Negligence Liability for Personal Injury and Compensation Awards in the United States

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Introduction

In the United States, compensation in tort claims is concerned primarily with the provision of reparations to persons suffering personal injury or property loss due to a failure to act with due care under the circumstances. This contention is based on finding negligence liability that is not concerned with penalising enterprises and to allow the investment of industrial capital to utilise resources to increase production. [2] The intention is to protect persons and property from unreasonable risk of harm; and the tortfeasor's liability in tort is limited by concepts of reasonable foreseeability.[3] The personal injury liability insurance that provides insurance cover needs examination because it is necessary to determine the extent to which it covers damages in an accidental injury and the heads of damages and their conceptual basis.

The courts generally apply a test of negligence liability which establishes "the five elements of a prima facie case for negligence as 'duty,' 'failure to exercise reasonable care,' 'factual cause,' 'physical harm,' and 'harm within the scope of liability' (which historically has been called 'proximate cause')."[4] The courts have followed this reasoning and applied this formula in adjudicating on tort liability as based on "(1) duty; (2) breach; (3) cause-in-fact; (4) legal cause; and (5) damages)"; [5] or as "(1) duty; (2) breach; "(3) injury; (4) causation in fact; and (5) proximate, or legal, cause)". [6]

The elements of the tort in common law need to be proven based on duty of care, breach of duty, and proximity. The term 'duty' is used through the Restatement of Torts "to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause."[7] A general

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[1] LLB Lon, LLM Lon, Gray's Inn

[2] Robert J. Kaczorowski, 'The Common-Law Basis of Nineteenth-Century Tort Law', (1990) 51 Ohio. L.J, 1

[3] Dan N B. Dobbs, The Law of Torts (1st ed, St Paul, West Group, 2000) 259-263.

[4] Restatement (Third) of Torts: Liability for Physical Harm § 6 (P.F.D. No. 1, 2005) 'Liability for Negligent Conduct,' cmt. b at 79-80.

[5] *Detraz v. Lee (*La. 2007) 950 So. 2d 557, 562.

[6] *Naifeh v. Valley Forge Life Ins. Co.,* (Tenn. 2006) 204 S.W.3d 758, 771.

definition of proximate is that "an injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission."[8] The injured party is generally entitled to recover damages for the natural and probable consequences of their negligent act and the insurers have to satisfy the claims of the injured party.

This article examines personal injury liability insurance in the US and the legal principles relied upon in damages awards. The first part of this paper examines the concept of bodily injury liability and insurance claims that arise in tort, the second part addresses the principle of corrective justice and how courts take into consideration the deterrence effect of compensation payments. The third part explores the concept of economic efficiency that is of crucial importance in monetary awards by the courts. The final part evaluates the punitive damages the courts can award in bodily injury liability and how insurance companies fix premiums to cover their loss.

1. Bodily injury insurance and litigation process

1.1 Motor accident claims

The compensation claims based on personal injury in the US can arise from any accidental injury that includes "road traffic accidents, workplace accidents, sports injuries, where the venue or another user's negligence has caused an injury; and any debilitating disease or illness" that has been caused by negligence.[9] Of these, "the most common personal injury claims" involve liability for auto car injury and the majority of insurance claims revolve around car accidents. While English law allows up to three years under the Limitation Act 1980, s-11 in which to start a compensation claim for an injury that arose from negligence or a deliberate act, the deadline for bringing a claim in negligence varies in the US from State to State.[10]

The insurance cover that is required by law in the US has two components which is the bodily injury liability and property damage liability and both these form of insurance coverage are required up to the minimum limit by most states. If a person owns

> "*a vehicle, the state they live in probably requires them to at least have a minimum amount of these coverages and if they cause an accident that injures another person and/or damages their property,*

[7] Black's Law Dictionary (Abridged 6th ed., Henry Campbell, 1990), 1345.

[8] ibid (853).

[9] The Daily Campus. The 10 most common personal injury claims. Southern Methodist University (1 November 2020, https://www.smudailycampus.com/sponsoredcontent/promoted/the-10-most-common-personal-injury-claims, accessed 11 May 2021)

[10] David Goguen, How Long Do I Have to File a Personal Injury Claim? (17 October 2019, https://www.lawyers.com/legal-info/personal-injury/how-long-do-i-have-to-file-a-personal-injury-claim.html, accessed 19 May 2021)

bodily injury and property damage liability insurance are designed to protect them from paying a substantial amount of money out of pocket to cover the related costs."[11]

The bodily injury liability covers the medical expenses for someone else's serious injuries and hospital care if the insurer causes a car accident. It may also cover any after care costs and includes compensation required for lost wages and income to the injured party. The insurance cover will pay compensation up to the covered amount while the rest will be paid privately. This form of insurance policy includes cover for the legal fees because after an accident resulting in injuries, the tortfeasor could be taken to court by either the injured party or the injured party's insurance company which requires the payment of lawyer's fees. If the accident is fatal, bodily injury liability will help cover funeral costs.

1.2 Compensation in out -of-court settlements

The amount of compensation depends on the extent of injuries as well as the applicable laws in whichever US State the incident occurred. The injured party can claim for general damages including pain and suffering and also claim for any special damages for loss of earnings as well as for the cost of any medical treatment or rehabilitation period that may be required. The claims in the US are pursued on a No Win No Fee basis and a significant proportion of personal injury compensation claims which will be accepted by law firms are on the basis of contingency fee agreements.

The contingency fee arrangement generally means the attorney does not get paid if the claim fails and personal injury compensation is not awarded. The

"*attorneys' fees come directly from money received through negotiated insurance settlements and/or jury verdicts. The majority of lawyers only offer contingency fee contracts in cases likely to result in lump-sum monetary payouts. The most common cases accepted on a contingency fee basis include car, truck, and motorcycle accidents, bicycle and pedestrian injuries, falls, medical malpractice, nursing home abuse and malpractice, intentional physical and sexual assault, workplace injuries, defective product cases, dog bites, and any other unlawful conduct resulting in injury or illness. It is only plaintiffs (claimants making the injury claim) who may generally request contingency fee contracts. Those defending themselves in personal injury cases must typically pay attorneys by the hour or work with insurance-provided lawyers*."[12]

There's no standard content clause in a contingency fee contract or fee and law firms draft their own attorney-client agreements based on the facts of the case. However, prospective clients may not want to sue, especially if the

[11] Bodily Injury & Property Damage liability Insurance: 'What it is and what is Covered. American Family Insurance' (https://www.amfam.com/resources/articles/understanding-insurance/bodily-injury-and-personal-property-liability-insurance, accessed 10 May 2021).

[12] David Braun, 'What is the Standard Contingency Fees', Brauns Law (13 April 2021, BraunsLaw.com/blog/standard-contingency-fees-for-attorney, accessed 20 May 2021).

accident involved negligent friends and they may instead retain lawyers to settle their insurance for medical bills or lost wages. In other cases, lawyers may need to file litigation for injured clients in high-value cases involving life-altering or disabling injuries such as brain trauma, spinal cord damage, and burns that exceed insurance policy limits. This may cause estimating claims based on the fact that "most Americans lack adequate disability insurance."[13]

The insurance company may undervalue the claim and pay only a nominal amount based on the assumption that the person making the claim was "*completely at fault; someone other than the insured person was completely at fault the claimant's injuries were not caused by the accident, or the claimant had no real injuries at all*." However, in many cases an "*insurance adjuster's initial refusal to make any settlement will eventually turn into an offer to settle the case for a small amount known as 'nuisance value' bearing no relation to the damages formula*", in their settlement offer. The individual claimant is unlikely to gain reasonable amount in their claim because the "insurers seldom, if ever, offer fair financial settlements to unrepresented claimants."[14]

This is corroborated by the Insurance Research Council (IRC) emphasis that payouts are much higher when the injured party was covered by an insurance policy. The IRC in a countrywide survey of auto injury claims on major auto insurers stated the following :

"*One in eight drivers on the road in 2019 was driving without insurance, according to a new report from the Insurance Research Council (IRC). In 2019, the estimated countrywide uninsured motorist rate was 12.6 percent. At-fault drivers who fail to comply with state insurance requirements increase the cost of insurance for those who comply with state requirements. Insured drivers paid, on average, approximately $78 per insured vehicle in 2016 for insurance protection against at-fault drivers who are uninsured or who have inadequate insurance to cover the medical costs and property damage incurred by others. Across the U.S., insured drivers in 2016 paid more than $13 billion for uninsured/underinsured motorist coverage.*"[15]

The IRC studies have established the fact that in "personal injury claims, having an attorney to represent a client can make a large monetary difference when it comes to the value of the insurance compensation."[16] The Attorney

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[13] Alena Allen, 'State Mandated Disability Insurance as Salve to the Consumer Bankruptcy Imbroglio', Buy L. Rev. 1327 (2011) 1343 (https://digitalcommons.law.byu.edu/lawreview/vol2011/iss5/1, accessed on 21 May 2021).

[14] The Insurance Adjuster's Nuisance Value of your Claim. All Law (excerpted from How to Win your personal injury claim by Joseph Mathews; 10th ed., Nolo Publishing 2018; https://www.alllaw.com/articles/nolo/personal-injury/insurance-adjusters-nuisance-value-your-claim.html, accessed 21 May 2021).

[15] 'One in Eight Drivers Uninsured', Insurance Research Council, News Release' (22 March 2021, https://www.insurance-research.org/sites/default/files/downloads/UM%20NR%20032221.pdf., accessed 15 May 2021).

[16] Insurance Research Council 'Paying For Auto Injuries: Consumer Panel Survey of Auto Accident Victims', (19 August 2004, https://www.insurance-research.org/research-publications/paying-auto-injuries-consumer-panel-survey-auto-accident-victims-2004-edition, accessed 23 May 2021).

involvement in auto insurance claims is on the rise and varies significantly by state, according to the IRC findings in their report *Attorney Involvement in Auto Injury Claims.* This evaluated

> "*more than 35,000 auto injury insurance claims that closed with payment under the five principal private passenger coverages. Twelve insurers, representing 52 percent of the private passenger auto insurance market in the US participated in the study*."

The report used data from 2012

> "*to examine trends in the rate of attorney involvement in auto injury claims over time and across states. It also provides details on the interaction between the presence of attorneys and cost drivers such as medical treatment and claim abuse and how represented claimants fare compared to claimants without attorneys with respect to claim payment and time to settlement*."[17]

The findings showed that the percentage of auto injury claimants represented by attorneys rose to 36 percent of personal injury protection (PIP) claimants in 2012, up from 31 percent in 2007 and more than double the rate found in a similar study in 1977. The rate of attorney involvement among bodily injury (BI) claimants rose slightly, to 50 percent in 2012. [18] The IRC study also examined the factors associated with attorney involvement and found insurance companies

> "*were much more likely than those without representation to receive treatment in a pain clinic and to undergo magnetic resonance imaging (MRI) for similar injuries; were more likely to be involved in apparent claim abuse; received, on average, lower net payments (total payments adjusted for claimed economic expenses and applicable legal fees) than those who did not hire attorneys; and waited longer for payment of claims*."[19]

The IRC studies point to the fact that legal representation causes insurance companies to settle out of court with a reasonable offer of payment. The role of attorneys is crucial in many of the factors driving up the cost of auto insurance premiums for bodily injury coverage. The attorney involvement emphasises two of the perceived benefits of no-fault auto injury systems which are a less adversarial settlement process and more timely payments by the insurance company.

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[17] Insurance Research Council 'Attorney Involvement in Auto Injury Claims' (8 July 2014. https://www.insurance-research.org/research-publications/study-finds-more-auto-injury-claimants-are-hiring-attorneys, accessed 24 May 2021).

[18] 'Study Tracks Rise in Attorney Involvement in Auto-Insurance Claims' Insurance Journal (8 July 2014, https://www.insurancejournal.com/news/national/2014/07/08/334002.htm, accessed 25 May 2021).

[19] Ibid.

2. Principle of Corrective Justice

In theory, tort law is designed to achieve justice for the claimant. The principle of corrective justice advances the proposition that the judiciary should promote a rights-based jurisprudence grounded in moral precepts when adjudicating damages in tort based claims.[20] This implies that the morality-based goals still form a necessary and foundational element of modern tort law and propounds "that the law should choose one avenue of justice, because there cannot be an integration between corrective and distributive justice, and the latter can accomplish justice aims".[21] It is generally accepted that a wrong caused by a party is a consequence of a moral transgression in which there is an identifiable perpetrator and a victim who that damages arise from the tort.

The elements of the tort in common law need to be proven based on duty of care, breach of duty, proximity and causation for a civil injury claim and the "Wrongdoing of a party is an essential factor in the decision to impose liability."[22] Once this is established apportioning liability would be the goal of corrective justice, i.e., a result that to the extent possible deprives the wrongful party of his gain, and restores the injured party to the position he was capable of before the harm. This is a form of indemnity, which has been argued as the general purpose of tort law, that a person attains after certain forms of harm to person, reputation, or estate, at the hands of the perpetrators.

There are other aspects of corrective justice as a remedy in tort that concerns the deterrence aspect which imposes the monetary burden on the defendant. Some accounts of corrective justice have addressed the first-order duty of care, but these formulations deny that deterrence is an aspect of corrective justice. This implies that any rights-based rationale for tort liability will be lacking unless it can explain why the negligence rule values the prevention of injury over the compensation of injuries with the damages remedy. [23] The mathematical formula that corrective justice suggests has caused theorists to base their assumption on specifying grounds of liability and recovery. This implies that any mode of redress that does not create wrongful gains and losses is compatible with corrective justice. In this manner the concept prohibits creating a wrongful loss, even if doing so would have the effect of rectifying substantial injustice.

The tort law theorist Jules Coleman, argues, that tort law is not a particularly good institution for redeeming wrongful gains because:

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[20] Vincent A. Wellman, 'Conceptions of the Common Law: Reflections on a Theory of Contract′ 41 (1987) U Miami L Rev 925 (citing Ronald Dworkin, *Taking Right Seriously,* First edition (Harvard University Press) 1977 [84], in which Dworkin "propound[s] a rights-based theory of law and a corresponding obligation of judges to consider moral precepts when deciding significant cases")

[21] Ernest J. Weinrib 'The Gains and Losses of Corrective Justice', 44 Duke L. J. (1994) 277.

[22] Martin A. Kotler 'Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine' 58 U. Cin. L. Rev. (1990) 1231, 1240.

[23] Mark A. Gestfield 'Damages and the Nature of Tort Liability' 121 Yale L. J. (2001) 142.

> "[*w]ere there no way of rectifying a wrongful loss of substantial magnitude other than by creating some small injustice, then it would be odd to claim that nothing could be done about the greater injustice; more precisely, anything done which rectifies the greater injustice by creating a lesser one would violate corrective justice*."[24]

Coleman observes that it can never be permissible to create a wrongful loss in order to rectify another wrongful loss if rectification without doing so is conceivable. On the other hand, the imposition of a wrongful loss is allowed only if the disparity between the wrongful loss created and the loss invalidated is substantial. The reasoning is that there must be a method for the wrongful loss to be justified and there is no space for rectifying the existing loss without imposing another wrongful loss. He asserts that:

> "*the difference between the loss annulled and the loss created must be substantial. The difference between this proposal and the efficiency account is that all that is required in the latter case is a marginal difference between the loss created and the loss annulled*."[25]

This thesis has been extrapolated by Christopher Schroeder who has constructed a model of corrective justice that builds on the premises of Coleman and defines it as "(a) individual liability that must be consistent with moral norms (b) victim must be wholly compensated and (c) the resources for satisfying must come exclusively from the liability payments." These three requirements may be identified as action based responsibility "for just compensation and internal financing."[26] He argues further that the dynamics of the system provides the funds necessary for compensation and it is "not a concern for the courts to determine where damages come from."[27]

However, there is disagreement by those theorists who view modern tort law as about protective justice, not merely corrective justice. Protective justice theorists offer an alternative explanation that implies that tort law has a secondary, but equally important, objective of protecting valuable social interests from harm. The issue of liability is the overarching objective that unifies the primary and secondary duties of tort liability. It serves to unify the law of tort with other legal branches rather than demarcate them separately.[28] There is a sound reasoning for maintaining the principle of corrective justice, while at the same time acknowledging the desirability and plausibility of reducing the extent of its implementation in the population as a whole even when doing so creates an element of injustice.[29] The concept of corrective justice does not negate the efficiency of the system of formulistic assessment of tort

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[24] Jules L. Coleman 'Tort Law and Demands of Corrective Justice' 67 Indiana L. J. (1982) 358, 360.

[25] Ibid.

[26] Christopher H. Schroeder 'Corrective Justice, Liability for Risks, and Tort Law' 37 UCLA L. Rev. (1990) 143, 143.

[27] Ibid. (150)

[28] Hanoch Sheinman 'Tort Law and Corrective Justice', 22 Law and Philosophy (2003) 21.

[29] Guido Calabresi 'Optimal Deterrence and Accidents' 84 Yale L.J. (1975) 656.

claims based on personal injury law. It is an approach that is an important element to safeguard the principle of not awarding damages that would lead to unjust gain for the party that has committed a wrong.

The principle of corrective justice has been viewed by Helen Eemmaa Dimitrieva as the antithesis of "the increasingly complex forms of the problem of dependency that the critics have proposed which lose their force once we have a better understanding of the principle of corrective justice and its relationships with other principles. The principle of corrective justice does not serve a conception of distributive justice or efficiency and can provide an explanation of a large area of our law despite the criticism. It does so independently as a principle of justice that is reflected in our legal practice." [30]

The principle of corrective justice exists as an abstract principle of justice that can be applied in practice. This is based on a calculation that leads to a just result in a dispute that has been caused through accidental injury. In the realm of compensation, it requires a nexus between the duties of care and the duties of repair which is itself dependent upon the initial breach of duty and the loss that has been incurred. This implies a mutual duty that arises from a bilateral relationship between the tortfeasor and the injured party who has been caused the loss.

3. Principle of Economic Efficiency

Compensatory damages are generally divided into the following categories: economic; non-economic; and physical impairment or disfigurement. Economic damages typically refer to the pecuniary harm suffered by an injured party, or those damages that can be accurately calculated in monetary terms. Non-economic damages refer to the non-pecuniary harm suffered by an injured party, and such damages include emotional distress, pain and suffering, inconvenience, fear and anxiety, and impairment of the quality of life. Both non-economic and punitive damages are often limited by statute due in large part to the widespread tort reform passed in state legislatures as a result of excessive damage awards. The federal government has intervened by passing laws for "the regulation of the standards of liability that apply in tort cases as well as the amount of damages that a tort plaintiff may recover) and procedural changes (i.e., regulation of where, when, and how a tort lawsuit may proceed)". [31]

The test of economic efficiency was framed by the Judge Learned Hand in the Supreme Court case of *United States v. Carroll Towing Company*[32] where he set out the formula that the degree of care required in "proving a breach of a legal duty is found by balancing three factors which are the likelihood of injury; seriousness of injury and cost of

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[30] Helen Eemmaa Dimitrieva 'The Problem of Dependency of Corrective Justice: Corrective Entitlements and Private Transactions' Canadian Journal of Law and Jurisprudence, Vol 32, Issue 1 (2019) 59-82, 59.

[31] Kevin M. Lewis 'Tort and Litigation Reform in the 115th Congress' (Congressional Research Service, 10 April 2018, fas.org/sgp/crs/misc/LSB10118.pdf, accessed on 25 May 2021)

[32] (2d Cir. 1947) 159 F.2d 169.

avoiding the risk". [33] The tortfeasor's duty is intertwined with the notion of due care, viewed in terms of their reasonableness: i.e., and in this instance "*the burden of having an attendant aboard the barge was less than the gravity of injury of a runaway barge multiplied by the probability that the barge would break free if unattended and "burden was less than the injury multiplied by the probability*."[34]

If the efficiency theory is accepted then the award made for corrective injustice will be diminished because it will not include the damages award for more than economic loss. In general, attorney's fees are not recoverable as damages or costs in civil litigation unless authorized by contract, statute, or court rule. This general rule, known as the "American rule" stands in direct contrast to the "English rule" which provides attorney fees to the prevailing party. Costs, however, are awarded to the prevailing party, and this is defined as the economic test of negligence which is based on the resource allocation, rather than based on reasonable person standard. [35]

The vindicated party in the US in litigation is ordinarily not entitled to reimbursement for its reasonable attorneys' fees and expenses from the loser in the absence of a statutory or contractual provision allowing such an award to be made. When such an award is made and the losing party is insured under a liability policy, e.g., a commercial general liability policy (CGL) or a directors' and officers' (D&O) liability policy it usually will seek to convey the burden of payment of those fees and expenses to its insurer as covered "costs" or "damages". Whether the insured will succeed depends on the exact policy text and the court's interpretation of those terms in the context of the remainder of the policy document as well as considerations of public policy.[36]

In *Employers Mutual Casualty Co. v. Donnelly*,[37] addressed a dispute between the Donnelly and Rimar Construction, Inc. (RCI), a contractor that Donnelly had engaged to do repairs and further remodeling on their home after a fire. RCI was insured by Employers Mutual Casualty Company (EMC) under a CGL policy. Donnelly brought the underlying action against RCI, alleging negligent and intentionally faulty workmanship, breach of contract, and breach of warranty. EMC filed a declaratory judgment action against Donnelly and RCI to establish that it had no duty to pay any damages claimed or awarded to Donnelly in the underlying action. RCI counterclaimed against EMC, alleging bad faith and a breach of contract.

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[33] Ibid. (173).

[34] Ibid. *(*174).

[35] See William M. Landes and Richard A. Posner 'Causation in Tort Law', 12 J. Legal Studies (1983) 109; Richard A. Posner 'Wealth Maximization and Tort Law*:* A Philosophical Inquiry', in David G Owens, ed. 'Philosophical Foundations of Tort Law' § 4 (1995); Richard A. Posner 'Instrumental and Non-instrumental Theories of Tort Law' 88 Ind. L. J. (2013) 469.

[36] Thomas R. Newman 'Attorneys fees as covered costs, damages or loss', Insurance Law (2014) (https://www.duanemorris.com/articles/static/newman_for_the_defense_0314.pdf., accessed on 25 May 2021).

[37] (Id. 2013) 300 P.3d 31.

The district court jury rendered a verdict that RCI had breached the implied warranty of workmanship resulting in $126,611.55 in damages. EMC and RCI later reached a settlement regarding the declaratory action and the underlying action such that RCI waived its counterclaims and agreed not to contest EMC in the declaratory action. The ruling meant that as to the contract-based damages, there was no insurance coverage for the amount awarded in compensatory damages that Donnelly incurred. However, there was coverage for the award of $296,933.89 in costs and attorneys' fees. The jury found that there was a contract involving the remodeling project between RCI and the Donnellys; RCI did not substantially perform under the contract; a breach of contract caused damage to the Donnellys; and that RCI breached "the implied warranty of workmanship with regard to the manner in which it constructed the Donnelly remodel project."

Based on the jury's verdict, the breach of implied warranty of workmanship occurred with regard to RCI's performance under the remodeling contract with the Donnellys. The Idaho Supreme Court affirmed the decision of the district court noting that EMC's policy contained a "'Supplementary Payments' provision that stated: 1. We will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend: a. All expenses we incurred . All costs taxed against the insured in the 'suit.'" The CGL policy defined "suit" as "a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged."[38] The ruling explained that a reservation of rights can only preserve existing rights because " it is not a destruction of the insured's rights nor a creation of new rights for the Company. It preserves that to which the parties had originally agreed."[39]

The Court stated that the "key determination for whether an implied warranty of workmanship—and therefore the insurance policy—covers the damages is whether the duty is based upon a contractual promise or if the duty can be maintained without the contract". [40] It was held that there was nothing in this policy wording to "indicate that payment of costs is conditioned upon a final determination that the policy covers the insured's conduct."[41] This was despite a finding that the insurer had no duty to indemnify the contractor for the contract damages awarded against it because the policy contained an express exclusion for contractual damages in the event of breach.

It affirmed the decision of the district court that it was able to "determine from the special verdict the allocation of damages or responsibility for the payment of the damages awarded by the jury. As noted above, the district court correctly—and with no apparent difficulty—identified the jury-awarded damages of $126,611.55 as contractual in nature and the two $1,000 awards for violations of the Idaho consumer protection statutes. Additionally, to the extent that EMC has any duty to ensure an allocated verdict, that duty is to the insured, and not the injured party". [42]

[38] Ibid. (34).

[39] Ibid. (35).

[40] Ibid. (684).

[41] Ibid. (854-856).

[42] Ibid. (979).

This is the general proposition in the public policy in the development of tort law in the United States. Each state has its own body of personal injury liability arising from negligence. They have developed a separate system of liability for claims arising from a legal duty of care and the resulting breach that may be actionable. The liability varies from state to state, and the legal provisions have strengthened the discovery process in litigation which is responsible for out of court settlements reached in these personal injury claims.

4. Punitive damages and public policy

The courts in the US do allow punitive damages for loss that has been incurred through tortuous injury. The principles of how an award is granted is based on the "the common law as a means of punishing a defendant bad actor in cases where the civil award was deemed insufficient to punish the defendant. This extra level of punishment is generally reserved for situations when a defendant's tortuous conduct is found to be malicious, wanton, intentional, outrageous or reckless". [43] The U.S. federal statutes do have the provision to authorize damage awards that are estimated beyond the formula based compensation for loss.[44] The issue that is significant to what extent do insurance companies can pay out damages that are punitive and above the compensation for the loss sustained through bodily injury.

The availability across the jurisdiction varies and there are at present "*three states Michigan, Nebraska and Washington where punitive damages are not available. In 27 other states, the punitive damage dollar amount or the punitive-to-compensatory ratio is capped (typically to ratios of 2:1 or 3:1). The circumstances which trigger punitive damages and their quantum are issues within the authority of the judges and juries trying the cases as well as the appellate courts reviewing those trial court decisions*."[45]

The Supreme Court has set out the framework as to when to award punitive awards as well as the allowable amount that has an

> "*upper limit for punitive damages based on a 4:1 punitive-to- compensatory ratio. In cases where compensatory damages were substantial, the ratio should be closer to 1:1.4. Despite this upper limit 4:1*

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[43] Wilson Elser 'Punitive Damages Overview: 50 State Survey' (2014, https://www.wilsonelser.com/writable/files/Legal_Analysis/Punitive_Damages_Review/2014-wilson-elser-punitive-damages-review.pdf, accessed 18 May 2021)

[44] For example, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq. (RICO) authorises treble damages, and the Civil Rights Act, 42 U.S.C. §1981 allows the imposition of punitive damages under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990 and the federal employment section of the Rehabilitation Act of 1973 also have the same effect.

[45] Richard Porter and Steve Jones 'A Review of the US Punitive Damages Liability Landscape' (2017) Chubb Bermuda. (https://www.chubb.com/bm-en/_assets/documents/epl-punitive-wrap-final-6.6.19.pdf, accessed 26 May 2021).

ratio guidance, there are nonetheless examples of state Supreme Courts affirming punitive awards far in excess of a 4:1 ratio."[46]

However, the punitive damages generally arise from common law tort litigated in state courts and the states' imposition of punitive damages has to be in accordance with federal Constitutional principles. The Supreme Court has "adopted a test that centers on proportionality, this time locating the requirement within the Due Process Clauses." [47] These are the 5th Amendment due process clause that provides that no one shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The right to contract for the sale of insurance is a liberty or property interest protected by the Due Process Clause and arguably a private property interest protected by the Takings Clause. The Due Process Clause of the Fourteenth Amendment is exactly like a similar provision in the Fifth Amendment, which only restricts the federal government. It states that no person shall be "deprived of life, liberty, or property without due process of law." The implication is that the "due process" refers to fair procedures.

The Supreme Court ruled in *State Farm Mutual Automobile Insurance Co v. Campbell*[48] that under the Fourteenth Amendment punitive damages must be "reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[49] In *BMW v North American Inc v Gore*[50] the Supreme Court affirmed the three principles in reviewing a punitive damages award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." There are three main guidelines that the Court has established in determining punitive damages awards.[51]

The principle exists under the US Constitution that in private law there is no restriction as to punitive damages. In *Browning-Ferris Indus. v. Kelco Disposal,*[52] Federal District Court, charging BFI with antitrust violations and with interfering with Kelco's contractual relations in violation of Vermont tort law. The jury found BFI liable on both counts, and awarded Kelco, in addition to $51,146 in compensatory damages, $6 million in punitive damages on the state-law claim. The Court of Appeals affirmed as to both liability and damages awards and also stated the principle:

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[46] Ibid.

[47] *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.

[48] (2003) 538 US 408.

[49] Ibid. (429).

[50] (1996) 517 US 599.

[51] Ibid. (575).

[52] (1989) 492 U.S. 257, 264.

"*The Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awards in cases between private parties; it does not constrain such an award when the government neither has prosecuted the action nor has any right to recover a share of the damages awarded*."[53]

The California Civil Code (CCC) allows a trial court jury to award punitive damages in a personal injury case. Punitive damages can only be imposed pursuant to the standards set forth in §3294:

"(a) *In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant*."

The harm to others may be relevant in determining reprehensibility based on factors (a)(2) (disregard of health or safety of, others) and (a)(4) (pattern or practice). This has to be balanced with the California Insurance Code §533:

"*An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others*".[54]

The Californian Supreme Court in *PPG Industries, Inc. v. Transamerica Ins. Co*[55] dealt with a claim where a third party brought a personal injury action against the insured resulting in a judgment at first instance, affirmed at the Court of Appeal, against the insured that included an award of punitive damages based on the insured's perceived misconduct. The insured then sued its insurance company to recover as compensatory damages the amount of the punitive damages, which the insured alleged were caused by a breach of the duty of care in the unreasonable failure to settle the third party's lawsuit against the insured.

The Court held that while the "*insurance company's alleged negligent failure to settle the third party lawsuit was a cause in fact of the punitive damages awarded against the insured, it was not a proximate cause of those damages. We therefore conclude that the insured in this case cannot shift to the insurance company its responsibility for the punitive damages*".[56] Furthermore, there were "*three policy considerations that strongly militate against allowing the insured, the morally culpable wrongdoer in the third party lawsuit, to shift to its insurance company the obligation to pay punitive damages resulting from the insured's egregious misconduct in that lawsuit.*" [57]

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[53] Ibid (262-276).

[54] Stats. 1935, Ch. 145.

[55] (1999) 20 Cal. 4th 310.

[56] Ibid. (314).

[57] See section 533 of the Insurance Code: "An insurer is not liable for a loss caused by the wilful act of the insured ...." Although often cited together with the foregoing, section 1668 of the Civil Code-providing that "[a]ll contracts

The ruling affirmed that "*implied in every contract is a covenant of good faith and fair dealing that neither party will injure the right of the other to receive the benefits of the agreement. Proximate cause involves two elements. These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy.*" [58]

The Court explained the public policy based on the principle that if it "*were to allow the intentional wrongdoer, here the insured, to shift responsibility for its morally culpable behavior to the insurance company, which surely will pass to the public its higher cost of doing business, we would defeat the public policies of punishing the intentional wrongdoer for its own outrageous conduct and deterring it and others from engaging in such conduct in the future*". [59]

Bryan M. Weiss has argued that the courts "have found in favor of insurance coverage for punitive damages have done so on the basis that (1) the presence of insurance coverage has no impact on the deterrent effect of punitive damages, (2) the expectation of the insured that the policy will cover allawarded damages must be honored, and (3) the acceptance of the premium estops the insurer from denying coverage that arguably exists in the insurance contract." [60]

In *Bullock v. Phillip Morris*[61] the issue was the cigarette company's misconduct in which California Supreme Court upheld a 16:1 punitive damage award that included a $16 million punitive award alongside a $850,000 compensatory award. This reflects the policy framework of the courts and the wide disparity of the awards that they can enforce if the claim against the insured by the wronged party rather than a third party suing the insurance company.

There is a large public policy element in the award of punitive damages. The courts have to follow the principles established in case law and there are two cases where these were set out for evaluation of such damages in personal injury claims. In *Northwestern National Casualty Co. v. McNulty* [62] in which Smith, a drunken driver, traveling

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which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law"-has been held inapplicable to liability insurance policies. (See, e.g. *State Farm Fire & Casualty Co. v. Eddy* (1990) 218 Cal. App. 3d 958, 966-967 [267 Cal. Rptr. 379].)

[58] Ibid. (315).

[59] Ibid. (319).

[60] Bryan M. Weiss 'Insurability of Punitive Damage Awards' (Murchison & Cumming's, https://www.iadclaw.org/assets/1/7/7.3-_Weiss-_Insurability_of_Punitive_Damages.pdf, accessed 28 May 2021).

[61] (2011) 198 Cal. App 4th, 543.

[62] *(*5th Cir. 1962) 307 F.2d 432.

above eighty miles drove erratically and tried to overtake the automobile of the claimant, Edward McNulty. The defendant smashed into the rear of McNulty's car and did not halt to provide any help and instead fled the scene of the accident. He was arrested twelve miles down the highway when his car ran out of gas. McNulty suffered severe injuries including permanent damage to his brain.

The defendant was covered by the Northwestern National Casualty Company family combination automobile policy for $50,000 in Virginia where he resided. The accident had occurred in Florida. The insurance company took the defence of the law suit as it presented the issue of the liability of an insurance company, under an automobile accident liability policy, for punitive damages. The Fifth Circuit Court of Appeals held that under Florida law precluded a tortfeasor from securing insurance coverage for punitive damages that were awarded against him for bodily injury.

The majority in McNulty manifestly acknowledged that none of the prior cases dealing with the question of indemnification by an insurer for the assessment of punitive damages against its insured had examined the "more important ... question of public policy."[63]

The Appeal Court stated:

> "*The policy considerations in a state where ... punitive damages are awarded for punishment and deterrence would seem to require that the damages rest ultimately as well [as] nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to premium payers. Society would then be punishing itself for the wrong committed by the insured*".[64]

The Court affirmed the principle that since punitive damages are awarded for punishment and deterrence there would be no utility if the party responsible for the wrong could shift the burden to its insurance company. The public policy on insurance covering punitive damages depends on the nature or character of punitive damages and as compensation for the plaintiff or as punishment of the defendant and deterrence to the wider community it depends on the function such damages serves.

In *Lazenby v. Universal Underwriters Insurance Co* [65] there was a driving accident by a reckless driver that led to serious injuries to the claimant. The defendant wanted to transfer the burden of paying compensation to the

[63] Ibid. (436).

[64] Ibid (440-41).

[65] (Tenn. 1964) 383 S.W.2d 1.

insurance company and the public policy element became the primary concern of the Supreme Court of Tennessee. The Court acknowledged that the deterrent aspect of the doctrine of punitive damages in Tennessee was similar to that of Florida, but stated that "We ... are not able to agree [that] the closing of the insurance market, on the payment of punitive damages, to such drivers would necessarily accomplish the result of deterring them in their wrongful conduct."[66] The reasoning accepted the "punishment purpose of punitive damages."[67] However, it postulated that argument "on the basis that the deterrent aspect of punitive damages is in fact nonexistent." [68]

Kagan observes that court inferred 'that punitive damages would not deter socially irresponsible drivers from reckless conduct.' This is premised on the court's departure

> "from the merits of the problem and issuing a mandate, implicit in its result, to insurance companies to the effect that: If change is to be made in the provisions of this standard policy and the coverage afforded thereby, it should be made in the office of the Commissioner and not by the Court." [69]

The Court accepted the Fifth Circuit's application of Florida law in McNulty and agreed with the principle "that as a matter of public policy punitive damages in this state are based on a theory inconsistent with their coverage by liability insurance."[70] The Court was not convinced by the reasoning for disallowing insurance coverage for punitive damages because it was not proven that socially irresponsible drivers would be deterred from their wrongful conduct if coverage for punitive damages were not allowed. After basing its decision on public policy, the court concluded that a construction of the insurance contract would not be necessary because "[the standard liability policy] would expect to be protected against all claims, not intentionally inflicted." [71]

This provides a different perspective on claim against insurance companies for punitive damages and makes them liable for the act of the tortfeasor in inflicting injury on the claimant. This is a public policy argument that is more favourable for the injured party for the harmful and reckless acts of the defendant. The objective is to cover liability because of the inability to prevent drivers taking risks and escaping liability by sanctions available in law.

The punitive damages are not generally insurable are because of public policy concerns, specifically, the reluctance to allow a tortfeasor to escape personal responsibility for reprehensible conduct by shifting the loss to the insurer. In *Wolfe v. Allstate Prop. & Cas. Ins. Co*[72] after heavy drinking, the defendant, Karl Zierle drove into the rear of Jared

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[66] Ibid. (1, 5).

[67] Ibid

[68] Ibid

[69] Barry Kutun 'Insurance Against the Assessment of Punitive Damages'. 20 U. Miami L. Rev. 192 (1965) 176 (https://repository.law.miami.edu/umlr/vol20/iss1/9; accessed 29 May 2021).

[70] Ibid. (5).

[71] Ibid.

[72] (3d Cir. 2015) 790 F.3d 487.

Wolfe's vehicle, injuring him. Wolfe made an initial settlement demand to Zierle's insurer, Allstate, of $25,000. The insurance company's counteroffer was $1,200 which led to Wolfe to litigate against Zierle, amending his claim after finding Zierle's over the limit to add a punitive damages claim.

The insurance company was assigned Zierle's rights, and Wolfe sued Allstate alleging breach of contract and bad faith conduct under §8371. Under the contract claim Wolfe sought the $50,000 awarded against Zierle, plus interest and attorney fees and costs and, under §8371, statutory interest, punitive damages and court costs. The district court denied Allstate's motion for summary judgment and reasoned that the $50,000 award was payable because it constituted damages resulting from any bad faith and breach of contract. On appeal, the Third Circuit Court held that the district court was wrong in permitting Wolfe to introduce the punitive damages award against Zierle.

The Pennsylvania Supreme Court held

> "*Because Pennsylvania law prohibits insurers from providing coverage for punitive damages in order to ensure that tortfeasors are directly punished, that Allstate cannot be responsible for punitive damages incurred in the underlying lawsuit. To hold otherwise would shift the burden of the punitive damages to the insurer, in clear contradiction of Pennsylvania public policy*."[73]

The Court stated

> "*California, Colorado, and New York have similar prohibitions on the indemnification of punitive damages, and those states' highest courts have similarly held that an insured cannot shift to the insurance company its responsibility for the punitive damages in a later case alleging a bad faith failure to settle by the insurer*."[74]

The emphasis was on the "*damages which are claimed to be compensatory in the instant case are none other than the punitive damages from the underlying case. The contract between the parties expressly precluded recovery for punitive damages incurred by the insured. The insured may not later utilize the tort of bad faith to effectively shift the cost of punitive damages to his insurer when such damages are expressly precluded by the underlying insurance contract*."[75]

The public policy grounds for bringing a claim under Pennsylvania law gave rise to separate claims for the bad faith by an insurance company. This was based on a breach of contract action for violation of an insurers implied duty of good faith, and a statutory action under the terms of Pennsylvania's bad faith statute.

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[73] Ibid. (517).

[74] Ibid.

[75] Ibid

The Statute states : "*Actions on insurance policies. If an insurer has 'acted in bad faith toward the insured,' a court may (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%. (2) Award punitive damages against the insurer. (3) Assess court costs and attorney fees against the insurer*". [76]

It led the Court to accept a fiduciary obligation for an insurer's breach and an insured's right to recover compensatory damages under that claim for injuries sustained as a result of that breach. The breach of contract claim and statutory bad faith claim were pleaded entirely independent of one another. The strength of the claim rested on the bad faith clause that binds the insurance company to the insured to act in an appropriate manner.

Conclusion

Tort liability is based on the principles of common law damages and the bodily injury that stems from auto accidents is the most common claim against insurance companies. The legal claims are instituted on a no win no fee basis and it has been confirmed that those claims upon which lawyers are representing clients lead to greater sum in compensation awards. The mandatory insurance in states is designed to promote efficient self-resolution of civil disputes and the accepted norm is that personal injury cases will rarely reach trial.

Each US State has its own statute of limitations and a cap on the amount of compensation received in accidental injury. Bodily injury liability insurance is an intrinsic part of insurance taken out on auto insurance and they cover both for medical expenses and loss of wages when accidents occur that result in physical injuries. This form of insurance is predominantly in terms of claims bought when insurance company agrees to pay out a settlement amount to cover the damages arising from the accident and a reasonable sum in compensation.

Corrective justice is an integral part of the evaluation of damages awards and its variables concern tortious-aspect causation requirement and it continues to influence the decision of actual tort cases. The courts apply this principle even as they formulate their decisions within the equation of loss-spreading and wealth-maximization. There are two principal elements of causation and rights are fixed in any determination of liability in personal injury matters when they come to court. The reaching of economic efficiency is an important factor in tort claims for damages awards and this promotes the ideal of placing the wronged party in the same circumstances had the tort never been committed. The awards of consequential damages by courts play the fundamental role in addressing justice and in this area of law is influenced by courts and has become part of the framework in individual and group-based claims.

[76] Title 42 Pa. C.S.A. Judiciary and Judicial Procedure § 8371.

There are many US States that exclude exemplary or punitive damages as uninsurable mainly due to public policy concerns, specifically, the reluctance to allow a tortfeasor to escape personal responsibility for reprehensible conduct by shifting the loss to the insurer. Usually, punitive damages are awarded only if there has been proof of intentional wrongful acts, and most insurance policies also exclude coverage for damages caused by intentional harmful conduct of the insured. If the conduct that caused the damages was intentional, then any damages related to that conduct are excluded, including both compensatory and punitive damages as a matter of public policy.

This provides the basic compensation framework of tort liability in the American courts. The US does not have a federal statute that establishes liability when there is a breach of a duty of care. These principles on insurance liability derive from case law and the assessments made therein balance corrective justice with economic efficiency. The compensation model allows for both out of court settlements that save the parties time and money, and a regulated and estimated process for monetary awards.