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,\textsuperscript{1} an incentive enhanced by the recent amendment to Section 29(1).\textsuperscript{2} 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.\textsuperscript{3} 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.

Paul R. Williams

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.\textsuperscript{4} 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).

\textsuperscript{1} 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.

\textsuperscript{2} See id. at 1552-53.


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.\textsuperscript{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.\textsuperscript{317} Re-


cently, in *Hartford Accident & Indemnity Co. v. Village of Hempstead*, 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.

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. While interpreting the “ambiguous wording” of the insurance policy against the insurer to cover punitive as well as compensatory damages, special term, nevertheless, granted Hartford’s motion for summary judgment, holding that liability coverage for punitive damages violated public policy. The Appellate Division, Second Department, af-
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-
scious [or reckless] disregard of the rights of others” through the purchase of insurance,\textsuperscript{329} the Court concluded that coverage was barred on policy grounds.\textsuperscript{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.\textsuperscript{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.\textsuperscript{332} Noting that its holding was in accord with the rule applicable to nongovernmental insureds,\textsuperscript{333} the Court stated that the Leg-

\textsuperscript{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.

\textsuperscript{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 899, 392 N.Y.S.2d 282 (1976).

\textsuperscript{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).

\textsuperscript{332} 48 N.Y.2d at 222, 397 N.E.2d at 744, 422 N.Y.S.2d at 54.

\textsuperscript{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.\footnote{48 N.Y.2d at 229, 397 N.E.2d at 744, 422 N.Y.S.2d at 54.}

The \textit{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.\footnote{Id. at 228, 397 N.E.2d at 744, 422 N.Y.S.2d at 54; see note 317 supra.} 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.\footnote{See Rupert v. Sellers, 48 App. Div. 2d 265, 272, 368 N.Y.S.2d 904, 912 (4th Dep't 1976); 21 St. John's L. Rev. 198, 201-02 (1947). In \textit{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.} 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.\footnote{Spreading liability for the payment of compensatory damages is justified by the importance of making the victim whole. \textit{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. \textit{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). \textit{But see Zuger, Insurance Coverage of Punitive Damages}, 53 N.D.L. Rev. 239, 257-58 (1976).} 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.\footnote{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 indemnify an employee for "negligent acts or torts." \textit{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. \textit{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, \textit{reprinted in} [1979] N.Y. LEGIS. ANN. 402 (GML § 50-k); Memoranda of the City of New York, \textit{reprinted in} [1976] N.Y. LEGIS. ANN. 162-63 (GML §50-j); Sikora, \textit{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. \textit{See} N.Y. PUB. OFF. LAW § 17(2)(a) (McKinney Supp. 1979-1980); \textit{GML} § 50-k(2) (Supp. 1979-1980). Consequently, a municipal employee must pay his own attorney's fees and legal expenses.} A contrary rule would seem
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. 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


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, 422 N.Y.S.2d 681 (2d Dep’t 1968) (punitive, as well as compensatory, damages may be proper under a municipal obligation to indemnify police officers pursuant to GML § 50-c).
damages to a third party, irrespective of whether the third party indemnifier is an insurance carrier, a private employer, or a governmental unit.\textsuperscript{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\textsuperscript{341} or, conversely, to authorize insurance coverage for this potential liability.\textsuperscript{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.\textsuperscript{343} This approach would promote a municipality's

\textsuperscript{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.

\textsuperscript{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 possibly 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.


\textsuperscript{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. 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 intended to insulate one of the contracting parties from liability for his own ordinary negligence are enforceable, absent statutory prohibition or overriding public policy. Because they 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.

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.

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).

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,