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Bankruptcy -- Survival of Liability for Willful and Malicious Injury

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the appeal provision of the Milk Commission Act[29] to prevent such an occurrence. The appeal provisions of the Virginia Milk Commission Act[30] limit the court to determining if the order appealed is within the discretion vested in the Commission, and if so, whether the Commission has exercised a reasonable discretion or the order is unreasonable or capricious. Legislative action would not be required, however, if the supreme court were to adopt the Connecticut court's concept of the purpose of a trial de novo on appeal from an administrative body[31] and limit the superior courts to the determination of the single question: "Has the Commission acted illegally?"

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Bankruptcy—Survival of Liability for Willful and Malicious Injury

The Bankruptcy Act[1] operates as a discharge or release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted in the act, and has as its purpose to relieve the honest debtor from the weight of oppressive indebtedness with leave to start afresh.[2] Where the liability or debt is the result of a judgment arising out of automobile accidents the idea of discharge has met with considerable criticism. This criticism may be illustrated by the language of a New York case where it was said:

> If the court were permitted to do moral justice instead of legal justice it would refuse to discharge the bankrupt of the judgments. There are too many accidents resulting in judgments which are wiped out in bankruptcy. The practice has grown up wherein a person will negligently operate his automobile and then when a judgment for such injuries is rendered against him, will obtain the protection of the Bankruptcy Law by filing a voluntary petition in bankruptcy . . . . Operators of automobiles may drive in a careless and negligent manner and go unscathed of justice by filing a petition in bankruptcy.[3]

Although liabilities which are the result of willful and malicious injuries to person or property are not dischargeable in bankruptcy,[4] the courts are by no means in accord as to what constitutes willful and malicious conduct. Most of the cases seem to lie between the areas

[29] N.C. GEN. STAT. § 106-266.17 (Supp. 1959).
[30] VA. CODE §§ 3-369 to -371 (1950).
[31] See note 11 *supra*.

[1] Bankruptcy Act, ch. 541, 30 Stat. 544 (1898), as amended by 66 Stat. 420 (1952), 11 U.S.C. §§ 1-1086 (1958).
[2] Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549 (1915).
[3] Francine v. Babayan, 45 F. Supp. 321, 322 (E.D.N.Y. 1942).
[4] Bankruptcy Act ch. 541, § 17, 30 Stat. 550 (1898), 11 U.S.C. § 35 (1958).

where the injury is produced by ordinary negligence and where it is the result of a deliberate and intentional wrongdoing. A majority of cases have decided that no degree of negligence can produce a willful and malicious injury.[5] This view is buttressed by the theory that exceptions tend to impair the bankrupt's remedy, and that since the statute is highly remedial, these exceptions should be so construed as to affect that remedy only so far as is necessarily required by its express terms.[6] The modern trend, however, favors the interpretation that "willful and malicious injuries to the person," as used in the act, does not necessarily connote ill will or special malice, but describes a wrongful act done in utter disregard of the legal rights of others and without just or lawful support, evidencing a reckless disregard and indifference to the safety of human life resulting in injury to the person or property of another. This view is based on the theory that bankruptcy should not be allowed to function as a refuge for reckless drivers.[7]

It appears that North Carolina would follow the modern trend. Our court has considered the question of what is willful and malicious in deciding cases under our civil arrest statute[8] and in cases involving punitive damages. In a case[9] where the evidence tended to show that defendant was driving an automobile at an excessive rate of speed near the center of a populous town on Sunday, at the time people were going to church, and ran on the sidewalk striking plaintiff, our court found these facts sufficient for a jury to find an intent on the defendant's part willfully to injure the plaintiff, justifying civil arrest of defendant. The court adopted as one of the definitions of willfulness and wantonness: "[N]egligence so gross as to manifest a reckless indifference to the rights of another."[10] The court also cited as a correct charge to the jury the following:

> To establish the charge of willfulness . . . an actual intent to do the particular injury alleged need not be shown; but if you find from all the evidence that the misconduct of the defendant's

[5] 29 REF. J. 70 (1955).
[6] 1 COLLIER, BANKRUPTCY 1609 (14th ed. 1940).
[7] 29 REF. J. 70 (1955).
[8] N.C. GEN. STAT. § 1-410 (1953). "The defendant may be arrested . . . in the following cases: 1. In an action . . . not arising out of contract where the action is for wilful, wanton, or malicious injury to person . . . ."
[9] Weathers v. Baldwin, 183 N.C. 276, 111 S.E. 183 (1922); *accord,* Foster v. Hyman, 197 N.C. 189, 148 S.E. 36 (1929), where defendant while drunk drove his automobile on the wrong side of a city street where traffic was heavy. The court held this sufficient to sustain the jury's verdict that the injury was inflicted willfully and wantonly, and thus an order for execution against the person or defendant was proper. In Braxton v. Matthews, 199 N.C. 484, 154 S.E. 735 (1930), it was held that driving recklessly while intoxicated was sufficient to warrant the submission of an issue as to willful, wanton conduct and to sustain an affirmative answer thereto.
[10] Weathers v. Baldwin, 183 N.C. 276, 279, 111 S.E. 183, 185 (1922).

> servants was such as to evince an utter disregard of consequences, so as to inflict the injury complained of, this may of itself tend to establish willfullness.[11]

In general, punitive damages may not be recovered in a case involving ordinary negligence in the absence of any intentional, malicious, or willful act. Wanton conduct, *i.e.,* intentional wrongdoing, is a sufficient basis for an award of punitive damages. North Carolina has held conduct to be wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.[12] That North Carolina shares the modern view and does not require a showing of special malice or intent to injure a particular person[13] is further borne out by the requirements for allegations sufficient for an award of punitive damages which are said to be:

> [T]he complaint must allege facts showing . . . circumstances which would justify the award, for instance, actual malice, or oppression, or gross and wilful wrong, *or wanton and reckless disregard of plaintiff's rights.*[14]

Most courts tend to brand certain specified acts of negligence as sufficient to bring the liability within the scope of the exceptions of section 17 of the Bankruptcy Act. Thus, where it appeared that the bankrupt was driving on the wrong side of the road,[15] deliberately disregarding a traffic signal,[16] and passing another car while it was impossible to see ahead,[17] courts have held the resulting liability to be nondischargeable. However, the acts of speeding,[18] passing a streetcar or school bus,[19] colliding with a parked car,[20] or negligently crossing a railroad track[21] have been held not to entail sufficient disregard for the safety of others to be classified as willful and malicious. The most recent

[11] *Id.* at 279-80, 111 S.E. at 185.

[12] Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393 (1956).

[13] In Foster v. Hyman, 197 N.C. 189, 148 S.E. 36 (1929), it was held that willfullness may be constructive, and where the wrongdoer's conduct is so reckless as to amount to a disregard for the safety of others it is equivalent to actual intent.

[14] Lutz Indus., Inc. v. Dixie Home Stores, 242 N.C. 332, 344, 88 S.E.2d 333, 342 (1955). (Emphasis added.)

[15] *In re* Dutkiewicz, 27 F.2d 334 (W.D.N.Y. 1928); Margulies v. Garwood, 36 N.Y.S.2d 946 (Sup. Ct. 1942); Doty v. Rogers, 213 S.C. 361, 49 S.E.2d 594 (1948).

[16] Tharpe v. Breitowich, 323 Ill. App. 261, 55 N.E.2d 392 (1944), *cert. denied,* 323 U.S. 801 (1945). *Contra, In re* Longdo, 45 F.2d 246 (N.D.N.Y. 1930).

[17] Margulies v. Garwood, 36 N.Y.S.2d 946 (Sup. Ct. 1942). *Contra,* Randolph v. Edmonds, 185 Tenn. 37, 202 S.W.2d 664 (1947) (restating the old rule).

[18] Freedman v. Cooper, 126 N.J.L. 177, 17 A.2d 609 (1941); Campbell v. Norgart, 73 N.D. 297, 14 N.W.2d 260 (1944).

[19] *In re* Tillery, 16 F. Supp. 877 (N.D. Ga. 1936); Wyka v. Benedicks, 266 App. Div. 1025, 44 N.Y.S.2d 907 (1943).

[20] Campbell v. Norgart, 73 N.D. 297, 14 N.W.2d 260 (1944); Prater v. King, 73 Ga. App. 393, 37 S.E.2d 155 (1946).

[21] Nunn v. Drieborg, 235 Mich. 383, 209 N.W. 89 (1926).

cases show that the uncertainty still exists as to driving when intoxicated, but the trend, at least in the federal courts, seems to be toward holding this misconduct sufficient for a finding of willful and malicious conduct.[22]

Assuming a close case where the court would be justified either in finding or in not finding willful and malicious conduct, counsel for both sides should decide what effect a bankruptcy by defendant would have on his client and how best to gain or avoid the benefits or handicaps of such bankruptcy. What should the plaintiff allege in his complaint? A judgment which is not based on an allegation or willful and malicious conduct is seldom declared to be based on a wrongdoing of such gravity as to justify denying a discharge.[23] The complaint is of particular importance in a jurisdiction such as North Carolina where specific issues are submitted to the jury and the jury responds to issues and does not find a general verdict.[24] In order for counsel to have the trial judge instruct the jury as to willful and wanton conduct such conduct must be alleged in the complaint.[25] However, allegations in the complaint are not alone sufficient to insure the submission of an issue as to willfulness and malice to the jury. Before an issue can be submitted to the jury, it must be supported by the evidence.[26] Thus it is said that in civil actions the issues are framed on both the pleadings and the evidence.[27] A trial judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect.[28]

In a jurisdiction such as North Carolina that uses the issue system the failure of counsel to cause an issue on willful and malicious conduct to be submitted to the jury can be disastrous even though he has correctly pleaded such conduct and has supported his allegations with proof.[29] In a late New York case[30] plaintiff's counsel asked the

[22] Den Haerynck v. Thompson, 228 F.2d 72 (10th Cir. 1955).

[23] 29 REF. J. 70 (1955).

[24] Witsell v. West Asheville & S.S. Ry., 120 N.C. 557, 27 S.E. 125 (1897).

[25] Wilson v. Atlantic Coast Line Ry., 142 N.C. 333, 55 S.E. 257 (1906).

[26] Carland v. Allison, 221 N.C. 120, 19 S.E.2d 245 (1942); Henderson v. Atlantic Coast Line R.R., 171 N.C. 397, 88 S.E. 626 (1916).

[27] Crouse v. Vernon, 232 N.C. 24, 59 S.E.2d 185 (1950).

[28] Smith v. Kappas, 219 N.C. 850, 15 S.E.2d 375 (1941). Griffin v. United Services Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945), holds that it is the right of counsel to have proper issues submitted. G.S. § 1-200 provides that it is the duty of the attorneys in the case to prepare the issues arising upon the pleadings and present them to the judge, to be by him submitted to the jury if approved. This rule is mandatory, but if for any reason counsel does not so submit the issues it is then the duty of the trial judge to frame the issues.

[29] In Crowder v. Stiers, 215 N.C. 123, 1 S.E.2d 353 (1939), it was held that in order to warrant execution against the person in an action for tort it is necessary that there be an affirmative finding by the jury upon a separate issue of express or actual malice. *Accord,* McKinney v. Patterson, 174 N.C. 483, 93 S.E. 967

trial court to charge the jury respecting wanton negligence, but the court refused to do so on the ground that plaintiff need prove only ordinary negligence in order to recover. The jury rendered its verdict for the plaintiff and the court expressed the opinion that defendant's act came close to wanton negligence. On motion by defendant for an order discharging the judgment against him the judgment was held not to be based on willfull and malicious injury and thus to be dischargeable in bankruptcy. The appellate court held that despite the trial court's opinion, the jury's verdict was conclusive only as to the fact that defendant was negligent and that to be non-dischargeable the judgment roll must show that the judgment was based on a willful and malicious wrong.

The submission of proper issues is also vitally important to the defense counsel. If a verdict is ambiguous in its terms, the ambiguity may sometimes be explained and the verdict interpreted by reference to and in connection with pleadings, evidence, and the charge of the trial court.[31] So if plaintiff's attorney has alleged willful and malicious conduct and has put on evidence to support his allegations it could be unsafe for the defendant to fail to submit the specific issue. New York has held in determining whether a judgment is dischargeable in bankruptcy, resort may be had to the entire record to determine the wrongful character of the act on which the judgment was based, and the form or allegations of the complaint are not conclusive.[32] The Minnesota court has gone so far as to allow a judgment creditor to show by evidence extrinsic to the record the non-dischargeable character of the original obligation, notwithstanding the fact that the judgment roll on its face did not show that it was a debt not dischargeable in bankruptcy.[33]

Thus it appears that if the North Carolina court, since there are no North Carolina decisions in this area, resorts to other jurisdictions in formulating decisions on this facet of the bankruptcy law the only safe course for both plaintiff and defendant is to be sure the issue of willful and malicious conduct is submitted to the jury for determination.[34]

(1917), holding that before execution against a tortfeasor can issue it is necessary that the jury find affirmatively upon an issue as to whether the tortious act was done willfully. The court enunciated the general rule as being that a party cannot object after the time for submitting issues has passed, and certainly not after the verdict, that an issue, for which he made no request, was not submitted by the court. In Turlington v. Aman, 163 N.C. 555, 79 S.E. 1102 (1913), it was held that in order to issue an execution against the person of the defendant in cases where it is permissible, the cause of arrest must be pleaded and proved and judgment rendered.

[30] Thibadeau v. Lonschein, 186 N.Y.S.2d 73 (Sup. Ct. 1959).

[31] Cody v. England, 216 N.C. 604, 5 S.E.2d 833 (1939).

[32] Proctor Sec. Corp. v. Handler, 162 N.Y.S.2d 209 (Sup. Ct. 1959).

[33] Fireman's Fund Indem. Co. v. Caruso, 252 Minn. 435, 90 N.W.2d 302 (1958).

[34] See discussion in note 29 *supra*.

A defendant's counsel, realizing his client is presently insolvent, may feel that the simplest approach is to allow a default to be entered and then have the judgment discharged in bankruptcy. This would not seem to be a wise course in those cases where willful and malicious conduct or facts from which such conduct could be inferred are alleged in the complaint. In a personal injury case the proper result when no pleadings are filed by defendant is default and inquiry since the damages are not liquidated.[35] The effect of a judgment by default and inquiry is threefold: (1) It establishes a right of action of the kind properly pleaded in the complaint. (2) It determines the right of the plaintiff to recover at least nominal damages and costs. (3) It precludes the defendant from offering any evidence in the inquiry to show that the plaintiff has no right to action.[36] Thus if the defendant fails to appear at the inquiry the plaintiff will be free to put on evidence of willful and malicious conduct without fear of rebuttal and be confident of a favorable finding on this issue. If the plaintiff follows this reasoning in the conduct of his case the defendant's subsequent discharge will be of no avail against the judgment. But on the other hand it is equally clear that the plaintiff cannot rely merely on the allegations of his complaint when the defendant fails to appear or plead. To be safe the plaintiff must frame the issue of willful and malicious conduct, put on evidence to support his contention and have the issue submitted for final determination.

In a Colorado case the complaint for damages allegedly suffered in an automobile collision alleged that defendant's negligence consisted of reckless or willful disregard of the rights of others. The trial court heard evidence in support of such allegation and entered default judgment without specifically finding that more than simple negligence was shown. The plaintiffs had execution on the judgment and the defendant interposed his discharge as defense to the execution. The plaintiffs contended that when defendant permitted default to enter against him he admitted the truth of all facts properly alleged in the complaint and that this created a non-dischargeable obligation. The court held the judgment debt discharged and said:

> If plaintiffs desired to protect themselves against the possibility that defendant might seek a discharge in bankruptcy, it was incumbent on them to secure a *specific finding* in the trial court that the negligence of defendant was such that a discharge in bankruptcy would not operate to release the judgment.[37]

[35] N.C. GEN. STAT. § 1-212 (1953).
[36] Howze v. McCall, 249 N.C. 250, 106 S.E.2d 236 (1958).
[37] Valdez v. Sams, 134 Colo. 488, 491, 307 P.2d 189, 190 (1957). (Emphasis added.)

An Ohio court[38] has gone so far as to look beyond the record, which recited that it was the wrongful and intentional acts of defendant that caused the injury, to the evidence offered at the time of judgment to determine whether the action was actually based on wrongful acts or whether it resulted from mere negligence. This court found that the evidence supported mere negligence only and held the bankrupt discharged. This case seems to follow the modern trend of decisions that a court is not concluded by allegations of the complaint and resort may be had to the entire record to determine whether the action was one for willful and malicious injuries to the person or property of another.[39] Though the modern trend is toward this view there is still a definite split of authority.[40] The California court expresses the contrary view as follows:

> By permitting his default to be entered he [the defendant] confessed the truth of all the material allegations in the complaint . . . including the allegations of wantoness, recklessness and gross carelessness . . . . A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer. . . . Such a judgment is res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint.[41]

In view of the foregoing it submitted that the best course for both plaintiffs' and defendants' attorneys to pursue in their attempt to secure justice for their clients and prevent further litigation is simply to make every effort in cases where willful and malicious injury could be involved to have the issue submitted to the jury. It is believed that if this course is followed there will be no need for a defendant or a plaintiff to try the issue of whether a particular judgment is or is not discharged in bankruptcy when the judgment is sued on. The verdict and judgment on this issue by the court trying the personal injury action will put an end to litigation of dischargeability.

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[38] Carroll v. Jones, 3 Ohio Op. 2d 221, 141 N.E.2d 239 (1956).
[39] Annot., 145 A.L.R. 1238 (1943).
[40] Tharpe v. Breitowich, 323 Ill. App. 261, 55 N.E.2d 392 (1944); Reell *ex rel.* Haskin v. Central Illinois Elec. & Gas Co., 317 Ill. App. 106, 45 N.E.2d 500 (1942).
[41] Fitzgerald v. Herzer, 78 Cal. App. 2d 127, 177 P.2d 364, 366 (1947).