THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Lincoln & Carol Hanscom

v.

Linda O'Connell

No. 03-C-338

ORDER

Lincoln & Carol Hanscom ("Plaintiffs") have sued Linda O'Connell ("Defendant") for damages for injuries suffered in an automobile accident. Before the Court is the Defendant's Motion to Dismiss Count III of the Plaintiffs' Complaint. The Plaintiffs object. For the following reasons the Motion to Dismiss Count III is **DENIED**.

I. Factual Background

Plaintiffs allege that early in the morning of March 25, 2003, Lincoln Hanscom was rear-ended by the defendant while he was stopped awaiting the change of a traffic light. Plaintiff's Complaint ¶¶ 4 and 6. Plaintiffs allege that since that accident Mr. Hanscom has had physical and emotional pain, and that Mrs. Hanscom has lost the "society, comfort and consortium of her husband." Plaintiff's Complaint ¶¶ 7 and 10. They seek compensatory damages as well as enhanced compensatory damages because they claim Defendant, "operated her motor vehicle in a wanton manner and under the influence of intoxicating liquor with reckless indifference and disregard of the lives and safety of the public and other drivers." Plaintiff's Complaint ¶ 12. Defendant seeks to dismiss the enhanced compensatory damages on the grounds that they are not permitted under Gelinas v. Mackey, 123 N.H. 690 (1983).

II. Standard of Review

The standard of review in a motion to dismiss is "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Hobin v. Coldwell Banker, 144 N.H. 626, 628 (2000) (quoting Miami Subs Corp. v. Murray Family Trust, 142 N.H. 501, 516 (1977)). This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. See Williams v. O'Brien, 140 N.H. 595, 598 (1995). When the court tests the pleadings, it "[a]ssume[s] the truth of the facts alleged in the plaintiff's pleadings and construe[s] all reasonable inferences in the light most favorable to him" Hobin, 144 N.H. at 628 (citation omitted). Dismissal is appropriate "[I]f the facts as pled do not constitute a basis for legal relief." Id. (quoting Buckingham v. R.J. Reynolds Tobacco Co., 142 N.H. 822, 825 (1998)).

III. Discussion

In 1983 the New Hampshire Supreme Court decided Gelinas v. Mackey wherein it held that, "the act of driving while intoxicated did not constitute 'wanton or malicious' conduct as defined at common law for purposes of enhancing damages." 123 N.H. 690, 693 (1983) (citing Johnsen v. Fernald, 120 N.H. 440, 441-42 (1980)). While the Court recognizes the continuing validity of the Gelinas decision, the widespread adoption of legal standards allowing enhanced damages for driving while under the influence, renders the decision worthy of reconsideration.

A. The Fernald Decision

In Fernald, the plaintiff was a passenger in a sports car that was struck by the defendant's truck. 120 N.H. at 440. At trial, the defendant admitted liability, but the plaintiff sought to increase the damages by introducing evidence of the defendant's

intoxication. Id. The trial court ruled that the evidence of drunkenness was not admissible for the purpose of enhancing damages and the Supreme Court agreed. Id. at 441. The justification for not allowing the evidence was that the plaintiff had made no allegations that the defendant's conduct – driving while intoxicated – had been willful or malicious. Id. The plaintiff sought to introduce the evidence on the grounds that, "the allegation of driving while under the influence alone amounts to an allegation of wanton or malicious conduct." Id. (internal citations omitted). The Court turned down that rationale because they, "[did] not equate the act of driving while under the influence with the term 'malice.'" Id. The Court cited Munson v. Raudonis, 118 N.H. 474, 479 (1978) for the proposition that, "liberal compensatory damages will not be allowed without the *allegation* and proof of wanton, malicious, or oppressive conduct." Fernald, 120 N.H. at 442 (emphasis in original). Absent from the Court's decision was a holding that enhanced damages could never be awarded for injuries sustained in an accident where the defendant was driving while intoxicated. The holding is that driving while under the influence, by itself, does not qualify as a malicious act for the purpose of enhancing damages. The Court does not mention if it would qualify as a wanton or reckless act, only that it did not qualify as a malicious act. The case was dismissed because the plaintiff had not alleged wanton, malicious, or oppressive conduct and was therefore not permitted to introduce evidence to that end.

In a special concurrence, Justice Douglas stated that he also believed the case should be dismissed because the plaintiff had not alleged wanton, oppressive, or malicious conduct. Id. at 442. However, Justice Douglas stated, "that this court should have made it clear that had the plaintiff's pleading conformed with the rule in Munson, evidence relating to the defendant's drunken state at the time of the accident would have been admissible on the

issue of enhanced damages, regardless of whether the defendant admitted liability." Id. He follows this statement with a lengthy discussion of the case history of enhanced compensatory damages in New Hampshire, which he ended by stating:

> In my opinion all the above-mentioned cases lead to the conclusion that enhanced compensatory damages should be allowed by this court in cases involving injuries caused by drunken drivers. . . [I]t cannot seriously be denied that when a person becomes intoxicated with the intention of driving while in that condition, he acts in wanton disregard of the rights of others and the consequences to follow.

Id. at 444 (internal quotations and citations omitted). In concluding his analysis he asserted that:

> Statistics, criminal law and public policy all agree that driving while intoxicated should be discouraged. If in the future we refuse to permit enhanced damages in cases like the one at bar, we will act contrary to the case law in this jurisdiction and, in my opinion, against public policy.

Id. at 446. While this special concurrence is not mandatory authority, it demonstrates that the issue of enhanced compensatory damages in drunken driving cases was not a closed issue when Fernald was decided.

B. The Gelinas Decision

Three years after Fernald the Supreme Court decided Gelinas where the plaintiff and his wife sued for injuries and loss of consortium resulting from an automobile accident. Gelinas, 123 N.H. at 692. Again the defendant had admitted liability and the only issue was the amount of damages. Id. The jury was permitted to hear evidence of the defendant's highly intoxicated state in an attempt to show that the defendant had acted wantonly. Id. The jury, by special findings, found that the defendant had not acted wantonly, and awarded damages accordingly. Id.

The Gelinas court focused on the fact that the only law that had been passed providing enhanced damages would not apply and had been repealed. The General Court had passed RSA 265:89-a in 1981 and it provided for enhanced damages for those twice convicted of driving while intoxicated within seven years. As that law did not apply to the Gelinas facts, and as it had been repealed in 1983, the Court did not allow enhanced damages. Further, since it was the only law that had been passed regarding enhanced damages, the Court treated it as the only way that enhanced damages could ever be recovered. Gelinas, 123 N.H. at 693.

In Gelinas, as in Fernald, Justice Douglas concurred specially, citing his reasoning in Fernald. He believed that since the jury found that the defendant did not act wantonly, damages could not be enhanced. Id. He also believed that the existence or non-existence of RSA 269:89-a was not determinative as to the issue of enhancing damages. Id.

C. Other Authority

A general discussion of the availability of enhanced or punitive damages in various jurisdictions may be found in Russell Ward, Punitive Damages in Motor Vehicle Litigation – Intoxicated Driver, 18 Am. Jur. Proof of Facts 3d 1. Section 3 of that entry declares:

> As a general rule, punitive damages are recoverable in all actions for personal injuries based on tortious acts that involve some additional element of asocial behavior going beyond the facts necessary to create the underlying tort. In particular, it is well established that if, while the defendant was operating a motor vehicle, the defendant's misconduct proximately causing the injury complained of was sufficiently offensive, an award of exemplary or punitive damages may be sustained.

The general rule is that egregious misconduct that causes injury will support an award of enhanced damages. More specifically, the author then states:

> Although the courts are not in complete agreement, most courts that have considered the issue have found. . . operation of a motor vehicle after voluntary intoxication may be conduct (however characterized) for which punitive damages will be sanctioned.

It is then stated that the primary division among courts, is not about whether enhanced damages should be awarded, but whether driving while intoxicated alone will support an enhanced award, or if there is a need for further misconduct. Thus, most courts are willing to award damages and only debate the nature of proof necessary to support those awards. New Hampshire is out of step with most courts in this regard.

Justice Douglas's special concurrence in Fernald indicated that at least fourteen jurisdictions had permitted evidence of intoxication to be admitted to enhance damages. 120 N.H. at 442. Since that decision, the number of courts permitting such evidence has increased, which demonstrates that the general consensus is that driving while intoxicated is an evil that should be restrained by the use of enhanced or punitive damages. Danny R. Veilleux, Annotation, Intoxication of Automobile Driver as Basis for Awarding Punitive Damages, 33 A.L.R. 5th 303 (1995 and Supp. 2002), lists no fewer than 27 states that have allowed punitive damages to an injured party in an automobile accident when an intoxicated defendant was determined to have acted wantonly, recklessly or the like. Later in the annotation, the author discusses a number of other states that have allowed damages when the defendant's conduct is judged malicious. Id. Such a large number of states indicates that the majority of American jurisdictions regard driving under the influence and thereby causing injury as a transgression that may be dissuaded by the imposition of enhanced monetary penalties.

Further evidence that New Hampshire is out of step with the majority of states may be found in that same annotation. Section 8[a] of the annotation is a collection of

cases where punitive damages are not available under common law or statute in personal injury actions. Aside from a single South Dakota case[1] New Hampshire is the only jurisdiction represented. The State of New Hampshire has refused to recognize the availability of punitive or enhanced damages for personal injuries sustained in automobile accidents where the defendant has been driving while under the influence, and in so doing, has partitioned itself from a large majority of states.

IV. Conclusion

As New Hampshire is in the extreme minority in its denial of enhanced damages, it is appropriate to leave open the issue of enhanced damages at this time. Although the Court does not make any judgment on the merits of the case, the Court will permit the issue of possible enhanced damages for reckless or wanton conduct to be determined by the trier of fact. Therefore, since Plaintiffs have pled reckless and wanton conduct and have thus satisfied the requirements of Munson, they shall be allowed to introduce evidence of reckless or wanton conduct for the purpose of enhancing damages. Accordingly, the Defendant's Motion to Dismiss Count III is **DENIED**.

Date 11/7/2003

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EDWARD J. FITZGERALD, III
Presiding Justice

[1] The South Dakota case, Berry v. Risdall, 576 N.W. 2d 1 (1998), actually upholds the decision of a trial judge who did not dismiss a claim for punitive damages in a drunken driving case.