conduct of two “distinct” types:¹⁷⁷ 1) that by which the wrongdoer desires to cause harm, or which he knows is “substantially certain” to result in harm; and, 2) that which the wrongdoer “knows, or should have reason to know,”¹⁷⁸ involves a “strong probability” of harm. The court found that because Maxey’s conduct was of the latter type, the appellate court had erred in setting aside the punitive damages award.¹⁷⁹

Having found that an award of punitive damages was proper, the court next refused to overturn the amount despite its magnitude and despite the fact that Brown had introduced no evidence of Maxey’s wealth for an award determination.¹⁸⁰ The court agreed that the amount was substantial, but contended that as “smart money,” the amount was supposed to hurt. The court refused to alter the $200,000 award, finding that it did not “shock the conscience,” but rather, that a jury could have found such an amount to be an appropriate measure of punishment and deterrence commensurate with Maxey’s misconduct.¹⁸¹ The court dismissed the defendant’s contention that the damages, this interpretation would be unreasonably broad. We believe the better course is to view punitive damages within their historical context, that is recoverable only in a few well-defined instances.

If, as a matter of policy, enlargement of the punitive damages rule is thought to be necessary, such a decision is solely within the sphere of the supreme court.

Brown v. Maxey, No. 83-2325, slip op. at 21-23 (Wis. Ct. App. Oct. 25, 1984), rev’d, 124 Wis. 2d 426, 369 N.W.2d 677 (1985). Cf. supra notes 37-66, 138-39 and accompanying text (the “fine-line” criticisms). The court of appeals may have been concerned that Wangen and the trial court’s opinion in Brown conveniently reduced or “abbreviated” the standard of conduct to “outrageous.” See supra note 175. The more liberal reading of Wangen appeared to grant juries sweeping power to award punitive damages in practically any tort case because “outrageous” is for the jury to determine. See supra notes 67-73 and accompanying text. The appellate court phrased its holding in such a way as to force the supreme court to take a definitive position as to the availability of punitive damages: either to “reinstate” the Bielski limitations, or to reaffirm its apparent position in Wangen, that is, one of unrestricted availability.

¹⁷⁷. 124 Wis. 2d at 433, 369 N.W.2d at 681-82. Yet for all the subtle terminology, the court nonetheless found it convenient to “use the term ‘outrageous’... as an abbreviation for the type of conduct justifying the imposition of punitive damages.” Id. at 431 n.1, 369 N.W.2d at 680 n.1. See supra notes 32-36 and accompanying text.

¹⁷⁸. 124 Wis. 2d at 433, 369 N.W.2d at 681. Traditionally, the lower level of culpability justifying a punitive damages award “hovers” around recklessness. The language “should have reason to know” misstates the definition of recklessness. Restatement (Second) of Torts § 500 (1965); see supra notes 55-56. By combining the “should know” and “has reason to know” states of mind, the author of this language implied that punitive damages may be appropriate for an act which is only sufficiently unreasonable to constitute negligence, but not recklessness.

¹⁷⁹. 124 Wis. 2d at 437-38, 369 N.W.2d at 682-83. But see id. at 447-52, 369 N.W.2d at 688-91 (Steinmetz, J., dissenting).

¹⁸⁰. Id. at 437-39, 369 N.W.2d at 683-84.

¹⁸¹. Id. at 438-40, 369 N.W.2d at 684-85.
amount was defective in the absence of evidence of the defendant’s wealth. Citing Fahrenberg v. Tengel, the court stated that although the defendant’s wealth is one of several factors which a jury may consider in determining an award, this is not a prerequisite for a punitive award. This directly contradicted Cieslewicz v. Mutual Service Casualty Insurance Co., cited frequently in Fahrenberg and Brown, which stated that a jury must consider the defendant’s wealth in determining the size of an award. It seems strange that the majority would uphold the award without considering the defendant’s wealth; after all, “what would be ‘smart money’ to a poor man would not be, and would not serve as a deterrent, to a rich man.” Actually, by holding Maxey’s insurer liable for the punitive damages award regardless of the amount, the court effectively made Maxey’s wealth irrelevant.

The Brown court next ventured into the field of contract construction: by applying the standard principles of insurance policy construction, the court concluded that Maxey’s State Farm insurance policy did in fact extend coverage for punitive damages liability. Yet, in construing the policy language by which State Farm agreed to pay “all sums which the insured shall become legally obligated to pay as damages because of: A. Bodily injury . . .,” the court even went so far as to hold that there was no ambiguity—that this language clearly contemplated punitive damages coverage. It is curious that after devoting the first half of its opinion to the proposition that punitive damages are awarded because of the nature of the wrongdoer’s conduct, the majority then turned around and stated that punitive damages clearly are awarded “because of bodily injury.” That a significant number of jurisdictions have found the same or similar lan-

182. 96 Wis. 2d 211, 291 N.W.2d 516 (1980).
183. 124 Wis. 2d at 439, 369 N.W.2d at 684.
184. Cieslewicz, 84 Wis. 2d at 102, 267 N.W.2d at 600-01; Hartland Cicero Mut. Ins. Co. v. Elmer, 122 Wis. 2d 481, 485, 363 N.W.2d 252, 254 (Ct. App. 1984); supra note 112; cf. 124 Wis. 2d at 452, 369 N.W.2d at 690-91 (Steinmetz, J., dissenting) (Tailoring the award to a defendant’s wealth is critical.).
186. This is inconsistent with the court’s previous finding that the award did provide an appropriate quantum of punishment and deterrence. See supra note 181.
187. 124 Wis. 2d at 441-43, 369 N.W.2d at 685-86; see supra notes 76, 80, 84, 90, 116. But see Burrell & Young, supra note 3, at 10-11 (discussing the decision of the Insurance Services Office not to provide explicit punitive damages exclusions, apparently believing such action unnecessary). The insurance industry, however, had received ample warning in Cieslewicz. See Brown, 124 Wis. 2d at 451, 369 N.W.2d at 690 (Steinmetz, J., dissenting).
188. 124 Wis. 2d at 442, 369 N.W.2d at 685.
189. Id. at 442-434, 124 Wis. 2d at 686.
guage did not extend coverage to punitive damages liability would seem to indicate that coverage was ambiguous at best.

Having concluded that Maxey's policy contemplated punitive damages coverage, the court treated the public policy question as the final inquiry. The court dealt with the public policy issue by first citing Harris v. County of Racine for a synopsis of the viewpoints of both sides of the insurability split. The court then disposed of the issue by specifically adopting the reasoning of the Cieslewicz court.

The first argument that the court adopted from Cieslewicz was that there exists more than one public policy, one of which specifically favors the freedom to contract. This argument sidesteps the real question: should the public be free to enter such contracts in the first place. Certainly, in discussing whether to void a policy insuring an individual against criminal fines, a court would be unlikely to invoke such an argument.

The second argument that the court adopted from Cieslewicz is that, even if insurability does dilute the doctrine's force, there still exist alternate sources of punishment and deterrence, such as increased insurance rates and the possibility that the award will exceed the limits of liability under the policy. This argument proves very weak under analysis. First, as indicated earlier, multiple damages are not designed to impose the same element of punishment and deterrence as are punitive damages; therefore, adopting the "alternate source" argument of the Cieslewicz court is unpersuasive. Second, after asserting at length that the punitive damages award of $200,000 against Maxey was appropriate in light of Maxey's conduct, it defies reason that the court would subsequently state that the possibility of higher future insurance premiums would have an equivalent effect. Insurability neutralizes the flexible punch of punitive dam-

191. 124 Wis. 2d at 444-47, 369 N.W.2d at 686-88. If the court had been predisposed against insurability, it might have approached the public policy question at the onset, as did the court in Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 434 (5th Cir. 1962). See supra note 90.
192. 124 Wis. 2d at 444-45, 369 N.W.2d at 687 (citing Harris, 512 F. Supp. at 1280-81).
193. Id. at 447, 369 N.W.2d at 688.
194. Id. at 446-47, 369 N.W.2d at 687-88 (citing Cieslewicz, 84 Wis. 2d at 103, 267 N.W.2d at 601).
195. See supra notes 76, 80, 84, 90, 116.
196. See supra notes 80, 117 and accompanying text.
197. 124 Wis. 2d 446-47, 369 N.W.2d at 688 (citing Cieslewicz, 84 Wis. 2d at 103-04, 267 N.W.2d at 601).
198. See supra note 45 and accompanying text.
199. But see 124 Wis. 2d at 452, 369 N.W.2d at 690-91 (Steinmetz, J., dissenting). Justice
ages and allows a potential tortfeasor the opportunity to make a cost/benefit analysis of culpable conduct to determine whether such conduct will be "worthwhile." Essentially, if a landlord such as Maxey finds it more profitable to risk higher premiums than to spend increased sums on maintenance and security, he will do so. The majority's holding makes this a practical and financially reasonable course of action. \(^2\) If punitive damages indeed punish and deter, it is because they are of a magnitude that hurts the wrongdoer to a degree to which he never would have chosen to subject himself. \(^2\)

The "alternate source" argument also fails because an award consisting solely of compensatory damages would have exactly the same effect: increased premiums, possible awards in excess of policy limits, and social stigma. Punitive damages are appropriate where the element of punishment and deterrence inherent in an award of compensatory damages would be insufficient for the conduct involved. \(^2\)

Thus, if the alternate sources proposed by the Cieslewicz court and adopted by the Brown court are sufficient, there is no reason to impose punitive damages in the first place. The majority failed to respond adequately to the proposition that insurance neutralizes the effect of a punitive damages award with respect to the actual wrongdoer. The net result is that a court will allow civil sanctions against a tortfeasor under the guise of punishment and deterrence, while not requiring that tortfeasor to pay. \(^2\)

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Steinmetz contended that the court had accepted the principle that "money talks," and that it is "direct financial liability" for a punitive damage award which affects the doctrine's purposes. Id.

- **200.** *See also* Reynolds v. Pegler, 123 F. Supp. 36, 41-42 (S.D.N.Y. 1954), **aff'd,** 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955) (proposing that if net worth is not considered in determining the amount of an award, this may even result in encouraging malfeasance); State Farm Mut. Auto. Ins. Co. v. Daughdrill, 474 So. 2d 1048, 1052 (Miss. 1985) (asserting that a jury must consider the defendant's wealth in awarding punitive damages).

- **201.** Doralee Estates, Inc. v. Cities Serv. Oil Co., 569 F.2d 716, 723 (2d Cir. 1977) ("Exemplary damages are intended to inject an additional factor into the cost-benefit calculations of companies who might otherwise find it fiscally prudent to disregard the threat of liability. To function effectively, the award must be 'of sufficient substance to 'smart' . . . the offender.'") (quoting from Reynolds v. Pegler, 123 F. Supp. 36, 41-42 (S.D.N.Y. 1954), **aff'd,** 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955)); Tuttle v. Raymond, 494 A.2d 1353, 1359 (Me. 1985) ("Flexibility of [punitive damage award amounts] is also necessary to avoid situations where the potential benefits of wrongdoing could outweigh a known maximum liability."); *supra* notes 112, 185 and accompanying text. The *Brown* majority decision simply does not address these considerations. *Brown,* 124 Wis. 2d at 451, 369 N.W.2d at 690 (Steinmetz, J., dissenting) (The majority has given "license to violent, conscious, wanton, outrageous behavior as long as you can afford to pay for it in advance.").

- **202.** Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 435-36 (5th Cir. 1962) (citing cases therein).

VIII. Conclusion

It is fundamental logic that if the punitive damages doctrine indeed punishes and deters undesirable conduct, then insurability robs society of this benefit. For this reason, pro-coverage courts necessarily justify their decisions, not by advocating insurability directly, but rather, by impugning the doctrine itself. Pro-coverage decisions often betray a pronounced anti-doctrine orientation. There is little logic in a court retaining a doctrine that it deems either of no value, or more harmful than helpful. The most logical solution would appear to be judicial abolition or limitation of the doctrine.

Yet, although the doctrine was born under a judge’s pen, judges hesitate to erase their own creation for fear of impinging upon subsequently exercised legislative prerogative. No court yet has generated enough internal fervor to take this bold step. Because legislatures do not exercise their prerogative to the satisfaction of some judiciaries, many courts resort to insurability as a surreptitious way of rendering the doctrine impotent.

Moreover, even judges that approve of the doctrine in principle, may balk at its inherent potential for unfair application. However a court may attempt to avoid this overbreadth by the linguistic manipulation of standards, culpability always will be an elusive inquiry because a juror’s only guideline is, ultimately, his own subjective conscience. Overbreadth is an unavoidable cost of the doctrine; ideal application is an unrealistic demand.

One factor upon which pro-coverage courts often focus is ambiguous insurance policy drafting by insurers. Judicial distaste for this practice often fuels the pro-coverage trend and eclipses effective discussion of the public policy implications of insurability itself. This misplaced focus distorts the issue. It is illogical to contend that conduct may be culpable enough to merit a punitive award, but not so culpable as to merit a denial of insurance protection. It must be assumed that a jury award of punitive damages serves public policy. Thus, even if the policy under scrutiny explicitly offered punitive damages liability coverage, insurability would contravene public policy; the insurer’s drafting, however misleading, is not germane to the inquiry. However irrelevent, pro-coverage courts profit from this contractual analysis to bolster their indirect assault on the doctrine.

In Brown, the issues on appeal forced the Supreme Court of Wisconsin to establish a definitive punitive damages standard. The first option was to impose a strict limitation on conduct for which punitive awards would be appropriate. The second option was to read Wangen liberally so as to allow punitive damages awards for any conduct of
sufficient culpability. The court selected the latter open-ended standard, thereby exposing a broad range of conduct to civil punishment and deterrence. Paradoxically, despite ample authority that consideration of a defendant's wealth is crucial to assess an award that will impart a sufficient measure of punishment and deterrence, the court held to the contrary.204 In so ruling, the Brown court evinced either an outright skepticism toward the doctrine's punitive and deterrent efficacy, or a recognition that its auxiliary pro-coverage holding would neutralize the doctrine's force, and thus render such a consideration superfluous.

It is indisputable that a resourceful individual may now make a cost/benefit analysis and place himself above the Wisconsin law of punitive damages. Whatever the rationale, the Brown court effectively affirmed the value of the doctrine and then emasculated it within the span of eleven pages.

Although at first glance this jurisprudence may appear weak, it may have the effect of forcing the legislature's hand. In 1984, the Supreme Court of Montana held in favor of insurability.205 Within the year, the Montana legislature created a statutory cap to punitive damages awards, limiting such awards to the greater of $25,000 or one percent of the defendant's net worth.206 Although insurance lobbyists may have influenced the passage of this legislation; it is also possible, however, that the Montana legislature disapproved of these pro-coverage decisions and promulgated this statute, at least in part, to persuade the court to decide differently should it have the opportunity to reconsider the insurability question. Although the statutory cap should significantly soothe judicial concerns as to the doctrine's unfair overbreadth, it will have a side effect analogous to that of disregarding the defendant's wealth.

It will frustrate the jury's discretion to tailor an award to punish the defendant in an appropriate measure, and thereby reduce the doctrine's efficacy as a source of civil punishment and deterrence. It appears that, while both insurability and statutory caps soften the doctrine's overbreadth, both dilute the doctrine's force as well. There is no escaping this trade-off. Perhaps pro-coverage courts recognize that they cannot retain the doctrine's benefits while simultaneously eliminating its burdens. Assuming that they would prefer to rid themselves of the burdens even at the cost of foregoing the benefits, they very well may perceive insurability as the only judicial means of

204. See supra notes 181-87 and accompanying text.
205. See supra note 85.
206. See supra note 1.
wrenching control of the doctrine from unresponsive legislatures. Whatever the rationale, pro-coverage courts have purported to defer to legislative prerogative, while welcoming insurability as a back door into that branch's realm. In essence, pro-coverage courts effectively have managed to do what critical jurists have wanted to do for over a century: abolish the doctrine of punitive damages.207

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207. See supra note 11 and accompanying text.

* I dedicate this comment to all the good folks in my life, and thank Kevin Dorse in particular for his insight, effort, and spring break. Some break!