UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JESSICA GIORGETTI,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 96-287-B**
	)	
JOHN WOLOSHCHUK,	)	
	)	
Defendant	)	

MEMORANDUM OF DECISION[1]

The Court has before it the defendant's motion for a partial summary judgment on the plaintiff's punitive damages claim, as well as the defendant's motion *in limine* to exclude reference to or evidence of the fact that he was driving while impaired on the date of the underlying accident or that he has a prior conviction for operating a motor vehicle while under the influence of alcohol. Having carefully considered the merits of the parties' respective positions with respect to the motions, the Court denies the defendant's motion for a partial summary judgment, but grants in part and denies in part his motion to exclude certain evidence.

I. Defendant's motion for partial summary judgment

First, the Court is unpersuaded by the defendant's contention that punitive damages are unavailable as a matter of law under the facts of the instant case. Under Maine law, punitive damages based on tortious conduct are available only if the plaintiff can prove by clear and convincing evidence that the defendant acted with malice. *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985). In the instant case, the plaintiff contends that the disputed facts generate the issue

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[1] Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

whether implied malice may be attributed to the defendant. The Court agrees. In adopting the heightened standard of malice for an award of punitive damages in *Tuttle*, the Law Court vacated a jury's award of punitive damages to the plaintiff, holding that the defendant's reckless operation of an automobile at a high rate of speed was insufficient as a matter of law to support such an award. *Id.* at 1364. In doing so, the court delineated the contours of a showing of implied malice, stating that "where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct [may be implied]," an award of punitive damages may result. *Id.* at 1361. The court was careful to note, however, that such implied malice "will *not* be established by the defendant's mere reckless disregard of the circumstances." *Id.* (citation omitted). It is important to note, however, that the court's holding in *Tuttle* was based on a finding that, as a matter of law, the defendant's conduct was not accompanied by malice. *Id.* at 1362. Such a determination is less certain in the instant case.

Numerous jurisdictions have allowed an award of punitive damages in cases involving a defendant's operation of a motor vehicle while under the influence of alcohol. *See, e.g., Johnson v. Rogers*, 763 P.2d 771, 774 & n.1 (Utah 1988); Danny R. Veilleux, Annotation, *Intoxication of Automobile Driver as Basis for Awarding Punitive Damages*, 33 A.L.R.5th 303 (1995). Some of these courts have held that the act of driving while intoxicated itself is sufficiently culpable conduct worthy of punitive damages, while others require a showing that the driver's conduct was reckless, grossly negligent, or even malicious. *Id.* Maine law is silent on the question whether driving while intoxicated is, in and of itself, a sufficient basis for an award of punitive damages, and the Court need not decide that issue today. The Court does conclude, however, that it is a question for the trier

of facts whether the plaintiff's proof, including the aggravating factors listed below, is sufficient to show implied malice on the part of the defendant as to permit an award of punitive damages.

The plaintiff submits, and the Court agrees, that the following evidence, if believed by the jury, could give rise to a finding of outrageous conduct on the part of the defendant: (1) that the defendant drank four, twenty-ounce glasses of beer and two shots of liquor, and also smoked marijuana, within a three-hour period while at a party prior to the accident; (2) that the defendant felt the effects of the intoxicants and knew he was under their influence when he chose to operate his automobile; (3) that the defendant's blood-alcohol content at the time of the accident was determined by police to be .21% (Maine's legal limit is .08%); (4) that the defendant was operating his vehicle at fifteen-to-twenty miles per hour when he struck the plaintiff's vehicle without applying his brakes; (5) that, after striking the plaintiff's vehicle and causing it damage, the defendant fled the scene of the accident in his automobile, but later was apprehended by police; (6) that the defendant previously had been convicted in February of 1994 of operating under the influence, had his driver's license suspended for a period of one year, and had the license restored only two and one-half months prior to the accident. Such factors have, in other jurisdictions, properly been considered by juries in assessing punitive damages against a defendant. *See* Veilleux, Annotation, *Intoxication of Automobile Driver as Basis for Awarding Punitive Damages*, 33 A.L.R. 5th at 363-451.

The Court is satisfied, after reviewing the pleadings and the contested facts highlighted by the plaintiff in support of her position, that an award of punitive damages based on a finding of implied malice on the part of the defendant is possible in this case. Contrary to the defendant's contention, the Court finds that the aggravating factors cited by the plaintiff could support a finding of outrageous conduct on the part of the defendant. Moreover, the Court cannot say, as a matter of

law, that punitive damages would have no deterrent effect in this case. *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 363 (Me. 1982). Although in Maine a showing of gross negligence or reckless disregard of the circumstances on the part of a defendant is insufficient to support an award of punitive damages, *Kelleher v. Boise Cascade Corp.*, 683 F. Supp. 858, 860 & n.1 (D. Me. 1988); *Tuttle*, 494 A.2d at 1361, that does not mean that the defendant's actions in this case, as determined by the factfinder, cannot amount to deliberate conduct so outrageous as to imply malice. The plaintiff will, however, be required to prove "to a high probability" that the defendant's conduct was impliedly malicious. *Chiapetta v. LeBlond*, 544 A.2d 759, 760 n.1 (Me. 1988).[2] Accordingly, the defendant's motion for a partial summary judgment on the plaintiff's punitive damages claim is denied.

II. Defendant's motion in limine

The defendant also has filed a motion *in limine* to exclude at trial any evidence of or reference to the fact that he was driving while intoxicated on the date of the accident, that he subsequently was convicted for such conduct, or that he has a prior conviction for operating a motor vehicle while under the influence of alcohol on a separate occasion. The defendant seeks to exclude such evidence pursuant to Federal Rules of Evidence 609 and 403. In view of the Court's ruling denying a summary judgment in the defendant's favor on the plaintiff's punitive damages claim, the plaintiff may seek to introduce evidence of the defendant's drunk driving or of his prior convictions as a means of proving both liability and implied malice for purposes of punitive damages. The Court is, at this time, prepared to allow evidence of the defendant's conduct of operating his motor vehicle

[2] At the trial, the Court will be required to reject any claim for punitive damages as a matter of law unless the plaintiff presents adequate proof in her case that the defendant acted in a sufficiently culpable manner. *Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985).

while under the influence of alcohol on the date of the incident, as well as evidence of his prior conviction on the unrelated O.U.I. charge for purposes of punitive damages. For reasons related to Rule 403 considerations, the Court is not, however, willing to allow any reference to or evidence of the fact that the defendant subsequently was convicted for driving while intoxicated on the date of the accident. In considering whether to award punitive damages, a jury generally is permitted to consider the defendant's financial condition, as well as any aggravating factors such as the defendant's state of mind at the time of his tortious conduct. *Caron v. Caron*, 577 A.2d 1178, 1180 (1990) (citing *Hanover Insurance Co. v. Hayward*, 464 A.2d 156, 158 (Me. 1983)); *see also Tuttle*, 494 A.2d at 1359 (citing egregiousness of defendant's conduct, defendant's financial circumstances, and any criminal punishment imposed as factors that may be weighed if presented).

If the plaintiff attempts to impeach the defendant's testimony, attack his credibility, or otherwise introduce evidence at the liability phase of the trial of the defendant's subsequent conviction for his conduct on the date of the accident, the Court is persuaded that both Rule 609 and Rule 403 militate against the admission of such evidence. Rule 609 limits impeachment of a witness to criminal convictions "punishable by death or imprisonment in excess of one year," Fed. R. Evid. 609(a)(1), or if the conviction "involved dishonesty or false statement . . . ." Fed. R. Evid. 609(a)(2). Neither exception pertains to the present case and, thus, the general rule against the admission of such evidence likely will prevail. Moreover, even if these exceptions or any other exception existed in this case, the Court likely would bar the admission of such evidence based on the considerations of unfair prejudice and confusion of the issues as set forth in Rule 403. Thus, although the Court is willing to revisit the issue should the need arise at trial, for now its ruling is that the defendant's motion to exclude any reference to or evidence of the defendant's conduct on the night of the

accident or of his prior O.U.I. conviction on an unrelated charge is denied, but the motion is granted as it seeks to exclude evidence of or reference to the defendant's actual conviction for drinking on the date of the accident.

III. Conclusion

Accordingly, the defendant's motion for a summary judgment on Count II of the plaintiff's complaint is **DENIED**, and so much of the defendant's motion *in limine* that seeks to exclude reference to or evidence of the fact that the defendant was convicted for driving while intoxicated on the date of the accident is **GRANTED**, but the motion is **DENIED** as it relates to reference to or evidence of the defendant's conduct on the date of the accident or of his prior conviction on an unrelated charge for operating under the influence.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on September 18, 1997.