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Court of Appeals Prohibits Insurer's Indemnification of Municipal Employee for Punitive Damages Arising Out of Federal Civil Rights Action as Contrary to Public Policy

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earlier realization of his benefits operates as an inducement to the employee to seek such a recovery,[312] an incentive enhanced by the recent amendment to Section 29(1),[313] it appears incongruous to reject an apportionment which depletes the employee's share of the judgment but then allows him to recoup the costs assessed against him in the form of periodic future payments from the carrier.[314] It is submitted, therefore, that where the third party recovery does not exceed the sum of the lien and the carrier's future obligation, the objectives of the WCL could best be met if future courts, in equitably apportioning the litigation expenses, strive to maximize the residuum of the judgment.

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DEVELOPMENTS IN NEW YORK LAW

Court of Appeals prohibits insurer's indemnification of municipal employee for punitive damages arising out of federal civil rights action as contrary to public policy

Under a policy of liability insurance, an insurer is obligated to indemnify its insured for an award of compensatory damages rendered in a suit within the purview of the policy's provisions.[315]

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of the worker and his family through preservation of any rights he may have which are not inconsistent with the compensation system. *See* McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 TEXAS L. REV. 389, 401 (1959).

[312] In the 1975 Memorandum, note 287 *supra*, the Law Revision Commission implicitly recognized that a reduction, or elimination of the proceeds inuring to the employee from the third party action would detract from the policy of encouraging employees to pursue their common-law remedies. *See id.* at 1552.

[313] *See id.* at 1552-53.

[314] *See generally* N.Y. WORK. COMP. LAW § 29(4)(McKinney Supp. 1979-1980); note 287 *supra*.

[315] *See* 1 COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 1:2, 1:4, 1:5 (2d ed. 1959). Insurance is a voluntary contract between an insurer and its insured. The rights and obligations of the parties, absent contravention of public policy or statute, are governed by the policy's terms. *Id.*; W. PROSSER, LAW OF TORTS 542 (4th ed. 1971). *See* Kronfeld v. Fidelity & Cas. Co., 81 Misc. 2d 557, 562, 365 N.Y.S.2d 416, 422 (Sup. Ct. N.Y. County 1975), *aff'd*, 53 App. Div. 2d 190, 385 N.Y.S.2d 552 (1st Dep't 1976). The duty of an insurer to defend a lawsuit brought against its insured arises when the pleadings disclose facts which describe a risk covered under the policy. Sucrest Corp. v. Fisher Governor Co., 83 Misc. 2d 394, 399, 371 N.Y.S.2d 927, 934 (Sup. Ct. N.Y. County 1975).

Liability insurance is designed to reduce an insured's risk of loss and protect him against the deleterious effects of large damage awards. *See* R. MEHR & E. CAMMACK, PRINCI-

Where an insured's conduct is criminal or intentional, however, considerations of public policy preclude him from avoiding the full consequences of his behavior by shifting liability through the purchase of insurance.[316] Since punitive damages are awarded in order to punish a wrongdoer for conduct that is reckless or consciously disregards the rights of others, indemnification of an individual following such an award likewise has been barred.[317] Re-

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PLES OF INSURANCE 1-5 & 31-37 (6th ed. 1976); W. PROSSER, *supra*, at 541-44. As a contract among similarly situated individuals to share losses, "[i]nsurance allows the individual insured to substitute a small, definite cost (the premium) for a large but uncertain loss (not to exceed the amount of the insurance) under an arrangement whereby the fortunate many who escape loss will compensate the unfortunate few who suffer loss." R. MEHR & H. CAMMACK, *supra*, at 31-32. Although early critics of liability insurance contended that it encouraged negligence by allowing the tortfeasor to escape the full consequences of his conduct, W. PROSSER, *supra*, at 543, as the number of uncompensated injuries increased, statutes requiring mandatory liability coverage were enacted to assure the party injured recovery sufficient to compensate him for his loss. *E.g.*, N.Y. VEH. & TRAF. LAW §§ 310-321 (McKinney 1970 & Supp. 1979-1980); N.Y. WORK. COMP. LAW §§ 50-52 (McKinney 1976); *see* Poniatowski v. City of New York, 14 N.Y.2d 76, 80, 198 N.E.2d 237, 238, 248 N.Y.S.2d 849, 851 (1964); *In re* MVAIC, 32 Misc. 2d 946, 947, 228 N.Y.S.2d 508, 509 (Sup. Ct. Nassau County 1962), *rev'd on other grounds*, 18 App. Div. 2d 810, 238 N.Y.S.2d 507 (2d Dep't 1963).

[316] *See* Morgan v. Greater N.Y. Taxpayers Mut. Ins. Ass'n, 305 N.Y. 243, 248, 112 N.E.2d 273, 275 (1953); Messersmith v. American Fidelity Co., 232 N.Y. 161, 165, 133 N.E. 432, 433 (1921); E. VAUGHAN & C. ELLIOTT, FUNDAMENTALS OF RISK AND INSURANCE 412-13 (2d ed. 1978). Spreading liability for criminal or intentional conduct among policy-holders violates public policy by thwarting society's interest in imposing the monetary sanction. *See* Kendrigan, *Public Policy's Prohibition Against Insurance Coverage for Punitive Damages*, 36 INS. COUNSEL J. 622, 625 (1969). As a general rule, insurance policies exclude coverage for acts committed deliberately by or at the direction of the insured, E. VAUGHAN & C. ELLIOTT, *supra*, at 413; *see* McCarthy v. MVAIC, 16 App. Div. 2d 35, 41, 224 N.Y.S.2d 909, 915-16 (4th Dep't 1962), *aff'd*, 12 N.Y.2d 922, 188 N.E.2d 405, 238 N.Y.S.2d 101 (1963), or confine coverage to "accidents." Utica Mut. Ins. Co. v. Cherry, 68 Misc. 2d 514, 515, 327 N.Y.S.2d 532, 533 (Sup. Ct. Orange County 1971), *rev'd*, 45 App. Div. 2d 350, 355, 358 N.Y.S.2d 519, 524 (2d Dep't 1974), *aff'd*, 38 N.Y.2d 735, 343 N.E.2d 758, 381 N.Y.S.2d 40 (1975). Where the insured is liable vicariously, however, coverage for intentional torts has been allowed. *See, e.g.*, Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58, 60 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935); Travelers Ins. Co. v. Wilson, 261 So.2d 545, 548 (Fla. Dist. Ct. App. 1972); Scott v. Instant Parking, Inc., 105 Ill. App. 2d 133, 245 N.E.2d 124 (1st Dist. 1969); Commercial Union Assurance Cos. v. Town of Derry, 118 N.H. 469, 471, 387 A.2d 1171, 1173-74 (1978). *But see* Logan, *Punitive Damages in Automobile Cases*, 11 FED'N OF INS. COUNSEL 59, 61 (1960); McKillip, *Punitive Damages in Illinois: Review and Reappraisal*, 27 DE PAUL L. REV. 571, 577-78 (1978).

[317] *See* Walker v. Sheldon, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 500, 223 N.Y.S.2d 488, 490 (1961); Clevenger v. Baker Voorhis & Co., 19 App. Div. 2d 340, 340, 243 N.Y.S.2d 231, 232 (1st Dep't 1963) (per curiam), *aff'd*, 14 N.Y.2d 536, 197 N.E.2d 783, 248 N.Y.S.2d 396 (1964). In contrast to the policy against insurance coverage for punitive damages arising from an insured's wanton and reckless conduct, an insurer must indemnify its insured for an award of compensatory damages arising from such conduct. Teska v. Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 618, 300 N.Y.S.2d 375, 378 (Dist. Ct. Nassau County 1969); *cf.* Padavan v.

cently, in *Hartford Accident & Indemnity Co. v. Village of Hempstead,*[318] the Court of Appeals held that, as a matter of public policy, a municipal employee similarly may not be indemnified under a municipality's liability policy for any obligation to pay punitive damages based on a violation of the Civil Rights Act.[319]

In *Village of Hempstead,* Lawrence Critelli brought an action in the District Court for the Eastern District of New York alleging violation of his civil rights by two Village of Hempstead police officers. Thereafter, the Hartford Accident and Indemnity Co. sued in the Supreme Court, Nassau County, for a declaration that under the Village of Hempstead's liability insurance policy, it was not obligated to indemnify the two village policemen for punitive damages sought in the pending civil rights action.[320] While interpreting the "ambiguous wording" of the insurance policy against the insurer to cover punitive as well as compensatory damages,[321] special term, nevertheless, granted Hartford's motion for summary judgment, holding that liability coverage for punitive damages violated public policy.[322] The Appellate Division, Second Department, af-

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Clemente, 43 App. Div. 2d 729, 730, 350 N.Y.S.2d 694, 696-97 (2d Dep't 1973) (Compensatory damage award for gross negligence not contested by insurer).

[318] 48 N.Y.2d 218, 397 N.E.2d 737, 422 N.Y.S.2d 47 (1979), *aff'g* 61 App. Div. 2d 893, 402 N.Y.S.2d 262 (2d Dep't 1978).

[319] 48 N.Y.2d at 228, 397 N.E.2d at 744, 422 N.Y.S.2d at 53-54.

[320] *Id.* at 220-21, 397 N.E.2d at 739, 422 N.Y.S.2d at 49. In the underlying federal suit, Critelli alleged that two Village of Hempstead police officers battered him about the head, face and body with their nightsticks in violation of 42 U.S.C. § 1983 (1976). The policemen saw Critelli lying on the grass adjacent to a public street in a "drunken stupor" and claimed they were trying to rouse him. Since the only relief sought in the federal suit was $100,000 in punitive damages, Hartford disclaimed any obligation under the policy based on the policy's alleged exclusion of coverage for punitive damages. *Id.* at 221, 397 N.E.2d at 739, 422 N.Y.S.2d at 49. The Village of Hempstead was not named a defendant in the federal action because suit was instituted while a municipality had not been considered a "person" within the meaning of 42 U.S.C. § 1983 (1976) and hence could not be sued under that section. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled in part,* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

[321] 48 N.Y.2d at 221, 397 N.E.2d at 739, 422 N.Y.S.2d at 49. The policy in *Village of Hempstead* obligated the carrier to pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury." *Id.* at 222 n.4, 397 N.E.2d at 740 n.4, 422 N.Y.S.2d at 49-50 n.4. Typically, ambiguous language in an insurance policy is construed against the insurer and in favor of the insured. Inexplicit exclusions and limitations in a policy are disfavored. *See, e.g.,* Kronfeld v. Fidelity & Cas. Co., 81 Misc. 2d 557, 562, 365 N.Y.S.2d 416, 420 (Sup. Ct. N.Y. County 1975), *aff'd,* 53 App. Div. 2d 190, 385 N.Y.S.2d 552 (1st Dep't 1976).

[322] 48 N.Y.2d at 221, 397 N.E.2d at 739, 422 N.Y.S.2d at 49. The Court's order to Hartford to defend the policemen in the federal suit because its "obligation to defend is broader than its duty to [indemnify]" for punitive damages was not appealed by Hartford. *Id.* The

firmed without opinion.[323]

On appeal, the Court of Appeals unanimously affirmed, basing its decision solely on considerations of public policy.[324] Writing for the Court, Judge Meyer noted that the provisions of the General Municipal law that require a village to indemnify its police officers for liability incurred in the course of their employment[325] and authorize a village to indemnify employees for acts performed in good faith[326] do not evince a clear legislative policy concerning whether coverage for punitive damages is appropriate.[327] Consequently, the Court focused on the function of punitive damages in resolving whether insurance coverage was permissible as a matter of policy.[328] Finding that the dual purposes of punishment and deterrence underlying an award of punitive damages would be undermined if a tortfeasor were permitted to avoid liability for his "con-

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Court reasoned that, even though the relief sought was limited to punitive damages, a jury nevertheless may award compensatory damages requiring the insurer to defend. *Id.; see* Cordial Greens Country Club, Inc. v. Aetna Cas. & Sur. Co., 41 N.Y.2d 996, 997, 363 N.E.2d 1178, 1179, 395 N.Y.S.2d 443, 444 (1977); Rimar v. Continental Cas. Co., 50 App. Div. 2d 169, 172, 376 N.Y.S.2d 309, 312 (4th Dep't 1975).

[323] 61 App. Div. 2d 893, 402 N.Y.S.2d 262 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 218, 397 N.E.2d 737, 422 N.Y.S.2d 47 (1979).

[324] 48 N.Y.2d at 228, 397 N.E.2d at 744, 422 N.Y.S.2d at 53-54. The Court decided the case without considering the terms of the policy between Hartford and the Village of Hempstead. Sections 50-j(1) and 52 of the New York General Municipal Law were enacted in 1975 and 1976, respectively, while the Village of Hempstead's policy commenced, and the injury occurred, in 1972. *Id.* n.10. Since modifications in the insurance law may not be enforced against an insurer until it has had a chance to discontinue coverage, the Court declared that even it it were to decide the issue of the interpretation of the policy, it would do so without reference to sections 50-j(1) and 52. *Id.*

[325] GML § 50-j(1) (1977) provides that a village:

> shall assume the liability to the extent that it shall save harmless, any duly appointed police officer of such municipality, authority or agency for any negligent act or tort, provided such police officer, at the time of the negligent act or tort complained of, was acting in the performance of his duties and within the scope of his employment.

[326] Unlike § 50-j(1), GML § 52 merely is permissive:

> Each city, county, fire district, school district, town and village may purchase liability insurance with such limits as it may deem reasonable for the purpose of protecting its officers and employees against liability for claims arising from their acts while exercising or performing or in good faith purporting to exercise or perform their powers and duties.

[327] Assuming, as defendants had contended, that § 50-j(1) was "broad enough" to permit a municipality to indemnify a police officer for punitive damages, the Court nevertheless interpreted the "good faith" language of § 52 restrictively to bar insurance for this purpose. 48 N.Y.2d at 225, 397 N.E.2d at 742, 422 N.Y.S.2d at 52; *see* notes 325 & 326 *supra*, and notes 338-340 and accompanying text, *infra*.

[328] 48 N.Y.2d at 226-27, 397 N.E.2d at 742-43, 422 N.Y.S.2d at 52-53.

scious [or reckless] disregard of the rights of others" through the purchase of insurance,[329] the Court concluded that coverage was barred on policy grounds.[330] In so holding, the Court rejected the contention that exposing municipal police officers to an uninsured risk of punitive damages would deter them from vigorously discharging their duties.[331] Judge Meyer similarly dismissed the argument that a municipality's liability for large punitive damage awards would have a devastating impact on its financial base should it be held directly liable for its own improper conduct or vicariously liable for its employee's conduct; Judge Meyer observed that a defendant can influence the size of the punitive damages award by submitting evidence of its financial resources to the jury.[332] Noting that its holding was in accord with the rule applicable to nongovernmental insureds,[333] the Court stated that the Leg-

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[329] *Id.* at 227-28, 397 N.E.2d at 743-44, 422 N.Y.S.2d at 53-54. Judge Meyer rejected the argument that coverage should be allowed because punitive damages in fact do not deter intentional or reckless conduct. *Id.* at 228, 397 N.E.2d at 744, 422 N.Y.S.2d at 54; *see* note 317 *supra*. The further argument that the Court should not protect an insurer who fails to exclude coverage for punitive damages likewise was rejected. *Id.* at 227, 397 N.E.2d at 743, 422 N.Y.S.2d at 53.

[330] Even though the Court restricted its decision to the public policy considerations pertinent in a Civil Rights Act action, the Court indicated that its holding may be extended in appropriate cases. *Id.* at 228 n.16, 397 N.E.2d at 744 n.16, 422 N.Y.S.2d at 54 n.16. The Court also noted that coverage for punitive damages in the future may be found appropriate where the insured's liability merely is vicarious. *Id.* at 223, 397 N.E.2d at 740, 422 N.Y.S.2d at 50; *see* note 316 *supra*. *But see* Monell v. Department of Social Servs., 436 U.S. 658, 691-94 (1978) (municipal liability may not be imposed vicariously under § 1983); Note, *Governmental Liability Under Section 1983 and the Fourteenth Amendment After* Monell, 53 ST. JOHN'S L. REV. 66, 92 n.127 (1978).

Although it appears that punitive damages have not yet been awarded directly against a municipality in New York, several cases have stated that to do so would be proper if the facts were such that recklessness or intentional wrongdoing by the municipality were shown. Kieninger v. City of New York, 53 App. Div. 2d 602, 602-03, 384 N.Y.S.2d 11, 12 (2d Dep't 1976); Hayes v. State, 80 Misc. 2d 498, 505, 363 N.Y.S.2d 986, 994 (Ct. Cl.), *rev'd on other grounds*, 50 App. Div. 2d 693, 376 N.Y.S.2d 647 (3d Dep't 1975), *aff'd*, 40 N.Y.2d 1044, 360 N.E.2d 959, 392 N.Y.S.2d 282 (1976).

[331] 48 N.Y.2d at 222, 397 N.E.2d at 740, 422 N.Y.S.2d at 50. The Court opined that the pernicious effect of personal, noninsurable liability for punitive damages on the lawful performance of municipal functions would be minimal since criminal sanctions and provisions for attorney's fees presently are utilized in section 1983 actions without a "chilling effect." *Id.* at 223, 397 N.E.2d at 740, 422 N.Y.S.2d at 50 (18 U.S.C. § 242 (1976); 42 U.S.C. § 1988 (1976)). *See also* Le Mistral, Inc. v. Columbia Broadcasting System, 61 App. Div. 2d 491, 494, 402 N.Y.S.2d 815, 817 (1st Dep't 1978) (punitive damages awarded against media defendant despite claim that award would "chill" first amendment rights); *The Survey*, 52 ST. JOHN'S L. REV. 620, 670-72 (1978).

[332] 48 N.Y.2d at 228, 397 N.E.2d at 744, 422 N.Y.S.2d at 54.

[333] *Id.* at 229, 397 N.E.2d at 744, 422 N.Y.S.2d at 54; *see* Padavan v. Clemente, 43 App. Div. 2d 729, 730, 350 N.Y.S.2d 694, 697 (2d Dep't 1973); Teska v. Atlantic Nat'l Ins. Co., 59

islature ultimately may decide to sanction insurance coverage for punitive damages in either the private or governmental spheres.[334]

The *Village of Hempstead* decision reflects the Court's view that the viability of punitive damages both as punishment of the wrongdoer and as an example to others depends upon their payment directly by the wrongdoer.[335] Provided that punitive damage awards are proportioned to a defendant's net worth, it is submitted that preventing him from shifting the burden of paying punitive damages through the purchase of liability insurance is not unduly harsh.[336] Moreover, while indemnification for compensatory damages often is necessary to make the victim whole, similar indemnification for punitive damages, which are awarded over and above those necessary to compensate the victim, are not.[337] It is submitted that for identical reasons, a municipality's statutory obligation to indemnify its employees for "negligent acts or torts" should not extend to punitive damage awards.[338] A contrary rule would seem

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Misc. 2d 615, 618, 300 N.Y.S.2d 375, 378-79 (Dist. Ct. Nassau County 1969).

[334] 48 N.Y.2d at 229, 397 N.E.2d at 744, 422 N.Y.S.2d at 54.

[335] *Id.* at 228, 397 N.E.2d at 744, 422 N.Y.S.2d at 54; *see* note 317 *supra.*

[336] *See* Rupert v. Sellers, 48 App. Div. 2d 265, 272, 368 N.Y.S.2d 904, 912 (4th Dep't 1975); 21 ST. JOHN'S L. REV. 198, 201-02 (1947). In *Rupert,* discovery of the defendant's wealth or poverty was permitted for the limited purpose of determining the amount of the award after the plaintiff had received a special verdict awarding punitive damages. The court stated that deterrence and punishment of a particular defendant are better accomplished by proportioning the size of the punitive damage award to a party's net worth. 48 App. Div. 2d at 271-72, 368 N.Y.S.2d at 912.

[337] Spreading liability for the payment of compensatory damages is justified by the importance of making the victim whole. *See* Esmond v. Liscio, 209 Pa. Super. 200, 204, 224 A.2d 793, 799-800 (1966); note 317 *supra.* Since the victim already has been fully compensated, liability insurance for punitive damages is less justifiable. *See* Padavan v. Clemente, 43 App. Div. 2d 729, 730, 350 N.Y.S.2d 694, 697 (2d Dep't 1973); Teska v. Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 618, 300 N.Y.S.2d 375, 378-79 (Dist. Ct. Nassau County 1969). *But see* Zuger, *Insurance Coverage of Punitive Damages,* 53 N.D.L. REV. 239, 257-58 (1976).

[338] Although insurance coverage for punitive damages in a section 1983 suit has been precluded on policy grounds, the General Municipal Law nevertheless obligates a municipality to idemnify an employee for "negligent acts or torts." GML § 50-j(1) (1977). Municipal statutory arrangements to indemnify employees are rationalized as necessary to shield them from the threat of civil liability which could inhibit the zealous performance of their duties. *See* Corning v Village of Laurel Hollow, 48 N.Y.2d 348, 359-60, 398 N.E.2d 537, 544, 422 N.Y.S.2d 932, 939 (1979) (Meyer, J., dissenting in part); Memorandum of Assemblyman Nicolosi, *reprinted in* [1979] N.Y. LEGIS. ANN. 402 (GML § 50-k); Memoranda of the City of New York, *reprinted in* [1976] N.Y. LEGIS. ANN. 162-63 (GML §50-j); Sikora, *Public Officers' Personal Liability for Money Damages,* 62 MASS. L.Q. 31, 31 n.1 (1977). It should be noted that a municipality's obligation to indemnify its police officers does not include a further obligation to defend the employee, absent specific legislation to that effect. *See* N.Y. PUB. OFF. LAW § 17(2)(a) (McKinney Supp. 1979-1980); GML § 50-k(2) (Supp. 1979-1980). Consequently, a municipal employee must pay his own attorney's fees and legal expenses

to conflict with the *Village of Hempstead* Court's position that the efficacy of an award of punitive damages depends upon payment by the tortfeasor.[339] Moreover, it is suggested that the reasoning of the *Village of Hempstead* decision should be extended to invalidate all contracts or agreements that shift liability for punitive

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even though the alleged tort was committed within the scope of employment. *See* Corning v. Village of Laurel Hollow, 48 N.Y.2d 348, 353, 398 N.E.2d 537, 540, 422 N.Y.S.2d 932, 939 (1979); Report of the Law Revision Commission to the Governor, Relating to the Indemnification and Defense of Public Officers and Employees [1978] LAW REV. COMM'N REP., *reprinted in* [1978] N.Y. Laws 1605 (McKinney). The *Corning* Court acknowledged that a different rule might obtain where the employee has a lesser degree of discretionary authority. 48 N.Y.2d at 352-53, 398 N.E.2d at 539-40, 422 N.Y.S.2d at 934-35.

In interpreting municipal obligations to indemnify employees, the phrase "within the scope of employment" has been interpreted so as to shift liability to the municipality in all but extraordinary cases. *See, e.g.*, Glens Falls Ins. Co. v. United States Fire Ins. Co., 41 App. Div. 2d 869, 869, 342 N.Y.S.2d 624, 626 (3d Dep't 1973), *aff'd*, 34 N.Y.2d 778, 315 N.E.2d 813, 358 N.Y.S.2d 773 (1974); Fitzgerald v. Lyons, 39 App. Div. 2d 473, 475-76, 336 N.Y.S.2d 940, 943 (4th Dep't 1972); Swerdzewski v. Westhampton Beach, 30 App. Div. 2d 694, 695, 291 N.Y.S.2d 848, 850 (2d Dep't 1968), *aff'd*, 24 N.Y.2d 760, 247 N.E.2d 855, 300 N.Y.S.2d 33 (1969). Thus, municipal liability is not precluded even where the employee's act is intentional. *See* Flamer v. Yonkers, 309 N.Y. 114, 118-19, 127 N.E.2d 838, 840 (1955); Baynes v. New York, 23 App. Div. 2d 756, 756, 258 N.Y.S.2d 473, 474 (2d Dep't 1965); Hinton v. New York, 13 App. Div. 2d 475, 475, 212 N.Y.S.2d 97, 97 (1st Dep't 1961). *But see* N.Y. PUB. OFF. LAW § 17(3)(a) (McKinney Supp. 1979-1980); GML § 50-k(3) (Supp. 1979-1980).

Should municipal indemnification for punitive damages be required, it would appear that the obligation to pay such an award will fall directly upon the municipality. Unlike §§ 50-b, 50-c and 50-d of the General Municipal Law, § 50-j(1) which applies to police officers does not limit a municipality's obligation to indemnify an employee to damages arising from negligence alone. Rather, the legislative definition of a municipality's obligation to indemnify includes responsibility for "negligent acts or torts" of the employee. While the courts have not yet determined whether indemnification for punitive damages is required by this section, it is submitted that the provision reflects nothing more than the legislature's cognizance that liability for certain intentional torts such as false arrest, false imprisonment, malicious prosecution, and assault frequently arise from police conduct. *See* Memoranda of the City of New York, *reprinted in* [1976] N.Y. LEGIS. ANN. 162-63; 1977 OP. N.Y. ATT'Y GEN. 127, 129-30 (municipality's obligation to indemnify certain employees not identical to its option to procure liability insurance for all employees). No intention to "save harmless" a police officer for intentional or reckless conduct giving rise to punitive damage liability can be gleaned from the legislature's approval of indemnification for non-negligent torts. *Cf.* Le Mistral, Inc. v. Columbia Broadcasting System, 61 App. Div. 2d 491, 495, 402 N.Y.S.2d 815, 817 (1st Dep't 1978) (intentional tort alone cannot form basis of punitive damage award absent showing of wrongful motive, or intentional or reckless misdoing). *But see* Eifert v. Bush, 27 App. Div. 2d 950, 951, 279 N.Y.S.2d 368, 370 (2d Dep't 1967), *aff'd mem.*, 22 N.Y.2d 681 (1968) (punitive, as well as compensatory, damages may be proper under a municipal obligation to indemnify police officers pursuant to GML § 50-c).

[339] 48 N.Y.2d at 228, 397 N.E.2d at 744, 422 N.Y.S.2d at 54. The ultimate result of requiring municipal indemnification for the uninsurable liability of a punitive damage award is that innocent taxpayers will be forced to pay penalities assessed against municipal employees while the latter avoid the financial punishment which the court and jury intended them to suffer personally.

damages to a third party, irrespective of whether the third party indemnifier is an insurance carrier, a private employer, or a governmental unit.[340]

The possibility that the municipal fisc may be depleted by obligation to indemnify for punitive damage awards may prompt the legislature explicitly to exclude punitive damage liability from the obligation to indemnify[341] or, conversely, to authorize insurance coverage for this potential liability.[342] It is submitted that the better course would be to exclude punitive damage liability from the obligation to indemnify employees for acts committed in the course of employment, rather than to authorize insurance coverage for this purpose.[343] This approach would promote a municipality's

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[340] In addition to the purchase of a liability policy, obligations to indemnify may be incurred by contract, *see* VAUGHAN & ELLIOTT, *supra* note 315, at 433-34, 516, or by operation of law. *See, e.g.*, GML §§ 50-a to 50-d, 50-j, 50-k (1977 & Supp. 1979-1980); GOL § 3-112 (1978) & Supp. 1979-1980); N.Y. VEH. & TRAF. LAW § 388 (McKinney 1970 & Supp. 1979-1980). In both situations, liability for punitive damages may be assumed by a third party and spread among innocent taxpayers or consumers.

[341] Recognition of a need to protect municipal coffers may in the future give rise to a per se ban on assessment of punitive damages against municipalities. New York State and New York City recently have assumed the obligation to defend employees for the consequences of acts executed within the scope of employment but have expressly disclaimed liability for punitive damages resulting from intentional wrongdoing or recklessness by the employee. N.Y. PUB. OFF. LAW § 17 (McKinney Supp. 1979-1980); GML § 50-k (Supp. 1979-1980). In light of *Village of Hempstead*, similar legislation soon may be forthcoming to limit the possibily uninsurable liability of municipalities covered by GML § 50-j(1) (McKinney 1977 & Supp. 1979-1980). *Cf.* International Bhd. of Elec. Workers v. Foust, U.S., 99 S. Ct. 2121 (1979) (punitive damages may not be awarded in suit for breach of duty of fair representation due to possible impairment of union's financial stability). *But see* Williams v. Horvath, 16 Cal. 3d 834, 845, 129 Cal. Rptr. 453, 460, 548 P.2d 1125, 1132 (1967) (en banc); City Council of Elizabeth v. Fumero, 143 N.J. Super. 275, 283, 362 A.2d 1279, 1283 (1976). It is conceivable that the same possibility of financial instability is underscored by statutory authorization for the purchase of liability insurance by municipalities.

[342] Generally, absent a clear indication that coverage is intended, mandatory insurance legislation should be understood to require full coverage only for compensatory damages. *See* Taska v. Atlantic Nat'l Ins. Co, 59 Misc. 2d 615, 618, 300 N.Y.S.2d 375, 378-79 (Dist. Ct. Nassau County 1969). *But see* Hayes v. State, 80 Misc. 2d 498, 505, 363 N.Y.S.2d 986, 994 (Ct. Cl.), *rev'd on other grounds*, 50 App. Div. 2d 693, 376 N.Y.S.2d 647 (3d Dep't 1975), *aff'd*, 40 N.Y.2d 1044, 360 N.E.2d 959, 392 N.Y.S.2d 282 (1976) (absent express exclusion of liability for punitive damages from Court of Claims Act. Such liability is assumed in state's waiver of immunity).

[343] Insurance for punitive damages improperly permits a tortfeasor to limit civil liability for socially reprehensible conduct to the size of his premium. *See* Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 443 (5th Cir. 1962). Although a tortfeasor may expose himself to criminal liability and risk an escalation in premiums, Zuger, *Insurance Coverage of Punitive Damages*, 53 N.D.L. REV. 239, 253 (1976), innocent policyholders ultimately will bear the financial impact of the punitive damage award. W. PROSSER, *supra* note 315, at 13.

Whether municipal liability for punitive damages is direct or vicarious, it similarly is

interest in protecting its treasury as well as society's interest in discouraging wanton and reckless conduct by governmental employees.[344]

Rose Frances DiMartino

Release agreement held no bar to negligence action under rule of strict construction

It has long been the rule in New York that exculpatory agreements[345] intended to insulate one of the contracting parties from liability for his own ordinary negligence are enforceable,[346] absent statutory prohibition[347] or overriding public policy.[348] Because they

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undesirable to permit liability shifting through insurance despite possible adverse consequences to the municipal fisc. Where liability is vicarious, a municipality should be held responsible for failing to carefully select and train its employees, rather than shifting the burden to taxpayers. *See* McKillip, *Punitive Damages in Illinois: Review and Reappraisal,* 27 DE PAUL L. REV. 571, 577-78 (1978). Where punitive damages are levied directly against a municipality, society's interest in punishing and deterring antisocial conduct should take precedence over a threat to a city's financial stability. While the innocent citizenry ultimately will provide the funds from which the award is paid under these approaches, the dual aims of punishment and deterrence nevertheless are effected because of the citizens' power to remove those officials whose policies gave rise to the award.

[344] *See* note 340 *supra.*

[345] The term "exculpatory agreement" has been used indiscriminately by the courts to encompass both releases and covenants not to sue. Colton v. New York Hosp., 98 Misc. 2d 957, 414 N.Y.S.2d 866 (Sup. Ct. N.Y. County 1979). Technically, however, a "release" is the present abandonment of an existing right or claim, while a "covenant not to sue" is a prospective promise to forego a right of action that may accrue in the future. *Id.* at 963, 414 N.Y.S.2d at 871-72. Since a prospective disclaimer, other than one between joint tortfeasors, operates as a complete and permanent bar to a cause of action, it has the same legal effect as a release. *Id.* at 965, 414 N.Y.S.2d at 873. For purposes of this Survey, the technical differences between these terms will be regarded as immaterial.

[346] Willard Van Dyke Prods., Inc. v. Eastman Kodak Co., 12 N.Y.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963); Phibbs v. Ray's Chevrolet Corp., 45 App. Div. 2d 897, 357 N.Y.S.2d 211 (3d Dep't 1974); *e.g.,* Ciofalo v. Vic Tanney Gyms, Inc., 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961); Church v. Seneca County Agricultural Soc'y, 41 App. Div. 2d 787, 341 N.Y.S.2d 45 (3d Dep't), *aff'd,* 34 N.Y.2d 571, 310 N.E.2d 541, 354 N.Y.S.2d 945 (1973); Solodar v. Watkins Glen Grand Prix Corp., 36 App. Div. 2d 552, 317 N.Y.S.2d 228 (3d Dep't 1971). *See generally* RESTATEMENT OF CONTRACTS § 574 (1932); W. PROSSER, LAW OF TORTS § 68 (4th ed. 1971); 15 S. WILLISTON, CONTRACTS § 1750 (3d ed. 1972).

[347] Agreements purporting to exempt parties engaged in certain businesses serving the public from liability for their own negligence have been rendered "void as against public policy and wholly unenforceable" by statutory directive. *See* GOL § 5-321 (landlords); *id.* § 5-322 (caterers); *id.* § 5-323 (building service and maintenance contractors); *id.* § 5-325 (garages and parking facilities); *id.* § 5-326 (places of public amusement and recreation).

[348] Releases purporting to exculpate parties from liability for injuries caused by gross negligence or intentional wrongs, however, are absolutely void as against public policy. *See,*