Making the Punishment Fit the Crime: Rhode Island's Common Law of Punitive Damages

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Common law punitive damages[1] straddle the boundary between civil and criminal law.[2] Although the form of the punitive damages remedy (i.e. damages awarded to the plaintiff) is civil, its purpose is not, as

> [p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor..., and to deter him and others from similar extreme conduct.[3]

As discussed in further detail below, R.I. courts have made the connection between punitive damages and criminal law even more explicit, stating on several occasions that punitive damages awards should be imposed only when the defendant's conduct "amounted to criminality, which for the good of society and warning to the individual, ought to be punished."[4]

Consistent with this standard, the Rhode Island Supreme Court has upheld punitive damages in cases involving criminal conduct, such as assault and battery[5] and misappropriation of confidential business information.[6] Also, R.I. courts have imposed punitive damages in actions for the commission of intentional torts that were not obviously crimes, but (in the opinion of the Court) did involve conduct that "amounted to criminality" such as malicious prosecution[7] and slander of title.[8]

In some areas, however, R.I. courts have had difficulty in reconciling the standard of conduct for punitive damages awards with the criminal law. In particular, there appear to be several areas of the law in which a person's conduct would qualify as a felony under the criminal law, but for which the availability of punitive damages in a civil suit is at best questionable, including involuntary manslaughter, certain cases of drunk driving and arson, and products liability. The result is interesting, with criminal penalties being extended to reckless and grossly negligent conduct, then being contained by the restrictive state-of-mind requirements that apply to punitive damages.

I. CRIMINAL PENALTIES FOR CONDUCT THAT IS LESS THAN INTENTIONALLY MALICIOUS

Rhode Island courts have made clear, in a number of contexts, that grossly negligent and/or reckless conduct can merit felony criminal liability. Also, R.I. courts have made clear that consequences of a criminal act can provide the basis for enhancing the criminal penalty, even if the defendant did not intend those consequences to occur. To provide a context in which to consider punitive damages law, we briefly consider three such areas: involuntary manslaughter, drunk driving and arson.

A. Involuntary Manslaughter

In R.I., the criminally negligent causing of another's death is a felony (involuntary manslaughter).[9] Three case decisions reflect the broad reach of this crime.

In **State v. Robbio**,[10] a grief-stricken father was adjudged a criminal after accidentally shooting his daughter with a gun that he did not realize was loaded. In that case, the Rhode Island Supreme Court upheld the conviction and the validity of a jury instruction that defined "criminal negligence" as

> conduct which is such a departure from what would be that of an ordinarily prudent or careful man in the same circumstances as to be incompatible with a proper regard for human life, or an indifference to its consequences.[11]

Because the father did not intend to harm his daughter or believe that he was placing her at risk, it was the objectively negligent nature of the defendant's act, rather than his subjective state of mind, that governed the outcome. As the Court stated in closing its opinion:

> The officer relieved Robbio of his medicine and he then asked him what he was doing with a loaded gun in a house with children. The jury's verdict was an appropriate response to his inquiry.[12]

The Supreme Court's decision in **Robbio** follows from a line of cases in which defendants have been convicted for criminally negligent behavior. One particularly interesting case is **State v. McVay**,[13] in which the captain and engineer of the passenger steamship Mackinac were charged with manslaughter when three passengers who boarded in Pawtucket perished just short of their Newport destination from steam escaping from the ship's exploding boiler. At trial, the jury convicted the defendants based upon evidence that they were aware that the boiler was "worn, corroded, defective and unsafe,"[14] but nevertheless operated the ship to generate more steam than the boiler could safely hold.

The unappealed convictions of the captain and the engineer who sailed the ship provide another useful example of the broad reach of the concept of criminal negligence.[15] The trial judge allowed the jury to consider the criminal liability of those two defendants for operating the ship under dangerous conditions, even though both men considered the ship to be safe enough to operate and ride themselves. Also, whatever general risk the defendants knew or should have known about, neither could reasonably foresee that any particular passenger would be harmed were an explosion to occur. In

this way, McVay's conviction goes further than the grieving father in **Robbio**, who at least knew (or should have known) exactly what consequences would result if the gun that he pointed at his daughter was, contrary to his sincere belief, loaded.

A third case, **State v. McLaughlin**,[16] illustrates further the reach of involuntary manslaughter law. In **Mclaughlin**, the Supreme Court upheld the conviction of a defendant on a "misdemeanor manslaughter" theory, while at the same time reversing a second conviction based upon the alterative theory of criminally negligent homicide.

The facts of the case were as follows. The defendant was a friend of the father of nine-year old Juston Ellinwood. One night, defendant visited the Ellinwood house when Juston was at home with his brother, but with both parents out of the house. According to the defendant's testimony, Juston asked him to go out for a ride. Later in the evening defendant and Juston got into an argument while standing in a brook where the water was about two feet deep. With the back of his hand, defendant hit Juston in the head. Juston did not appear to be seriously injured; when defendant left him, Juston appeared to be half walking and half swimming. Juston's body was found in the brook the next day. The state presented medical testimony that the blow to Juston's head was the second of two that he received that night, each causing a subdural hemorrhage.[17] The testimony also indicated that these injuries proximately caused Juston to become disoriented, fall and drown in the brook.[18] The jury convicted the defendant on two alternative theories: criminally negligent homicide and misdemeanor manslaughter.

On appeal, the Rhode Island Supreme Court vacated the criminal negligence conviction, holding that such a conviction required proof of three elements: (i) that defendant was aware of Juston's peril (following the blow), (ii) that defendant had a duty to aid Juston, and (iii) that defendant failed to aid Juston. Because the state did not demonstrate that defendant owed a legal duty to aid Juston, the Court vacated the conviction.[19]

However, even in the absence of criminal negligence, the Court upheld the conviction under the alterative theory of misdemeanor manslaughter. In particular, the Court held that the defendant's

blow to Juston was a misdemeanor (assault and battery) that proximately caused Juston's death. Thus, McLaughlin was held responsible for Juston's death even though McLaughlin did not negligently cause Juston's death, did not know Juston was in peril, and owed no legal duty to aid Juston even if he knew that Juston was in peril.

To conclude, R.I.'s manslaughter law adjudges defendants criminally responsible for deaths that a defendant proximately causes in a broad range of circumstances, even if those deaths were not foreseen or intended by the defendants.

B. Drunk Driving

A second area in which the standard of criminal intent is relaxed is in the area of criminal drunk driving law. Under R.I. GEN. LAWS § 31-27-2(d), driving under the influence is defined as a misdemeanor, even on a third offense. However, if a death results from the driver's intoxication, then the offense is upgraded to a felony with a penalty of up to 15 years' imprisonment for a first offense, and up to 20 years for subsequent offenses.[20] Thus, even though no drunk driver intends to get into an accident (and presumably would try his or her best to avoid one), the driver's actions will be considered a felony rather than a misdemeanor if, contrary to the driver's expectations and desires, a fatal crash occurs.

The Supreme Court reached exactly this result in **State v. Lisi**,[21] a reckless driving case. In that case, the defendant was convicted of driving recklessly at the time that he struck a pedestrian, who died from his injuries. On appeal, the defendant sought reversal of the trial court's denial of his directed verdict motion based upon the theory that the state had failed to prove that the defendant intended to harm the pedestrian. The Supreme Court upheld the conviction, stating that a jury could find the defendant guilty of reckless driving, death resulting if it found that

> the driving complained of is a conscious and intentional driving that the driver knows or should know creates an unreasonable risk of harm to others, even though he has no actual intent to harm them.[22]

Thus, a driver who is not aware of his or her reckless driving can be convicted of

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and you will inform your attorney about any new facts or circumstances that may affect your case as they arise.

2. You will adhere to your fee agreement with your attorney, pay your bills for all work that has been performed, and pay for all costs that were advanced for you. If you have any questions about your bill, you will discuss them with your attorney.

3. You will seek your attorney's advice before discussing any information relating to your legal matter with others.

4. You will tell your attorney if you have any concerns or reservations about the advice you are being given.

5. You will be on time for all court hearings and appointments with your attorney or let your attorney know in advance if you cannot be on time.

6. If you cannot reach your attorney when you phone the office, you will leave your name and phone number and a brief message.

7. You will complete the tasks requested by your attorney in a timely fashion or let your attorney know when you cannot.

8. You will discuss your expectations about what you want to accomplish in your legal matter with your attorney. When your expectations are not being met, you will talk to your attorney about it.

You have the right to change attorneys if you are dissatisfied with the representation you are receiving. However, in certain circumstances you will need the court's permission. It is also important for you to know that your attorney may decide to stop representing you. This may be due to your not meeting your obligations to your attorney or for some other reason. This too may require court permission.

This Client's Statement of Rights and Responsibilities is based on the Rhode Island Rules of Professional Conduct for attorneys. If you have any questions about this statement of your rights and obligations, you should contact the Rhode Island Bar Association at (401) 421-5740."

7. Effective Date. This Order shall take effect on ***May 1, 1998***.

Entered as an Order of this court this 7th day of April, 1998.

WEISBERGER, C.J. LEDERBERG, J.
BOURCIER, J. FLANDERS, J.
GOLDBERG, J.

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reckless driving, death resulting, if the driver *should* know that he or she is driving dangerously.

In fact, at least one justice of the Supreme Court would extend the reach of the drunk and/or reckless driving law even further. In **State v. Benoit**,[23] the victim's car crossed into a lane of oncoming traffic in which the defendant was traveling. The victim died in the crash, and it was determined that the defendant had been intoxicated when the crash occurred. On that basis, the state charged the defendant under R.I. GEN. LAWS § 31-27-2.2 (driving under the influence, death resulting), contending that the elements of the crime were established because the defendant drove while intoxicated, and the crash occurred during the time that the defendant was driving under the influence. The trial court dismissed the charge and the Supreme Court upheld the dismissal, on the ground that the accident was caused by the victim's crossing into the wrong lane, rather than by the defendant's manner of driving.

In a dissent, Justice Lederberg wrote that "[n]othing in these [drunk driving] statutes requires the state to prove deficiency in the defendant-operator's operation of the vehicle."[24] Instead, in her view, the legislature intended to hold drunk drivers strictly accountable for all harm that resulted once they took the wheel, even if the resulting injury was the fault of another driver, stating:

> The statutes establish a compelling deterrent to an individual who is about to engage in the criminal behavior or driving while under the influence of an intoxicating liquor precisely because of the statutes' harsh and unforgiving application.[25]

To conclude, R.I.'s criminal laws hold drunk drivers strictly accountable for any harm caused by their reckless driving regardless of whether the driver intended any harm to the victims of that driving. And, for at least one member of the Court, the policy of deterrence would support an even stricter rule, under which drunk drivers would be held criminally responsible, even if their driving while drunk was faultless.

C. Arson

The criminal law of arson provides another example of how criminal penalties can dramatically increase based upon factors beyond the defendant's intent, knowledge or control. A second degree arson conviction (setting fire to an unoccupied building) subjects a criminal defendant to a minimum sentence of two years imprisonment; however, if a death results, the minimum sentence increases to 20 years.[26] Again, it is quite likely that a defendant setting fire to an unoccupied building did not expect or intend that any deaths would result; however, in a manner similar to the operation of the misdemeanor manslaughter and felony murder rules,[27] the unintended, unforeseen result of death can dramatically increase the criminal punishment imposed.

The Rhode Island Supreme Court has interpreted the arson law liberally. For example, the legislature prescribed the greater penalties of first degree arson (five years minimum imprisonment) upon proof of second degree arson (minimum two years imprisonment) plus proof of the additional element that the defendant set the fire in an occupied building or that a fire in an unoccupied building created "a substantial risk of serious physical harm to any person."[28] While this element creates a theoretical distinction between the two statutes, the Supreme Court sharply curtailed the practical distinction between first and second degree arson in **State v. Caprio**.[29] In **Caprio**, the Supreme Court held that if firefighters respond to the fire of even an unoccupied building, that response may create a substantial risk of serious harm to the firefighter and will sustain a first-degree arson conviction.[30] Thus, even though an arsonist may take every precaution possible to ensure that the building in question was vacant and that the fire department would not respond, an unforeseen and unintended response by the fire department would seriously increase the defendants' criminal exposure. In another case, the Court has held that arson is a "general intent" crime, and that a defense of diminished capacity based upon voluntary intoxication is not available.[31]

D. Conclusion

There are several areas of R.I.'s criminal law in which the extent of the defen-

dant's punishment can depend crucially on factors beyond the defendant's intention, knowledge or control. Put another way, in the areas of involuntary manslaughter, driving under the influence and arson, the criminal law can increase the punishment imposed upon defendants for what they did not intend or foresee.

II. CULPABILITY STANDARDS FOR PUNITIVE DAMAGES LAW

On many occasions, the Rhode Island Supreme Court has articulated a standard for the imposition of common law punitive damages that appears to embrace criminal behavior. For example, in **Morin v. Aetna Casualty and Surety Co.**,[32] the Court reaffirmed the following often cited standard for conduct warranting punitive damages:

> Accordingly, one seeking punitive damages must produce "evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amount[s] to criminality, which for the good of society and warning to the individual, ought to be punished."[33]

The Rhode Island Supreme Court in **Morin** applied this standard to find that a criminal arson conviction was a sufficient basis for a court to impose punitive damages.

The facts before the **Morin** court were as follows. The plaintiffs owned a home that was extensively damaged by fire. At the time of the fire, the house was covered by an insurance policy issued by defendant. Plaintiffs filed a sworn statement and proof of loss claiming a total property loss of $261,000. When defendant paid only a portion of the claim, plaintiffs brought an action against it seeking the balance claimed, as well as interest. Defendant counterclaimed to recover the sums paid, as well as for punitive damages based upon the contention that the fire was intentionally set to defraud defendant.[34] While the civil trial was pending, the plaintiffs were convicted of arson and conspiracy to defraud an insurance company.[35] The civil trial court then granted the defendant summary judgment on both the plaintiffs' complaint and on the compensatory damages claims in its counterclaim, but also determined as a matter of law that defendant was not entitled to relief on its counterclaim for punitive damages.

On appeal, the Supreme Court held that the plaintiffs' arson convictions precluded judgment as a matter of law for the plaintiffs on the punitive damages counterclaim. In remanding the matter to the Superior Court on the issue of punitive damages, the Supreme Court stated the following:

> In this case, since criminality has been conclusively established the question of whether punitive damages are to be awarded should be referred to the trier of fact, judge or jury as the case may be.[36]

Thus, in **Morin**, the Supreme Court stated that a criminal conviction was, as a matter of law, a sufficient basis for a discretionary award of punitive damages.[37]

Notwithstanding **Morin**, other Supreme Court and Superior Court case decisions have held that conduct that clearly amounted to criminality might not provide a sufficient basis for a punitive damages award. This paradox stems from another often-quoted statement by the Supreme Court on the state of mind that must be shown in order to merit an award of punitive damages, also cited in **Morin**:

> We have held on several occasions

> that punitive damages are allowed in tort actions only when it can be shown that the defendant acted maliciously or in bad faith.[38]

Similarly, in **Palmisano v. Toth**,[39] the Rhode Island Supreme Court quoted favorably a federal court ruling that, under the R.I. common law of punitive damages, "one must allege that the other party acted with the intent to cause harm."[40]

The restrictive approach that R.I. courts take toward punitive damages becomes even more clear in the context of specific case decisions. In **Sarkisian v. The NewPaper, Inc.**,[41] a jury found the defendant (Davis) liable for fraud and conversion, for compensatory and punitive damages in the amounts of $43,106 and $36,666 respectively. The trial justice granted a motion for a new trial on the punitive damages count only.

The facts of the case were as follows. Defendant Davis, along with the two co-plaintiffs, jointly founded the NewPaper publication without a formal agreement. (The co-plaintiffs understood the arrangement to be an equal partnership.) Behind plaintiffs' backs, Davis incorporated the newspaper, issued each plaintiff one share of stock, and issued himself 1,001 shares of stock. For 11 months, Davis refused to provide the plaintiffs with information about the terms of the incorporation, or the responsibilities of the various individuals, instead assuring plaintiffs that the organization remained an equal partnership. Finally, Davis asserted his corporate authority and terminated the employment of one of the plaintiffs, leading to the lawsuit.[42]

On appeal, the Supreme Court upheld the trial judge's ruling granting the motion for a new trial on punitive damages, stating:

> We agree with the trial judge that although Davis' conduct was tortious, especially his failure over an eleven month period to resolve the incorporation issue with the plaintiffs, there is no evidence to suggest that he acted in such a malicious manner as to justify the imposition of a punitive damage award against him.[43]

Thus, in **Sarkisian**, proof of tortious fraud and conversion were legally insufficient to support an award of punitive damages, as plaintiffs had failed to prove that the tortious conduct was motivated

by malice directed toward the plaintiffs. In this way, punitive damages law imposes a more restrictive standard than does the criminal law; for example, the credit union customer who knowingly takes $7,200 mistakenly given to him by the teller is guilty of the felony of larceny even though the defendant did not maliciously intend to harm either the teller or the credit union.[44]

The Supreme Court again reversed a punitive damages award in a case involving an intentional tort in **Picard v. Barry Pontiac-Buick, Inc.**[45] In that case, the plaintiff believed that her automobile's brakes were able to pass inspection, but that the inspecting mechanic was "failing" them to try to make money from the resulting repair work. When a second mechanic initially issued an inspection sticker, but then (after talking with the first mechanic) asked the plaintiff to return to re-check the brakes, the plaintiff contacted the news department of a local television station (which featured a "troubleshooter" reporter), and then returned for the re-inspection with a witness and a camera.

The defendant, who was the first mechanic to "fail" the automobile's brakes, performed the re-inspection. While the defendant was looking at the brakes of her car, the plaintiff photographed him, apparently against his wishes. At trial, the plaintiff testified that the defendant then "'lunged' at her and 'grabbed her around [*sic*] the shoulders,'"[46] resulting in a ruptured vertebrate disc.[47] In a bench decision, the Superior Court held the mechanic liable for committing the intentional torts of assault and battery, and imposed punitive damages.

The defendant appealed the judgment on several grounds. He first challenged the Superior Court's finding that an assault and battery had occurred, claiming that other evidence (including his testimony) made clear that he was trying to grab the plaintiff's camera, not to cause her any injury. The Supreme Court upheld the Superior Court's judgment of liability, holding that, regardless of the defendant's intention, his actions placed the plaintiff "in reasonable fear of imminent bodily harm."[48] Also, the Supreme Court upheld the Superior Court's finding that a battery had occurred even if, as the defendant claimed, he had only contacted the camera in the plaintiff's hand, rather than the

plaintiff herself.[49]

While affirming the judgment that an intentional tort had occurred for which compensatory damages were available, the Supreme Court in **Picard** reversed the trial court's award of punitive damages, stating the following:

> In the instant case there was no proof of malice or bad faith nor was there a finding that defendant acted with malice. Consequently, the award of punitive damages in this case was not consistent with the purpose of such damages, namely, the deterrence of a defendant's "willfulness, recklessness or wickedness," because evidence of these factors was not presented.[50]

The Supreme Court's finding in this case illustrates again the complexity of the common law punitive damages standard. In particular, there was no doubt that the mechanic's action displayed, at a minimum, "recklessness," which word appears in the quoted punitive damages standard adopted by the Supreme Court. Furthermore, the record developed in the civil trial would appear to satisfy the elements of a *prima facie* case of criminal assault and battery,[51] thus the conduct in question "amounted to criminality." Were the defendant charged by the Attorney General, he would face a trial that could lead to incarceration. Further, as demonstrated by the discussion of the **McLaughlin** case above, it is clear that R.I. law would hold this defendant criminally responsible for all injuries proximately caused by his assault and battery, leading even to a manslaughter conviction if the injuries had been fatal. However, according to the Supreme Court's ruling in **Picard**, conduct that qualifies both as an intentional tort and as a crime does not merit punitive damages if the plaintiff fails to demonstrate that the defendant intended specifically to harm the plaintiff.

A recent Superior Court decision places Rhode Island's criminal law and the common law punitive damages standards into even greater relief. In **Willis v. Subaru of America**,[52] the Superior Court granted a motion to strike plaintiffs punitive damages claim based upon evidentiary submissions. (The hearing was held pursuant to the Supreme Court's ruling in **Palmisano v. Toth**[53] that provides that a court must decide whether a plaintiff has made a *prima facie* case for punitive damages prior to allowing discovery of the defendant's financial condition.)

Willis v. Subaru was a products liability case based upon personal injuries the plaintiff suffered when, after placing the automatic transmission of her automobile into the "park" setting, the car rolled backward down an inclined driveway. In connection with the punitive damages claim, the Superior Court found that the plaintiff had produced evidence sufficient to make the following *prima facie* case:

1. The defendants sold an automobile to the plaintiff on November 15, 1990.
2. At the time they knew that the automobile which they sold was defective and unreasonably dangerous in that it could roll on a slight incline when its transmission control had been placed in the "park," or "P," position.
3. They also knew that that defect constituted a risk of death or serious bodily injury to purchasers of the automobile, although they did not then know of the particular nature or cause for the defect, nor did they have the means to correct the defect.

4. The defendants' knowledge of that risk of death or serious bodily injury did not amount then to a substantial certainty that the defect would occur in the plaintiff's automobile or that the plaintiff would thereby be injured by reason of that defect.
5. The defendants did not actively or constructively intend to harm the plaintiff.[54]

To these facts the Court applied legal principles based upon the above-cited Supreme Court decisions. In particular, the Court defined the terms of the **Sherman** decision as follows:

> Since not every person liable for an intentional tort is liable for punitive damages, the state of mind called "intentional" standing alone will not suffice to support such an award.
>
> It is not enough that an actor engaged in intentional conduct which resulted in liability for the tort. In order for a plaintiff to recover punitive damages it would appear that the actor must have engaged in the conduct for the purpose of inflicting actual harm to the victim. ...

The notion of "recklessness" adds an even murkier concept to the kinds of state of mind of an actor which permit the assessment of punitive damages... Once again the focus is not on the blameworthiness of the conduct itself, but on the mental attitude of the actor with respect to the consequences of the wrongful conduct. Mere indifference to foreseeable harmful consequences to a plaintiff will not support an award of punitive damages. A knowing and deliberate disregard of the objectively substantial certainty of those consequences will suffice. At least at common law.

Under the circumstances, having found no active or constructive intent by these defendants to harm this plaintiff, I have granted the motions to strike.[55]

The above precedents reveal a gap in the law. Certain kinds of grossly negligent, reckless and/or intentional conduct can form the basis for a criminal conviction without qualifying as "such willfulness, recklessness or wickedness, on the part of the party at fault, as amount[s] to criminality, which for the good of society and warning to the individual, ought to be punished" in a civil lawsuit. While the Supreme Court has not stated that certain types of felonious criminal conduct are exempt from punitive damages in a civil suit, the precedents just discussed would support such a conclusion in the following areas:

A. Involuntary Manslaughter

The recent Louise Woodward case in Massachusetts[56] is an example of the type of civil lawsuit that can follow a criminal conviction for involuntary manslaughter. If the Massachusetts Superior Court's version of the facts presented in its decision granting the defendant's motion to reduce the verdict were the basis for a civil lawsuit in R.I., then Woodward's admittedly criminal conduct (for which she served time in jail) probably would not result in a punitive damages award.[57] Because the trial judge believed "that the circumstances in which Defendant acted were characterized by confusion, inexperience, frustration, immaturity and some anger, but not malice (in the legal sense),"[58] it follows that a R.I. court would not permit the jury to consider punitive damages in a civil suit brought against Woodward

because the plaintiff would fail to show that the defendant acted "maliciously or in bad faith."[59]

B. Drunk Driving

In a majority of states, a person whose injuries are caused by a drunk driver can sue the drunk driver for punitive damages, based upon a showing that the driver's conduct was reckless, wanton or willful.[60] While, to this writer's knowledge, the Rhode Island Supreme Court has not decided this question, the case decisions cited above appear to exempt the drunk driver from punitive damages. While the driver would be subject to a jail sentence of up to 15 years,[61] he or she probably can avoid civil punitive damages because few, if any plaintiffs can show that the defendant intended to harm him or her. Alternatively, no plaintiff could, under the **Willis** "recklessness" standard, show that the defendant had a "knowing and deliberate disregard of the objectively substantial certainty of [serious injury to the plaintiff]."

C. Arson

While the Supreme Court indicated in **Morin** that an arson conviction provided a sufficient factual predicate for a punitive damages counterclaim by the affected insurance company, that ruling may be limited by the factual circumstances of that case. In particular, the **Morin** defendants were convicted of both arson and conspiracy to defraud the insurance company, thus there was a factual basis upon which a finding of intent to harm the insurance company could be made. In contrast, if a person were injured in the fire, the viability of his or her punitive damages claim against the arsonist would be less clear. If the victim proves that the arsonist set the fire with the specific, malicious intent to injure the specific victim, then the punitive damages claim is viable. If, however, the arsonist's objective was to defraud the insurance company (as in **Morin**, *supra*), then the arsonist could prevent the jury from considering the punitive damages claim based upon a claim that the arsonist did not intend to hurt any of the fire's human victims.

D. Products Liability

In numerous other jurisdictions,[62] courts have imposed punitive damages upon manufacturers in products liability lawsuits involving such dangerous prod-

ucts as the poorly designed gasoline tank of the 1972 Ford Pinto,[63] asbestos insulation,[64] defectively designed radial tires[65] and surgical implants.[66] In those jurisdictions, a manufacturer can be held liable for punitive damages if the manufacturer acted recklessly in marketing the product despite known dangers or risks. The only published case decision applying R.I. law, **LaPlante v. American Honda Motor Co.**,[67] suggests that Rhode Island does not share this view. In **LaPlante**, the United States First Circuit Court of Appeals upheld a trial court ruling denying punitive damages as a matter of law because the plaintiff had failed to produce evidence that the defendant "acted maliciously, in bad faith or with the intent to harm."[68]

One could read **Willis** and **LaPlante** broadly to conclude that punitive damages are not available for *any* products liability claim in R.I. In particular, the standard set by the **Willis** court requires that a plaintiff show either a malicious intent by the seller to harm the consumer or, alternatively, a "knowing and deliberate disregard of the objectively substantial certainty of [serious bodily injury to the plaintiff]." It is unlikely that any plaintiff will ever be able to meet this standard. In the typical products liability case, a manufacturer may be aware that its product carries an unreasonable risk to the consumer, and perhaps a probabilistic likelihood that some [unidentified] consumer *will* be injured. However, this level of proof is far from the punitive damages standard articulated by the Superior Court in **Willis**, in which the plaintiff must show that the manufacturer faced a "substantial certainty" that a *particular* customer (or *all* customers) would be seriously injured. A manufacturer motivated by recklessness or greed might consent to the manufacture of a risky product, but only a malicious manufacturer would produce a product substantially certain to injure every customer who purchases it.

While this writer is unaware of any R.I. criminal case involving products liability, **McVay** supports the view that such a case (particularly one in which death resulted) could result in a criminal conviction and a significant jail sentence. As noted above, the **McVay** defendants were aware that the steam boiler in their ship was dangerously worn and corroded. However, the defendants elected to sail the ship despite that awareness; therefore,

they must not have possessed a "substantial certainty" that death or serious injury would result. Furthermore, even if the defendants were substantially certain that the boiler would explode, they still could successfully prevent a R.I. jury from considering a punitive damages claim because they would not have had any prior knowledge of which passengers would be injured by the explosion.

III. CONCLUSION

As these cases make clear, R.I. courts have allowed an apparent gap to develop between conduct worthy of criminal punishment (including imprisonment) and conduct that merits an award of punitive damages in a civil lawsuit. In R.I., conduct "amounting to criminality" that can lead to extensive incarceration often will not be sufficient to justify an award of punitive damages, even though many defendants would prefer to part with their money (on such expenses as defense costs) rather than with their freedom. The criminal defense bar can point to this result to support the relaxation of criminal liability, while the civil plaintiffs' bar can argue in favor of tougher punitive damages law. Perhaps some day the Supreme Court will decide which view (if either) is correct.

ENDNOTES

*[1] In addition to common law punitive damages for certain torts, several R.I. statutes provide for punitive damages. In some instances, the statutes indicate that punitive damages are automatically available if the plaintiff establishes liability and an entitlement to compensatory damages. E.g., R.I. GEN. LAWS § 12-7-14 (providing that, in a false imprisonment case, punitive damages are available in any case in which liability for compensatory damages is established); **Soares v. Ann & Hope of Rhode Island**, 637 A.2d 339, 351-52 (R.I. 1994) (interpreting § 12-7-14 in this way). In other instances, statutes provide a separate standard (generally more liberal than the common law) for the imposition of punitive damages. E.g., R.I. GEN. LAWS § 28-5-29.1 (authorizing punitive damages in employment discrimination actions when defendant's conduct "is shown to be motivated by malice or ill will **or when the action involves reckless or callous indifference to the statutorily protected rights of others**," (emphasis added)). Finally, there are statutes in which the Supreme Court has applied the common law standard. E.g., R.I. GEN. LAWS § 5-37.3-9 (release of confidential health care information); **Washburn v. Rite Aid Corp.**, 695 A.2d 495, 499 (R.I. 1997) (applying common law standard to punitive damages claim under statute). The Supreme Court has not yet described in detail what statutory language requires that punitive damages be considered by the fact finder whenever liability is established (as in the case of false imprisonment, **Soares, supra**), and what statutory language requires the court to apply the common law*

standard before submitting punitive damages to the fact finder (as in the case of release of confidential health care information, Washburn, supra).

[2] Victims of crimes also have a statutory remedy in a civil action against the criminal. R.I. GEN. LAWS § 9-1-2 authorizes crime victims to sue for compensatory damages, and for larceny victims to recover double the value of the goods stolen. Other than the larceny provision, this statutory remedy is limited to compensatory (and not punitive) damages.

[3] **City of Newport v. Fact Concerts, Inc.**, 453 U.S. 247, 266-67, 101 S.Ct. 2748, 2759 (1981) (citing RESTATEMENT (SECOND) OF TORTS § 908 (1979); W. PROSSER, LAW OF TORTS, at 9-10 (4th ed. 1971)).

[4] **Sherman v. McDermott**, 114 R.I. 107, 109 (1974) (quoting **Adams v. Lorraine Mfg. Co.**, 29 R.I. 333, 338 (1908) and **Hagan v. Providence & Worcester R.R.**, 3 R.I. 88 (1854)).

[5] **Id.**; **Norel v. Grochowski**, 51 R.I. 376 (1931) (reducing amount of award as excessive).

[6] **Abbey Medical/Abbey Rents, Inc. v. Mignacca**, 471 A.2d 189 (R.I. 1984).

[7] **Soares v. Ann & Hope of Rhode Island, Inc.**, 637 A.2d 339 (R.I. 1994).

[8] **Dias v. Vieira**, 572 A.2d 877 (R.I. 1990); **Peckham v. Hirschfield**, 570 A.2d 663 (R.I. 1990).

[9] R.I. GEN. LAWS § 11-23-3; **State v. Robbio**, 526 A.2d 509 (R.I. 1987).

[10] 526 A.2d 509 (R.I. 1987).

[11] **Robbio, supra**, note 9, at 514.

[12] **Id.**

[13] 47 R.I. 292 (1926)

[14] **McVay, supra**, note 13, at 294.

[15] The issue on appeal in **State v. McVay** was whether a third defendant (Kelley) could be held liable as an accessory before the fact, where he directed the other defendants to operate the ship, but where he was not present on the ship when the explosion occurred.

[16] 621 A.2d 170 (R.I. 1993).

[17] **Id.** at 173-74, 177-78. The other head injury apparently was caused by "wrestling" engaged in by Juston and his brother earlier that night.

[18] **Id.**

[19] **Id.** at 175-76.

[20] R.I. GEN. LAWS § 31-27-2.2(b).

[21] 105 R.I. 516 (1969).

[22] **Id.** at 520-21 (quotation omitted).

[23] 650 A.2d 1230 (R.I. 1994).

[24] **Id.** at 1234

[25] **Id.** at 1235

[26] R.I. GEN. LAWS § 11-4-3.

[27] For an example of a judicial application of the misdemeanor manslaughter rule, see **State v. McLaughlin, supra**, note 16. For an example of the judicial application of the felony murder rule, see **State v. Villani**, 491 A.2d 976 (R.I. 1985).

[28] R.I. GEN. LAWS § 11-4-2.

[29] 477 A.2d 67 (R.I. 1984).

[30] **Id.** at 71.

[31] **State v. Doyon**, 416 A.2d. R.I. 130 (R.I. 1980).

[32] 478 A.2d 964, 967 (R.I. 1984).

[33] **Id.** at 967 (quoting **Sherman**, supra note 4, at 109; **Adams** supra note 4 at, 338; and **Hagan v. Providence & Worcester R.R.**, 3 R.I. 88 (1854)).

[34] **Id.** at 965.

[35] **Id.** (citing **State v. Morin**, 422 A.2d 1255 (R.I. 1980)).

[36] **Id.** at 967.

[37] As the quoted passage from **Morin** emphasizes, punitive damages remain discretionary, and a decision by the court (in a bench trial) or by a jury not to award punitive damages is not reviewable. See also, **Dias v. Vieira**, 572 A.2d 877, 879 (R.I. 1990) (where

trial court following bench trial acknowledges that defendant's conduct merits punitive damages but denies them so that defendant "can learn a lesson from what he has experienced here," appeal of plaintiff is denied because trial court's decision is not reviewable).

[38] **Morin**, supra, note 32 at 967 (citing **Carvalho v. Coletta**, 457 A.2d 614, 616 (R.I. 1983) and **Berberian v. New England Telephone & Telegraph Co.**, 117 R.I. 629, 633-34 (1977)).

[39] 624 A.2d 314, 318 (R.I. 1993).

[40] **Id.** (citing **Wilson Auto Enterprises, Inc. v. Mobil Oil Corp.**, 778 F.Supp. 101, 107 (D.R.I. 1991)). **Wilson** was decided by Judge Lagueux, who grappled with the common law standard as a Superior Court justice in **Petrone v. Davis**, 118 R.I. 261, 267 (1977). In **Petrone**, Judge Lagueux denied a punitive damages claim in a bench trial because the plaintiff had failed to show that the defendant acted "maliciously, that is with the motive of hurting plaintiffs." When the plaintiffs appealed on the ground that the legal definition of "malice" was broader, the Supreme Court refused to decide the issue, ruling instead that the trial court had discretion to deny even a legally sufficient punitive damages claim. Id., at 267-68. As noted above, Judge Lagueux stated his view of the punitive damages standard again in **Wilson**, and the Supreme Court adopted that view in **Palmisano**.

[41] 512 A.2d 831 (R.I. 1986).

[42] **Id.** at 832-35.

[43] **Id.** at 837 (R.I. 1986).

[44] **State v. Hector**, 121 R.I. 685, 402 A.2d 595 (1979).

[45] 654 A.2d 690 (R.I. 1995).

[46] **Id.** at 692.

[47] In **Picard**, the Rhode Island Supreme Court also ruled that a medical affidavit upon which plaintiff relied to establish the nature and extent of her injuries was inadmissible. **Id.** at 695-96. On this basis (and others), the Supreme Court vacated the Superior Court's compensatory damages award.

[48] **Id.** at 694 (quoting **Proffitt v. Ricci**, 463 A.2d 514, 517 (R.I. 1993)).

[49] **Id.**

[50] **Id.** at 696 (quoting **Palmisano**, supra note 39 at 318).

[51] R.I. GEN. LAWS § 11-5-3

[52] **No.** PC 93-6202, slip op. (R.I.Super.Ct. March 4, 1997).

[53] **Palmisano supra** note 39.

[54] **Willis v. Subaru**, No. PC 93-6202 slip op. at 1-2 (R.I.Super.Ct. March 4, 1997).

[55] **Id.** at 3-4.

[56] **Commonwealth v. Woodward**, Cr. 97-0433, slip op. (Mass.Super.Ct., Middlesex Cty., November 10, 1997).

[57] Because the Massachusetts wrongful death statute, MASS. GEN. LAWS ch 229, § 2, allows the imposition punitive damages for "reckless" conduct without the additional requirements of intent contained in Rhode Island law, it appears to be more likely that a punitive damages claim would be presented to the jury.

[58] **Woodward, supra**, note 56.

[59] See **Morin** supra note 32 at 967 (citing **Carvalho v. Coletta**, 457 A.2d 614, 616 (R.I. 1983) and **Berberian v. New England Telephone & Telegraph Co.**, 117 R.I. 629, 633-34 (1977)).

[60] See Annotation, Intoxication Of Automobile Driver As Basis For Awarding Punitive Damages, 33 A.L.R. 5th 303 (1994), § 3 (collecting cases from 28 states, although one of the states (Arizona), has apparently changed its view on this question, **see** § 4).

[61] See R.I. GEN. LAWS § 31-27-2.6(d) (second conviction, serious bodily injury); R.I. GEN. LAWS § 31-27-2.2(b)(1) (first conviction, death resulting).

[62] See **generally** Annotation, Allowance of Punitive Damages in Products Liability Case, 13 A.L.R. 4th 52 (1980 & Supp. 1996) (collecting cases from at least 20 jurisdictions affirming punitive damages awards against manufacturers for reckless conduct).

[63] **Grimshaw v. Ford Motor Co.**, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (4th Dist. 1981).

[64] **Dunn v. Hovic**, 1 F.3d 1371 (3d Cir. 1993).

[65] **Baker v. Firestone Tire & Rubber Co.**, 793 F.2d 1196 (11th Cir. 1986).

[66] **3-M Corporation-McGhan Medical Reports Div. v. Brown**, 475 So.2d 994 Fla. Dist. Ct. App. 1985).

[67] 27 F.3d 731, 745 (1st Cir. 1994).

[68] **Id.** (citation omitted). ■