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Insurance for the Commission of Intentional Torts

By Donald F. Farbstein*
Francis J. Stillman*

I. Coverage For Intentional Torts Under Older Policy Forms
A. The Concept of Accidental Injury

Liability insurance policies are written in many forms. Among the most common are the following: (1) The automobile policy, which affords coverage for losses arising out of the use of certain classes of automobiles; (2) The comprehensive liability policy, applicable to a broad range of risks other than those connected with automobiles; (3) The fire policy or homeowner's policy covering various home and family risks; and (4) The owner's, landlord's and tenant's policy, covering various risks connected with certain designated commercial premises. Although they vary as to the risks which are insured, virtually all such policies contain the same provisions regarding the kind of injury or harm insured by the policy. In particular, most liability insurance policies issued prior to 1966 contain identical language applicable to the intentional tort liability of the insured.1

The older standard policy forms typically obligate the insurer to pay on behalf of the insured such sums as the insured shall become obligated to pay for "bodily injury or property damage caused

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1 See, e.g., National Bureau of Casualty Underwriters, Standard Provisions for General Liability Policies (1935) [hereinafter cited as Standard Liability Policy of 1935]. The policy clauses quoted in the text concerning accidental injury and intended harm were in common use long before 1935. The term "standard" has been used for want of a better one to reflect the similarity of the language used in most policies, although originally there was no single source of policy texts. In 1966 a new standard policy was issued containing certain changes in wording although not in philosophy. National Bureau of Casualty Underwriters, Standard Provisions for General Liability Policies (1966) [hereinafter cited as Standard Liability Policy of 1966]. Policies with similar language may be found in E. Patterson & W. Young, Cases and Materials on the Law of Insurance, app. I, at 647-97 (4th ed. 1967).
by accident."  As a corollary, the policy contains an express exclusion of coverage for injuries "intentionally caused by the insured." Most coverage questions in connection with intentional torts involve interpretation of the quoted phrases.

By limiting the covered claims to those for "bodily injury or property damage," the standard policy excludes (or was once thought to exclude) coverage for most of the intentional torts. Under a restrictive interpretation of the policy language, battery and trespass are the only torts clearly within the scope of the coverage, because these are the only intentional torts which result in "bodily injury" or "property damage." Such torts as assault and false arrest, which involve primarily mental anguish rather than physical harm, and defamation and invasion of privacy, which may cause pecuniary loss but which do not involve damage to property, would all be excluded by the nature of the policy. Questions such as whether a false arrest could give rise to a "bodily injury" within the meaning of a liability insurance policy never seem to have been litigated, probably because the "accident" and "intentional injury" clauses of the policy furnish a surer ground for refusing coverage.

The old standard policy states that its application is confined to damage "caused by accident." The policy does not define "accident"; however, the courts furnished the following definition at an early date: "[A] casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured." Many modern cases have adhered to essentially the same definition. "Accident" and the judicial interpretations surrounding it became the source of much litigation. The term became, in fact, so buried in a quagmire of judicial verbiage that the insurance industry abandoned it with the issuance of the new policy forms in 1966, substituting in its place the term "occurrence."

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3 Id.
5 See generally id. §§ 10, 12, 106-08, 112.
7 E.g., Zuckerman v. Underwriters at Lloyd's, 42 Cal. 2d 460, 473, 267 P.2d 777, 784 (1954).
The problem with the use of the word "accident" was its ambiguity with respect to two major issues. Courts and lawyers were never able to disabuse themselves of the notion that an event must happen "suddenly" in order to be an accident, thus producing unending argument over whether gradual processes such as erosion and leakage could give rise to an accident. This particular ambiguity had little bearing on the area of intentional torts, most of which tend to happen suddenly enough. The other major ambiguity, however, produced a crucial issue in resolving coverage for intentional torts.

The pre-1966 policy leaves unresolved the question whether the event should be viewed from the aspect of the insured or the aspect of the victim in determining whether an accident has occurred. Some courts adopted the view expressed in the definition quoted above, and borrowed from cases interpreting accident policies, that one looked at the event from the point of view of the injured person and asked whether he had been in an accident. Such an interpretation makes sense in the area of accident insurance, since under an accident policy the injured person is himself the insured. It is undoubtedly contrary to the underwriting intent of the liability policy, which seeks to distinguish between harm that the insured intended to inflict and harm caused by him inadvertently.

The popularity of this interpretation is understandable, however, in view of the fact that the issue was frequently presented in early cases where the insured was sued for a battery committed by his agent in which the insured did not participate. Some early cases held that such an injury was not accidental on the argument that it was intended by the person causing the harm. But most courts were more anxious to allow coverage in such situations. Viewing the issue of accidental injury from the standpoint of the injured person was the convenient way to uphold coverage, and the leading decisions soon took this approach. In addition, the insurance industry seems to have decided that coverage should be available for injuries resulting from battery by an agent. Most standard policies issued

11 E.g., New Amsterdam Cas. Co. v. Jones, 135 F.2d 191 (6th Cir. 1943); Georgia Cas. Co. v. Alden Mills, 156 Miss. 853, 127 So. 555 (1930); Hartford Accident & Indem. Co. v. Wolbarst, 95 N.H. 40, 57 A.2d 151 (1948); Fox Wis. Corp. v. Century Indem. Co., 219 Wis. 523, 6 N.W.2d 708 (1942). "Injuries are accidental or the opposite for the purpose of indemnity according to the quality of the results rather than the quality of the causes." Messersmith v. American Fidelity Co., 232 N.Y. 161, 165, 133 N.E. 432, 433 (1921) (Cardozo, J.).
12 E.g., Commonwealth Cas. Co. v. Headers, 118 Ohio St. 429, 161 N.E. 278 (1928).
13 Georgia Cas. Co. v. Alden Mills, 156 Miss. 853, 127 So. 555 (1930).
during the last thirty years have contained a clause providing that "assault and battery shall be deemed an accident unless committed by or at the direction of the named insured."14

Coverage for the intentional wrong of an agent was the earliest form of insurance for intentional tort liability to receive judicial recognition. As indicated, the major obstacle to such coverage was removed either by judicial acceptance of the principle that the "accident" was to be viewed from the standpoint of the injured person or by an express clause in the policy. That principle did not, however, resolve those cases in which the insured was sued on an intentional tort theory predicated on the assertion that he personally committed the act causing the harm. Such situations pose the most difficult problems in connection with insurance for intentional torts.

B. The Intentional Injury Exclusion

1. Judicial Treatment of Questions of Intent

The most significant language of the old policy form concerning insurance for intentional torts is the clause providing that the insurance did not apply to "injuries, loss or damage . . . intentionally caused by the insured."15 The meaning of this language is crucial to the question of the scope of coverage for intentional torts. The standard liability policy is designed to indemnify the insured for damage which he causes inadvertently, negligently, even recklessly. It is not intended to protect him from the legal consequences of harm which he intentionally inflicts.

The significant factor in the clause as it appeared in the pre-1966 policy is its reference to "injury" that is intentionally caused. Although sometimes referred to loosely, and very inaccurately, as the "intentional act exclusion," the clause focuses not on the intent to act but on the intent to injure. The better reasoned decisions would thus require that the insured specifically intend the particular harm that is the basis of the claim before the exclusionary clause applied.

The case of Morrill v. Gallagher16 is illustrative. The insured and a companion, both evidently adults, threw a "cherry bomb" firecracker into a room, intending to frighten a girl. The explosion resulted in deafness, for which she sued. Having intended an invasion of the plaintiff's interest in personal security, the insured was clearly liable for some form of intentional tort, either the intentional infliction

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15 Id. This clause usually appears in the policy listed under "Exclusions." The list of exclusions is lengthy and ordinarily situated at the end of the policy. One of the improvements in the new form was to put the analogous language in a more prominent place.
of mental distress, assault, or perhaps battery. Such liability would naturally include any unforeseen consequences of the act. The court held that coverage was afforded, stating: "[I]t will be noted that under the language of the excluding clause the injury must be caused 'intentionally.' There is nothing in this case to justify a conclusion that either Gallagher or Canfield intended to cause any physical harm to plaintiff." Another example is Connecticut Indemnity Company v. Nestor. Coverage was afforded where a boy set a fire to frighten the inhabitants of a house, and the fire spread accidently, thus damaging the house. Similarly, in Baldinger v. Consolidated Mutual Insurance Company, the insured, age six, shoved a little girl to the ground, causing a surprisingly severe fracture of her elbow. The court found him to be capable of understanding that his act caused an offensive bodily contact to the plaintiff and that he thus possessed the mental capacity requisite to commit battery, but it further held that he had not intended to inflict injury on the plaintiff. Coverage was held to be available.

The clause excluding intentionally inflicted harm thus poses two difficult and related problems: The need to discover and prove the subjective intent of the insured and the question of when the resulting harm exceeds the scope of the insured's intentions. The law of most jurisdictions includes a doctrine that persons must be held to intend the usual and ordinary consequences of their voluntary acts. Few courts and fewer insurance companies would be receptive to the plea that "I intended to hit him in the face but I did not intend to fracture his jaw." On the other hand, a point is reached where the harm done substantially exceeds that intended. At that uncertain point, coverage arises. In many instances, isolating that point is complicated by the fact that the evidence of intent must be drawn from observation of the external act, leaving the ultimate problem in the hands of the trier of fact, with no easily applied test available to facilitate its task.

One case indicating the difficulty in applying the exclusion is Wigginton v. Lumbermens Mutual Casualty Company, in which a taxicab blocked the way of the insured, who was parked at a curb.

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17 Id. at 588, 122 N.W.2d at 691.
21 See Pendergraft v. Commercial Standard Fire & Marine Co., 342 F.2d 427 (10th Cir. 1965), where the insured, a minor of unspecified age, struck the claimant on the cheek, causing him to fall and fracture his skull on the pavement. Coverage was denied.
The insured intentionally backed his auto into the cab, injuring the driver who was standing at an open door of his vehicle. The court denied coverage because there was "no question . . . that the injury was caused intentionally." The result may be correct; however, the opinion is deficient in failing to explore the possibility that the real intent was to inflict minor property damage to the cab, not major bodily injury to the driver.

The *Wigginton* case should be contrasted with *Crull v. Gleb*.

In that case, the claimant and the insured became involved in a dispute over a ditch dividing their lands. The claimant entered his car and began to back up. The insured, in a pickup truck, repeatedly rammed the claimant's car head-on, ultimately forcing it from the roadway and causing personal injuries to the claimant. The court found the evidence consistent with an "intent to do the act, knowing it was wrong, but no conscious intent to inflict or cause the harm that followed." The court characterized the conduct of the insured as "wanton" rather than intentional with respect to the injuries sustained by the claimant. Such cases make it clear that the issue is really one of degree, and that any effort to erect a verbal boundary line between intentional and negligent conduct can achieve only limited success.

Another troublesome type of case in applying the intentional injury exclusion is that in which the insured intends to injure a particular victim and manages, in the course of carrying out that intent, to harm other victims as well. In *Kraus v. Allstate Insurance Company*, the insured stole a quantity of dynamite and used it to convert his automobile into a bomb, apparently for the purpose of doing away both with himself and with his wife. He set off the blast while parked with his wife on a public street, blasting a number of innocent pedestrians in the process. The court held that there was no coverage for the injured pedestrians. It argued that the injuries did not result from the use of the auto and were thus outside the scope of the auto policy, but was not satisfied to rest on that ground alone. It applied a theory of "transferred intent" to the coverage question, holding that since the injury was intentional as to the wife, it would be deemed intentional as to the other victims as well. This

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23 Id. at 171.
24 Great Am. Ins. Co. v. Ratliff, 242 F. Supp. 983 (E.D. Ark. 1965), shows better reasoning on similar facts. The court recognized the distinction between intent to damage the car and intent to harm the occupant but found, on a showing of repeated bumping resulting from a standing feud between the parties, that harm to the occupant was intended.
25 382 S.W.2d 17 (Mo. App. 1964).
26 Id. at 22.
reasoning applied fiction as a mode of analysis instead of confronting the facts. It may be that the insured intended to injure his wife and anyone else unlucky enough to be in the vicinity of the blast. The facts were certainly subject to such an interpretation. But there is no language in the standard liability policy which would dictate the creation of a "transferred intent" fiction where the insured intends harm to one person and accidently injures someone else. The true basis of the decision is undoubtedly the normal visceral reaction that it is unfair to compel the insurer to cover the consequences of such a bizarre occurrence.

A sounder approach to this type of problem is illustrated by *American Insurance Company v. Saulnier*, in which a boy threw a soda pop bottle into a swimming pool, intending to either strike or frighten a girl. A small boy named David suddenly emerged from the water directly in the path of the bottle, was struck by it and injured. The court declined to apply the "transferred intent" theory urged upon it. Even if the boy had intended to hit the girl, which the judge doubted, he had not intended to hit David. As to David, there was no intent to cause injury. Coverage was allowed.

The result in the *Saulnier* case is wholly consistent with the objectives of the liability policy. Even if the insured intended harm, he did not intend serious bodily harm to anyone and the injury done to the innocent victim was wholly accidental from the insured's standpoint, being the consequence of his mistake, not his design. The *Kraus* case is distinguishable in the sense that an act of extreme violence was deliberately directed at one victim. In the light of that fact, one is far less inclined to view the numerous resulting injuries as accidental. However, if it is accepted that the injury to pedestrians was unintended in *Kraus*, the terms of the policy compel coverage in that situation as well.

2. *Insanity and Intent*

Cases such as *Kraus* suggest a further question as to whether insanity might vitiate the intent required to bring the exclusion into play. Few cases thus far have dealt with the question of mental capacity, but their number may well increase. The New Jersey case of *Ruvolo v. American Casualty Company* is likely to be an influential decision. The insured, a doctor, shot and killed his professional

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29 See Smith v. Moran, 61 Ill. App. 2d 157, 209 N.E.2d 18 (1965), where the insured fired several shots at A and one of the bullets struck B. The court had no difficulty in holding that the injury to B was unintended and that the policy applied.
associate. He was certified by court psychiatrists as unfit to stand trial and was committed to a mental institution. The wrongful death claim of the victim’s heirs resulted in coverage litigation over whether the death was intentional within the meaning of a liability policy. “Broadly stated, [the court said,] if the actor does not have the mental capacity to do the act intentionally, the policy coverage remains operative.”

The court had no doubt that if a homicidal act of an insured is of such character as to excuse him from criminal responsibility because of insanity, i.e., because at the time of its commission he did not have the mental capacity to understand the nature and quality of his act or to be able to distinguish between right and wrong with respect to it, the killing should not be considered “intentional” within the meaning of the defendant’s policy.

This decision creates a distinction between the effect of insanity upon liability and the effect of insanity upon coverage. The insured’s insanity would not relieve him from liability for the tort of battery. This is an ancient rule which is said to rest on a public policy of preferring to compensate the victim rather than to exonerate a person not responsible for his acts. The decision in favor of coverage is really an expression of the same policy, recognizing that the responsibility of the insane person for his torts is really a matter of strict liability and not of intent, and is thus the type of risk for which coverage is not excluded under the liability policy.

In suggesting that standards of intent derived from the criminal law are applicable in interpreting a liability insurance policy, the court in Ruvolo may have opened up many coverage problems. New Jersey evidently applies the traditional right-wrong test of criminal responsibility. One might ask how the coverage problem will be approached in jurisdictions applying the Durham or “product” approach where responsibility is determined with reference to whether the defendant’s act was the product of a mental disease or defect. A further question is whether insanity under the criminal law is the only mental state which will be recognized as a lack of capacity to formulate the required intent. Some jurisdictions, including California, have developed a doctrine of diminished capacity, concerning conduct falling short of insanity, which does not fully exonerate the defendant from guilt, but which does reduce the gravity of the offense. Possibly a similar doctrine, based upon a diminished ca-

31 Id. at 496-97, 189 A.2d at 208.
32 Id. at 498, 189 A.2d at 208.
See also CAL. CIV. CODE § 41.
pacity to formulate the intent to inflict injury, will be advanced in situations similar to that in the *Kraus* case.

Decisions concerning fire insurance policies, which typically exclude coverage for the incendiary acts of the insured, have long held that coverage is available if the insured is insane at the time he causes the fire. These cases furnish a ready analogy where the same question is presented under a liability policy. Such an approach was suggested in *Rosa v. Liberty Mutual Insurance Company*, in which the insured, a 16 year old boy, forced a girl into a car and shot her. He was committed to a mental hospital following a plea of nolo contendere in the criminal prosecution. The evidence showed that he was the victim of a severe mental illness diagnosed as schizophrenia. The court explained the decision in favor of coverage as follows:

[A]ll his activities leading up to the attack on the plaintiff, and the attack itself, are traceable exclusively to the impairment of his judgment and rational capacity by the influence of schizophrenia. This derangement of his intellect deprived him of the ability to govern his conduct in accordance with reason and intent, to judge the nature, character and consequences of his act and to resist impulses to do other than what he did.

Under these circumstances, his action cannot be regarded as “intentional” within the meaning of an insurance contract.

The authorities cited by the court in support of this holding were *Ruvolo*, a Connecticut case defining criminal insanity and an annotation dealing with insanity as a defense to coverage under a fire policy.

Although the *Ruvolo* and *Rosa* cases are the only ones located in which insanity was advanced as a means of avoiding the intentional injury exclusion, there is no risk in predicting that their number will increase. Examples can readily be located in which the point might well have prevailed had anyone thought to bring it up. In *United Services Automobile Association v. Wharton*, the insured swerved his auto into an oncoming truck, thereby killing his wife. In a coverage suit brought by the wife's administrator against the husband's policy the wife's dying declarations were admitted, showing that the insured was attempting to commit suicide when he caused the accident and that he had stated "[w]e will go to eternity together" just

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39 Id. at 408.
40 Id. at 409.
43 Id. at 257.
prior to the collision. A prosecution against him was dismissed on stipulation that he make certain reparations to the wife’s heirs. He later committed suicide in a mental hospital. The court treated the case as one involving an intentional injury and denied coverage. Evidently the argument that the insured’s insanity might render the killing unintentional was never raised.

From the foregoing it is apparent that the problem of fathoming human intent is no easier in connection with the interpretation of liability insurance policies than in the fields of tort and crime where it is more commonly encountered. Many recent cases have not hesitated to pursue the inquiry into the subjective intent of the insured to the ultimate extent possible for the exploration of mental capacity. Although the insurance industry has generally tried to resist such refinement of the inquiry, the better reasoned cases have clearly demonstrated that this inquiry is compelled by the terms of the policy, and that no simplistic approach can be substituted for a close analysis of the facts to determine what, in reality, the insured intended when he committed the act giving rise to the claim.

C. The Duty to Defend

The foregoing discussion has treated the extent of coverage for intentional torts from the standpoint of the insurer’s duty to indemnify the insured in the event he is held liable. This obligation is commonly referred to as the “duty to pay” and is expressed in the insuring agreement by that clause whereby the insurer promises “to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages [because of bodily injury or property damage].” In addition to this basic duty, the insurer under most liability policies promises to “defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent.” This obligation is commonly referred to as the “duty to defend.”

This latter clause—the duty to defend—furnishes one of the major benefits of liability insurance since it protects the insured not merely from exposure to liability, but also from the costs of investigation and legal counsel which are necessarily attendant to all litigation. This duty of the insurer is distinguishable from and broader than the duty to pay in several respects. The duty to defend arises

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45 STANDARD LIABILITY POLICY OF 1935, supra note 1.
46 Id.
when suit is brought against the insured, not when the legal obligation of the insured matures. Further, the language of the defense clause clearly states that the insured is entitled to a defense in cases where he is not and never will be obligated to pay, i.e., in cases where the suit is “groundless, false or fraudulent.” The extent to which the duty to defend is broader than the duty to pay creates problems in many areas of insurance coverage. In no area is litigation of the issue more common than that of intentional torts.

The major dispute over the meaning of the defense clause is created by the invariable presence of conflicting accounts as to the nature of the facts. In the typical case the insured is sued for assault and battery and the complaint alleges that he intended to inflict the injuries which the plaintiff claims to have suffered. The insured tenders the complaint to his insurance carrier for a defense and the carrier takes the position that there is no coverage and hence no duty to defend because of the allegation of intentional injury. The insured, however, contends that the suit is really one for something other than an intentionally inflicted injury. Typically he takes one or more of the following positions:

1. His act was privileged and thus not wrongful, i.e., he acted in self defense.
2. The blow was unintended, i.e., he was merely negligent or was not at fault at all.
3. He did not commit the act charged, i.e., someone else struck the blow.
4. He intended only a minor bodily contact, not a major injury such as is alleged to have resulted.

Under such circumstances the defense clause presents a difficult problem of interpretation. The issue is simply stated: If the insured denies the intentional infliction of injury, does the claim become one for “bodily injury,” some of the allegations of which are “groundless, false or fraudulent,” and thus a claim covered by the defense clause, or does it remain a claim for intentional, not accidental, injury and thus not a claim “damages for which are payable under the terms of

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48 STANDARD LIABILITY POLICY OF 1935, supra note 1.
this policy?" The answer to this question is not clearly evident from the language of the policy. In interpreting the defense clause, the courts initially developed certain basic rules. These have been subject to evolution, refinement and change as more and more litigation has arisen in connection with the defense of intentional tort claims.

It has long been recognized that the duty to defend must be tested against the allegations of the complaint and not against the ultimate outcome of the action.\textsuperscript{53} In other words, if the complaint states a claim that is covered, the insurer may not refuse to defend on the assertion that other facts not alleged would indicate that there is no coverage.\textsuperscript{54} The courts have been tormented by the more difficult question whether the duty to defend will arise in a case where the allegations of the complaint, if all of them were proven, would defeat coverage, but where information is presented to the insurer indicating that the true facts of the claim show it to be within the coverage of the policy. A vast body of cases has grown up around this question and the decisions in various jurisdictions are utterly inconsistent.\textsuperscript{55}

The older, restrictive solution to the problem is illustrated by \textit{Wilson v. Maryland Casualty Company}.\textsuperscript{56} In a coverage suit against his insurer the insured, a bar owner, alleged that the insurer had refused to defend a suit for battery in which the claimant had pleaded that the act was committed by the insured personally. The insured further alleged that the claim resulted from an attack by patrons of his bar in which he had not participated and that following the refusal of the insurer to defend, he had settled the claim for business reasons. The court held that no cause of action had been stated for breach of the policy. "The question is not as to the truth or falsity of a claim, but whether it is covered by the policy; if it is, the Company must defend it, if it is not, its truth or falsity is wholly immaterial."\textsuperscript{57} The court believed that "the rule everywhere is that the obligation of a casualty insurance company to defend an action


\textsuperscript{57} Id. at 592, 105 A.2d at 306.
brought against the insured is to be determined solely by the allega-
tions of the complaint in the action, and that the company is not
required to defend if it would not be bound to indemnify the in-
sured even though the claim against him should prevail in that
action."\[65\]

The decision is unsatisfactory in several respects and represents
an approach to the problem that is falling into disfavor. The court’s
basic argument is that if the claimant had prevailed on the theory
stated in the original complaint there would be no coverage; hence,
there was no duty to defend. This argument equates the duty to
defend with the duty to pay, and fails to account for the possibility
that the claim may involve facts other than those stated in the alle-
gations. Suppose, for example, the allegation that the insured per-
sonally committed the battery is false, as the insured contended in
the Wilson case. In that event, although the insured might not be
liable at all, on any theory, he has been deprived of the protection
of the policy by the erroneous version of the facts asserted by the
claimant. Further, under the version of the facts stated by the in-
sured, he might be liable on a theory of recovery for which coverage
would clearly be available, such as a negligent failure to protect a
business visitor from unruly patrons. As one dissenting justice stated:
“It is to me an amazing thing that an insurance company, being sued
on a contract of insurance, can summarily escape liability by simply
asserting, through hearsay, that the insured is lying.”\[69\]

In spite of its obvious deficiencies many decisions continue to
repeat the formula that “if the complaint tendered to an insurance
company does not allege the happening of an event covered by the
policy, there is no duty to defend.”\[60\] However, there are also many
decisions of recent date recognizing that the insured should be given
the benefit of a dispute over the facts giving rise to the claim and
that the duty to defend must be imposed whenever facts from any
source are disclosed to the insurer indicating the possibility of cover-
age.\[61\]

Perhaps the broadest interpretation of the defense clause articu-
lated to date is the decision of the Supreme Court of California in

\[65\] Id. at 594, 105 A.2d at 307.
\[66\] Id. at 599, 105 A.2d at 308.
\[60\] Consolidated Mut. Ins. Co. v. Ivy Liquors, Inc., 185 So. 2d 187 (Fla.
App.), cert. denied, 189 So. 2d 633 (Fla. 1966); Massachusetts Turnpike Au-
thority v. Perini Corp., 349 Mass. 448, 208 N.E.2d 807 (1965); see Ohio Cas.
129, 134 (1965); Crum v. Anchor Cas. Co., 264 Minn. 378, 387-88, 119 N.W.2d
703, 709 (1963); Mavar Shrimp & Oyster Co. v. United States Fidelity &
Gray v. Zurich Insurance Company. Although this decision has been condemned by many writers purporting to speak for the insurance industry, it is likely to outlive the words of its critics and it probably represents what will, in time, become the generally accepted approach to those duty to defend cases alleging intentional injury.

The facts of Gray v. Zurich fit the pattern described above. Dr. Gray was sued for assault and battery in Missouri. His version of the incident was as follows:

Immediately preceding the altercation Dr. Gray had been driving an automobile on a residential street when another automobile narrowly missed colliding with his car. Jones, the driver of the other car, left his vehicle, approaching Dr. Gray's car in a menacing manner and jerked open the door. At that point Dr. Gray, fearing physical harm to himself and his passengers, rose from his seat and struck Jones.

Dr. Gray tendered the defense of the Jones suit to his insurance carrier, which refused to defend him. He then unsuccessfully defended on the theory of self-defense and suffered judgment in the amount of $6,000 compensatory damages.

In holding that the carrier had wrongfully refused to defend Dr. Gray, the court pointed to the impossibility of determining, at the outset, whether coverage was available or not:

Although insurers have often insisted that the duty arises only if the insurer is bound to indemnify the insured, this very contention creates a dilemma. No one can determine whether the third party suit does or does not fall within the indemnification coverage of the policy until that suit is resolved; in the instant case, the determination of whether the insured engaged in intentional, negligent or even wrongful conduct depended upon the judgment in the Jones suit, and indeed, even after that judgment, no one could be positive whether it rested upon a finding of plaintiff's negligent or his intentional conduct. The carrier's obligation to indemnify inevitably will not be defined until the adjudication of the very action which it should have defended.

A second major argument used by the court in favor of a duty to defend was based on the language of the defense clause, which, "in its broad sweep would lead the insured reasonably to expect defense of any suit regardless of merit or cause." The court found the relation of the defense clause to the intentional injuries exclusion uncertain and ambiguous. In view of the uncertainty, the court held that the policy should be construed in favor of the insured.

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65 Id. at 271-72, 419 P.2d at 173, 54 Cal. Rptr. at 109.
66 Id. at 273, 419 P.2d at 174, 54 Cal. Rptr. at 110.
Another basis for the decision in Gray v. Zurich was a line of earlier decisions holding that a suit must be defended if it "potentially seeks damages within the coverage of the policy." Pleadings are likely to exaggerate or distort facts and are, under modern procedure, lacking in allegations of specific facts and readily subject to amendment. The court in Gray v. Zurich noted that

the complainant in the third party action drafts his complaint in the broadest terms; he may very well stretch the action which lies in only nonintentional conduct to the dramatic complaint that alleges intentional misconduct. In the light of the likely overstatement of the complaint and of the plasticity of modern pleading, we should hardly designate the third party as the arbiter of the policy's coverage.

The possibility that a complaint alleging intentional conduct may be amended to allege something else furnishes the plaintiff with an ever present opportunity to change his theory once the lawsuit has begun, even if he has confined his initial pleading to an intentional tort theory and has not included an alternative claim for negligence. A claimant, as a practical matter, always has the option of proceeding on a negligence theory even if there is some evidence of intended harm. The court in Gray v. Zurich was thus concerned to give the defendant the same latitude with regard to the defense clause of his policy as that possessed by the plaintiff in selecting a theory of recovery. In so doing it opted for an interpretation of the defense clause stressing the undertaking to defend all suits for bodily injury or property damage, including those which are "groundless, false or fraudulent," and suppressing the limitation to claims "damages for which are payable under the terms of this endorsement." Such a choice is compelled by the terms of the defense clause in cases where intentional harm is alleged.

Although it has not been universally applauded, the decision in Gray v. Zurich has at least clarified the scope of the duty to defend. It provides a broad, workable rule and, in jurisdictions where the decision is followed, it should virtually guarantee that persons owning liability policies will be entitled to defense against allegations of intentional tort, so long as the claim is of a nature covered by the policy. Circumstances should be rare in which the claim will not include the possibility that the insured's mental state in fact fell short of the specific intent to inflict the harm upon which the claim is based.

One factual situation not dealt with in Gray v. Zurich is that in which the insured admits that he intended to cause harm. If he

67 Id. at 275, 419 P.2d at 176, 54 Cal. Rptr. at 112 (emphasis by the court).
68 Id. at 276, 419 P.2d at 176, 54 Cal. Rptr. at 112.
69 Id. at 274, 419 P.2d at 173, 54 Cal. Rptr. at 109.
70 Id.
admits that he intended to cause all of the harm involved in the claim there would, presumably, be no duty to defend, as long as the insured’s admission excludes any possibility that the claim might fall within the language of the policy. But such an admission is, of course, highly unlikely. In the usual case the insured admits that he intended some harm, but denies that he intended all of the harm resulting.

The latter situation arose in Weis v. State Farm Mutual Automobile Insurance Company,71 in which the insured, when initially contacted by an adjuster from his carrier, described the accident as “the famous bumping case,”72 and admitted that he had “deliberately bumped into the back of [the claimant’s] car several times.”73 The court held that the insurer was not obligated to defend a bodily injury suit resulting from the bumping on the argument that the insured had admitted that there had been no “accident.” As with some of the decisions cited in the previous section,74 the Weis opinion is deficient in failing to analyze the factual issue actually presented. The court based its argument that no accident had occurred on the assertion that “the incidents complained of were not accidents but intentional and deliberate acts on his part.”75 As noted above, the policy does not exclude coverage for “intentional acts,” but rather excludes coverage for intentional injury.76 The question whether the insured had in fact intended bodily injury was not discussed, although it would appear from the opinion that no such harm was intended. The case is thus one where the insured intended to cause far less harm than that which ultimately resulted. The injury, viewed as a whole, is the result of aggravated negligence rather than intent.

A similar, and more difficult case to resolve, is Stout v. Grain Dealers Mutual Insurance Company.77 Female members of the insured’s family had been bothered by a Peeping Tom. The insured rigged a warning device and when the device revealed the Peeping Tom, the insured gave chase. He fired about 15 shots from a .22 caliber rifle, two of which struck the Peeping Tom and resulted in his death. In the resulting prosecution the insured pleaded guilty to

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71 242 Minn. 141, 64 N.W.2d 366 (1954).
72 Id. at 142, 64 N.W.2d at 367.
73 Id. at 145, 64 N.W.2d at 368.
76 STANDARD LIABILITY POLICY OF 1935, supra note 1.
77 307 F.2d 521 (4th Cir. 1962).
voluntary manslaughter. The insured tendered the defense of a civil suit by the Peeping Tom’s heirs to the carrier which had issued his homeowner’s policy and the tender was refused. The court upheld the refusal to defend, holding that the plea to the criminal charge was a binding admission of an intent to kill, thus defeating any possibility of coverage. The insured’s position was that he had entered the plea in order to avoid the possibility of a prison sentence and that he had not acted with a specific intent to kill.

It is submitted that even under the facts in Stout the insured was entitled to a defense, if one accepts the policy interpretation advanced in Gray v. Zurich. The insured’s plea was not res judicata on the issue of intent to kill and the explanation he later gave for its entry was reasonable in the light of the circumstances. The liability, if any, to the heirs of the Peeping Tom would not necessarily depend on such an intent. The insured might have been liable on a theory of use of excessive force in defense of his family or of recklessly firing to frighten away the intruder, neither of which would necessarily involve the intent to kill or even inflict serious injury. The case is really one in which the issue of coverage cannot be determined except by a separate proceeding inquiring into the intent of the insured. It is thus one in which a duty to defend should arise.

Much litigation concerning the duty to defend claims alleging intentional torts has been generated by an attitude formerly prevalent in the insurance industry of refusing to defend such claims. It has been the writers’ experience that this resistance to an expansive interpretation of the defense clause had its origin in the belief that the cost of defense in such cases was not included in the computation of the premium. The trend in judicial decisions toward upholding the duty to defend intentional tort claims has altered this attitude and

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78 In Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962), the court held that a conviction was collateral estoppel on the issue of participation by the insured in a theft, coverage for which was claimed under a policy. The court remarked that the case would be different if a guilty plea were involved: “A plea of guilty is admissible in a subsequent civil action on the independent ground that it is an admission. It would not serve the policy underlying collateral estoppel, however, to make the plea conclusive. . . . When a plea of guilty has been entered in the prior action, no issues have been ‘drawn into controversy’ by a ‘full presentation’ of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Consideration of fairness to civil litigants and regard for the expeditious administration of criminal justice . . . combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action.” Id. at 605-06, 375 P.2d at 441, 25 Cal. Rptr. at 561. See also Gillespie v. Modern Woodmen of America, 101 W. Va. 602, 133 S.E. 333 (1926).
has caused many companies to collect a premium for the cost of such defense and to accept the tender of defense in such actions. The effect of this new attitude in the industry, where it exists, is to afford the insured a defense, postponing the potential dispute over coverage until the claim has been resolved. Where this approach is adopted by the industry the public is undoubtedly better served.

As the court pointed out in *Gray v. Zurich*, if the insured is afforded a defense against a claim based on an intentional tort, he has as much protection as he might reasonably be led to expect by the language of the policy. In those cases where the allegations of intentional wrongdoing are exaggerations, he is not denied the protection of his insurance by a false statement of the facts upon which the claim is predicated. Imposing the duty to defend in such situations is thus in the best interest of the insured and is not in conflict with the concept held by many insurers of their duties under the defense clause. It is hoped that the approach furnished by *Gray v. Zurich* will be adopted in other jurisdictions and a general recognition will develop that a person insured under a liability policy is entitled to a defense under the policy regardless of whether the claim is initially predicated upon negligence or intentional wrongdoing.

II. Coverage For Intentional Torts Under Recently Developed Policy Forms

A. Amendments in the Standard Policy

In 1966 new standard policy forms were introduced, altering the accident and intentional injury clauses of the liability insurance policy.79 The language of the new forms clarifies, but does not substantially alter, the scope of coverage afforded for intentional tort liability in the commonly marketed forms of liability insurance, such as automobile, comprehensive, homeowner's, and owner's, landlord's and tenant's. The new standard liability policy was drafted with the objective of eliminating the ambiguities found in the old policy as a result of the use there of the unqualified term "accident." The applicability of the policy to the intentional conduct of the insured is also stated in a more lucid manner by eliminating the intentional injury exclusion, which was buried in the middle of a long list of exclusions toward the end of the old policy. In place of the intentional injury exclusion the new policy contains a clause related directly to the language of the insuring agreement.

The central clause of the insuring agreement of the new policy reads: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages

79 STANDARD LIABILITY POLICY OF 1966, supra note 1.
because of . . . bodily injury or . . . property damage to which this insurance applies, caused by an occurrence. . . ." In the "Definition" section it is stated that: "ocurrence means an accident, including injurious exposure to conditions which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured."8

By replacing the term "accident" with that of "occurrence," and by supplying the definition quoted above, the new policy seeks to eliminate the two major ambiguities noted earlier which were generated by the use of the term "accident."82 The "exposure to conditions" qualification clarifies the issue of whether an accident must happen "suddenly" or whether it may result from gradual processes. The definition further specifies that the loss must be "neither expected nor intended from the standpoint of the insured," thus solving the problem of whether "accident" should be viewed from the position of the insured or the injured party.83

Like the exclusion in the former policy, the new definition of "occurrence" focuses on the intent to injure rather than on the intent to act. Damages resulting from an intentional act, and even from an act committed with the intent to harm, are covered, so long as the damage actually resulting was neither "intended nor expected" by the insured. The new policy thus represents no major change in the scope of the coverage, but rather an effort to carry forward the philosophy of the old policy in a more intelligible verbal framework.

The same issues of coverage raised by the older forms are still present.

Another change in the language of the insuring agreement of the new policy is the addition of "expected" to the phrase which deals with intent. What one expects and what one intends can be two widely different things; however, the use of the word "expected" in the new policy must have been designed as an effort to specify the traditional distinction drawn in liability underwriting between harm brought about by the design of the insured and harm for which he is liable but which he did not contemplate.

It is difficult to foresee at this time any major alteration in the scope of coverage resulting from the addition of the word "expected." It can be foreseen, however, that the term may generate dispute as to whether there is coverage in cases in which the insured foresees a

80 Id. Essentially the same language appears in several other standard insurance policies issued by the National Board of Casualty Underwriters: The comprehensive general form, the owners', landlords' and tenants' form, the manufacturers' and contractors' form, the completed operations and products liability form, the contractual liability form, and the garage form.
81 STANDARD LIABILITY POLICY OF 1966, supra note 1.
82 See text accompanying notes 10-13 supra.
83 See text accompanying note 11 supra.
hazard and fails to prevent it, or where he commits an act the consequences of which any man would have anticipated, although he may deny having intended them. The former situation, as where the insured sees the claimant on the railroad track and does not warn him of the approaching train, is the type of conduct usually treated as negligence and should be covered. The latter, exemplified by the man who fires a gun into a crowd, falls more appropriately into what has traditionally been regarded as intended harm. The presence of "expected" in the policy might thus have some impact on cases such as *Kraus v. Allstate Insurance Company*, 84 where the insured, in setting off dynamite in a public area, may not have intended to injure bystanders, but surely could be held to have expected such a consequence.

B. Personal Injury Liability Insurance

Far more significant than the language change in the standard policy is the recent introduction of new forms of insurance on a general basis covering certain specific intentional torts. The new coverage is not confined to those damages resulting from "bodily injury or property damage." Rather, a new concept—"personal injury"—is introduced to deal with those wrongs which involve neither one's body nor his property. The new coverage does not invariably attempt to exclude harm intended by the insured. In some policy forms the concept of accidental injury has been abolished altogether and coverage is afforded for some torts regardless of the mental state of the insured.

The insurance industry has for many years written coverage for torts such as defamation, invasion of privacy, false arrest and malicious prosecution on non-standard forms and in what are called "non-admitted markets," that is, on an extremely selective basis. The new forms of coverage discussed herein were not invented overnight. The new development consists, rather, of a trend toward the standardization of policy forms and the availability of such coverage to commercial enterprises. The ordinary business establishment may today be covered for libel and slander, whereas such coverage would have been very unusual a decade ago.

While "personal injury" insurance forms are not yet as fully standardized as is the usual liability policy, most of the variations are minor. 85 The National Bureau of Casualty Underwriters has drafted a standard endorsement for use in connection with general

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85 Some policies exclude all harm intended by the insured; some include racial discrimination as a scheduled risk. Of the policies examined, these were the major variations from the standard endorsement.
liability policies. This endorsement includes the basic features of all personal injury coverage now available and will probably be the model for policy forms in the future.

The provisions of the standard personal injury endorsement are as follows:

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury (herein called “personal injury”) sustained by any person or organization and arising out of one or more of the following offenses:

Group A—false arrest, detention or imprisonment, or malicious prosecution.

Group B—the publication or utterance of libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual’s right of privacy . . .

Group C—wrongful entry or eviction, or other invasion of the right of private occupancy . . .

The endorsement also contains two exclusions concerning the impact of the mental state of the insured upon coverage. Utterances described in Group B are excluded if “made by or at the direction of any insured with knowledge of the falsity thereof.” The endorsement also excludes coverage of “personal injury arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of any insured.”

The two most important features of the endorsement are the unrestricted use of the term “injury” and the absence of any requirement that the loss be “caused by an occurrence.” Thus, coverage is afforded for any injury arising out of one of the scheduled torts, undoubtedly extending to all forms of general and special damages normally recoverable in actions predicated on these torts. The language is also sufficiently broad to extend coverage to liability for punitive damages and, in some cases, to harm inflicted intentionally by the insured. There is no effort to provide for a general exclusion of such harm, and the only circumstances under which it would be excluded by the terms of the policy are, therefore, those provided for in the exclusions referred to in the preceding paragraph.

The personal injury endorsement represents an innovation in one respect merely in seeking to insure many of the torts described. It presents a far more significant innovation, however, in attempting to furnish coverage under some circumstances for harm inflicted in-

87 Id.
88 Id.
89 Id.
90 Unless an exclusion applies.
tentionally by the insured. This is not only a novel form of insurance, but is also a form of insurance condemned in many sources as contrary to public policy.\footnote{91 \textit{G. COUCH, CYCLOPEDIA OF INSURANCE LAW} § 39:15 (2d ed. R. Anderson 1962).}

The initial interpretive problem which the endorsement presents is that of determining exactly those kinds of conduct which are insured. Unlike most policies, the endorsement seeks to restrict coverage by reference to various theories of recovery. The chief difficulty with this format is that there are bases for tort liability which are not listed in the endorsement but which involve conduct similar to that found in the torts which are listed. For example, in connection with the coverage afforded for malicious prosecution, the question may arise whether the kindred tort of abuse of process is also included. Malicious prosecution usually involves the unjustifiable instigation of criminal proceedings,\footnote{92 \textit{See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS} § 113 (3d ed. 1964).} but the bringing of a civil action out of malicious motives is also tortious.\footnote{93 Stevens v. Chisholm, 179 Cal. 557, 178 P. 128 (1919); Eastin v. Bank of Stockton, 66 Cal. 123, 4 P. 1106 (1884).} Abuse of process is the malicious prosecution of certain civil remedies such as attachment and injunction.\footnote{94 Pimentel v. Houk, 101 Cal. App. 2d 884, 887, 226 P.2d 739, 741 (1951).} If one looks beyond the label of the action, abuse of process ought to be covered by the endorsement. Other examples may be the "injurious falsehood" torts, which might be covered under Group B of the endorsement,\footnote{95 The reference in Group B to the utterance of "disparaging material" in connection with libel and slander raises the question of whether torts sometimes called "trade libel" and "slander of title" are also covered. The \textit{Restatement} categorizes these under the heading of "Disparagement" and defines them as the invasion of the interest in the vendibility of property. \textit{RESTATEMENT OF TORTS} § 624 (1938). Some text writers have employed the broader term "injurious falsehood" to characterize a whole class of unusual actions, all predicated on the utterances of falsehoods which are not defamatory to the personality of the plaintiff but which may cause pecuniary damage. \textit{E.g.}, \textit{W. PROSSER, HANDBOOK OF THE LAW OF TORTS} 938-50 (3d ed. 1964). These actions may include disparaging the quality of the plaintiff's goods, the integrity of his employees, or the nature of his business. \textit{Id.} at 943. They are not, strictly speaking, "personal injuries," but nothing in the endorsement would require that "personal injury" be interpreted in a manner restricting coverage. The general reference to "other defamatory or disparaging material" in fact appears to create coverage for a wide range of economic injuries. For example, the plaintiff may allege that the defendant circulated a false rumor that he is a malingerer, thus preventing him from obtaining employment. This could be actionable defamation, but it is also an interference with a prospective advantage, and could be actionable on that distinct theory of recovery. Similarly, inducing a third person to breach a contract with the
heading of “invasion of the right of private occupancy,” which might be covered under Group C.96

While it would appear that such actions should be included within the scope of coverage of the endorsement, it is arguable that such coverage was not intended; the question has not yet been decided. A larger question is whether the endorsement would cover an award of punitive damages, and if so, whether such coverage would be contrary to the public policy of the state.

1. Coverage For Punitive Damages97

As noted above, the insuring agreement of the personal injury endorsement obligates the insurer to “pay on behalf of the insured all sums which the insured shall become legally obligated to pay because of injury (herein called 'personal injury').”98 The literal reading of this language would indicate that punitive as well as compensatory damages are covered. The obligation extends to “all sums,” regardless of the technical form of the damages assessed. There is no language anywhere in the endorsement, or indeed in most liability insurance policies, which would expressly exclude from coverage the obligation to pay punitive damages.

No California decision has yet determined whether an insurer is obligated to pay an award assessed against its insured for punitive damages. In other jurisdictions, some courts have held that the object of punitive damages, the punishment of the offender, would be frustrated if the penalty could be shifted to an insurance company and have thus held that insurance for punitive damages would be contrary to public policy.99 Other courts have held that punitive

plaintiff, Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631 (1941), procuring his wrongful discharge from employment, Blender v. Superior Court, 55 Cal. App. 2d 24, 130 P.2d 179 (1942), stealing his customers, Elsbach v. Mulligan, 58 Cal. App. 2d 354, 136 P.2d 651 (1943), or his trade secrets, Riess v. Sanford, 42 Cal. App. 2d 244, 117 P.2d 694 (1941), all may involve defamatory or disparaging utterances or the publication of private information, although the remedial action most appropriately suited to the facts may be one of the torts developed for the protection of economic interests, not mentioned by express reference in Group B.

96 Thus coverage is afforded for interference with possession and enjoyment by means such as noise, leaky roofs, obstruction of access, obnoxious fumes, and others, actionable on a variety of theories such as breach of a lease, nuisance or trespass.


98 See text accompanying note 87 supra.

99 Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962)
damages are insurable, and at least one court has held that the insurer is liable for punitive damages on the argument that the policy speaks of a requirement to pay "all sums which the insured becomes obligated to pay," regardless of the nature of the liability. Where the judgment against the insured has been for compensatory and punitive damages in an unsegregated amount, there is authority for allowing coverage of the entire sum, no means of apportionment being available. There is also a problem of whether double and treble damages are truly punitive in nature and thus subject to the argument that punishment is being shifted to the insurer.

The course of California law in this area is difficult to predict, in view of the variety of holdings in other jurisdictions. Arguably, statutes such as Civil Code section 1668, which purports to invalidate contracts exempting a person from responsibility for "willful injury," and Insurance Code section 533, exonerating the insurer from liability for losses caused by the "wilful act" of the insured, would preclude coverage if the "malice" generally required by section 3294 of the Civil Code for the recovery of punitive damages is the equivalent of the "willful injury" or "wilful act" referred to by the statutes. Judicial interpretations of the term "wilful" in connection with Insurance Code section 533 seem to indicate that it means an act committed with the specific intent to harm. On the other hand,

(Florida law); Nicholson v. American Fire & Cas. Co., 177 So. 2d 52 (Fla. App. 1965).


Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941) (denying coverage). In some jurisdictions, notably Alabama, damages for wrongful death are treated as punitive; they have nonetheless been held insurable. American Fidelity & Cas. Co. v. Werfel, 230 Ala. 552, 162 So. 103 (1935).

"All contracts 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." Cal. Civ. Code § 1668.

"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." Cal. Ins. Code § 533.

"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Cal. Civ. Code § 3294.

cases interpreting Civil Code section 3294 have indicated that "malice" as used in that statute is broader in meaning, and that it may refer to an act "so unreasonable and dangerous that [the defendant] knew or should have known that it was highly probable that harm would result." In one case, the court observed: "The courts of this state have long recognized that punitive damages are recover-
able for an area of tortious conduct more culpable than negligence, but falling short of intentional conduct." If conduct falling short of "willful" behavior can give rise to liability for punitive damages, the rule of public policy against insurance for such damages must originate in some source other than the Insurance and Civil Code sections quoted. Such a rule does not now exist in California, and if developed, of necessity it will be through new legislation or through judge-made public policy.

The Exclusions

The personal injury endorsement first excludes utterances under Group B "made by or at the direction of any insured with knowledge of the falsity thereof." As this language is clear and succinct, no special problems are expected to arise from this exclusion.

The endorsement also states, however, that the insurance does not cover personal injury "arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of any insured." This clause removes from the coverage otherwise afforded a wide range of intended harm. Several interpretive problems are presented by his exclusion.

a. Only a "Violation" of a Penal Statute or Ordinance is Required to Defeat Coverage

Although the intent of the draftsman might have been expressed more clearly, it would appear that a conviction is not required to bring the exclusion into effect, and that the insurer would be justified in denying coverage on the basis of a "violation" whether or not a prosecution and conviction resulted from the alleged criminal act. However, the question whether a violation was committed could not,
in most cases, be resolved prior to the conclusion of the criminal prosecution. In the absence of such a prosecution, it could not be resolved without a declaratory relief suit. The insurer would therefore be required to defend claims arising out of alleged violations of penal statutes until such time as it might be finally adjudicated that a violation in fact occurred. Consequently, the penal statute exclusion may have little impact on the insurer's duty to defend, except in cases in which the insured is promptly convicted of a violation.

b. The Endorsement Requires a “Willful Violation”

The inherent ambiguity of the term “willful” creates many problems, as the term possesses differing meanings in different areas of the law. In California criminal law, the term usually means simply “a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another or to acquire any advantage.”112 Hence, a criminal intent is not necessarily involved in a crime committed “willfully.” Many crimes may be willful (e.g., traffic offenses) although a guilty state of mind or mens rea is not required.113

On the other hand “willful” is used in connection with certain true crimes, that is, those requiring a guilty state of mind, such as “willfully and lewdly” selling an obscene book.114 Such examples indicate that the term is essentially meaningless and that it can be interpreted to signify whatever culpability requirement seems most appropriate under the circumstances. In view of the breadth which this exclusion would achieve if the nonculpable meaning of “willful” were applied to the policy, it is believed that the term, as used in the personal injury endorsement, should be construed to imply a criminal intent. It is readily arguable that by its use, the draftsman of the endorsement intended to make a distinction between the so-called “true crimes” and those minor offenses such as traffic violations in which no culpable state of mind is required.

c. Interpretation Problems Could Be Raised by the Use of “Penal Statute or Ordinance”

This phrase could be interpreted to include every law for which criminal-type sanctions are imposed. It is more likely, however, as in

112 CAL. PEN. CODE § 7. The term is not even spelled consistently in California Statutes. E.g., CAL. LAB. CODE § 4553 (“serious and willful misconduct”).
113 R. PERKINS, CRIMINAL LAW 688 (1957).
the case of the “willful” requirement, that it would be confined in
applicability to those acts punishable only when coupled with a crim-
inal intent. Public welfare offenses, punishable by fine but not truly
criminal in nature, such as motor vehicle violations, should not be
held to fall within the meaning of this language of the exclusion. If
all such offenses were included in the exclusion, it would be possible
to deny coverage in innumerable situations in which the act of the
insured happens to offend an obscure regulatory statute involving
a criminal-type penalty.

The penal statute exclusion was obviously included in the policy
to obviate some of the objections based on public policy which have
been asserted in opposition to coverage for intended harm. The main
basis for the argument that such coverage should not be allowed is
that it would encourage wrongdoing. By excluding criminal offenses,
coverage is withdrawn by the endorsement from the more aggravated
forms of intended wrongdoing. Conflict with public policy is thus
minimized.

III. Public Policy Consideration in Insurance
for Intentional Torts

Decisions from many jurisdictions include statements to the effect
that insurance for “willful,” “malicious” or “intended” harm would be
contrary to public policy. In some states this rule is of common law
origin. In California and at least one other state, it is said to
rest on a statute, originating in the Field Code, which passed un-
modified into the twentieth century. That coverage for intended
harm raises substantial issues of public policy can readily be demon-
strated. It has already been noted that in cases in which punitive
damages are recovered, the ability to shift the burden of liability to
an insurer would defeat the deterrent purpose of the award and
allow the wrongdoer to go unpunished. Thus, arguably, the law
should not allow such insurance, whatever the contract says about
the forms of liability that are insured.

A broader issue of public policy is raised concerning the advisa-
bility of insuring general damages recovered because of intentional
wrongdoing. Expressions of a public policy against insurance for
losses inflicted intentionally by the insured are usually justified by
reference to the assumption that such conduct would be encouraged
if insurance were available to shift the financial cost of the loss from

116 CAL. INS. CODE § 533.
118 See text accompanying note 99 supra.
the wrongdoer to his insurer. Additionally, the rule has undoubtedly been motivated by moral considerations, although the morality may be somewhat out of date. Exonerating the tortfeasor from the cost of his wrong would not only encourage bad conduct, it would also save him from suffering financial cost. The punitive aspect of tort law, more apparent a century ago than it is today, would be nullified if such coverage were allowed.

Unfortunately, the rule of public policy disfavoring insurance for intentional torts has been handed down for a century or more with virtually no critical examination. Questions such as whether all forms of intended harm are equally likely to be encouraged by the availability of liability insurance to cover them and whether all potential insureds would be equally subject to illegal temptation have never been asked, much less answered. Rather the law has continued with a blanket rule against insuring any kind of intended harm. That rule is now confronted by an insurance market in which forms of the supposedly prohibited coverage are available to some buyers, bringing up the question whether its purchasers have acquired insurance, or merely participated in an illegal bargain.

The inclination of courts to allude to this rule without giving thought to its implications is a result of the fact that public policy rarely has any effect on the outcome of decisions involving coverage for intentional torts. Most liability insurance policies contain language excluding from coverage those injuries intentionally inflicted by the insured. If the court has before it such a contract of insurance, the reason for denying coverage for intended harm is that the contract does not provide for it. To say that such a contract would be illegal if it did so provide is a gratuitous afterthought, but such gratuities provide virtually the entire body of law on the subject of insurance for intentional wrongdoing.

The experience of California courts in applying section 533 of the Insurance Code is typical of the evolution of a rule of law by way of dicta. This statute has been held to codify a “general rule” of public policy against insurance for intended harm. The conclusion that section 533 deals with the illegality of contracts is less than inescapable. The statute provides that the insurer is “not liable for a loss caused by the wilful act of the insured.” Whether this was designed to preclude the making of contracts covering such losses, or whether it was merely a rule to apply in the interpretation of insurance policies, most of which have never been drafted with the idea of

121 CAL. INS. CODE § 533.
affording such coverage, is not clear from the language. As the statute says, an insurer is "not liable" for such a loss, but this is because of the standard practice in the industry. The statute does not state flatly that an insurer could not be liable for such a loss if it expressly agreed to be. In any event, it is too late to argue the point. There are already ample decisions making the statute an affirmative rule of law dealing with what may and may not be insured. Common law decisions also treat the question in terms of the legality of bargains, although they too might show better reasoning if the rule were treated as one of interpretation.

As noted above, the statute includes the grossly ambiguous term "wilful." Efforts to explain exactly that mental state denoted by the term have been less than successful. However, it is clear that the statute is treated as dealing with intentionally inflicted harm, and it has been held not to prohibit anything not already removed from the scope of coverage by the intentional injury exclusion of the standard policy. Thus, as with pronouncements on public policy in general, the California rule against coverage for intended harm rarely comes into conflict with coverage actually afforded by a policy. Where such conflict has appeared, the cases have taken opposing approaches. Some have tried to avoid the rule in order to uphold coverage. In one instance it has been applied to defeat coverage which would otherwise have been available.

Examples of judicial footwork to save the coverage are plentiful. One court commented that section 533 is like an exclusion and thus

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123 See, e.g., Kraus v. Allstate Ins. Co., 258 F. Supp. 407, 412-13 (W.D. Pa. 1966), in which the court suggested that public policy would be violated if coverage were allowed for the injuries resulting from the bomb blast.


should be "construed strictly against the insurer and liberally in favor of the insured." This is a peculiar statement concerning a statute designed by its very terms to exonerate insurers, but it may be preferable to allowing the statute to interfere with the intent of contracting parties. Another court had no difficulty in holding that section 533 has been superseded by the Workmen's Compensation Act so that coverage is available for an intentional injury inflicted by an employer or an employee. The decision is undoubtedly correct as a matter of statutory interpretation and the court was thus not particularly concerned with the dictates of public policy.

Perhaps the most nimble effort to dodge the statute is found in Tomerlin v. Canadian Indemnity Company, in which the court held the insurer estopped to deny coverage for a judgment recovered on a theory of battery. The estoppel was based on representations made by defense counsel hired by the insurer that coverage was available. The court's argument was that "defendant's liability here does not arise from a contract executed prior to plaintiff's wilful misconduct, but from the estoppel which arose after it." Thus, allowing coverage would not "arouse an illegal temptation," as it would had the coverage originated in the policy. The court's argument can readily be faulted in logic, although the decision was obviously motivated by a well intended desire to secure indemnification for an insured who had gone along with the defense afforded under the policy and who had been rather soundly defeated in the battery suit. If it is truly illegal to sell insurance covering the intentional infliction of harm by the insured, it is difficult to understand how it can be lawful to give it away through representations made subsequent to the execution of the contract. The estoppel is based on the argument that the insured has been led to rely on the availability of coverage for battery; but an insured who bargained for such a policy initially would be all the more entitled to reliance, although under the theory adopted by the court such reliance would receive no protection.

The one decision in which section 533 has been applied to defeat coverage furnished by the policy is Maxon v. Security Insurance Company. The insured in Maxon, a storekeeper, had purchased a policy covering bodily injury arising out of "[t]he ownership, maintenance or use of retail store premises, or operations necessary or incidental

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130 Id. at 648, 394 P.2d at 577, 39 Cal. Rptr. at 737.
131 Id. at 648, 394 P.2d at 578, 39 Cal. Rptr. at 738.
The policy contained a defense clause in standard form. If it contained an intentional injury exclusion the opinion does not refer to it. The insured filed a criminal complaint against one Beulah Johnson, who thereupon sued the insured for malicious prosecution. The insured tendered his defense to the carrier, was refused, and successfully defended through his own counsel on the theory that no malice had accompanied the filing of the complaint. The insured then sued the insurer for his costs of defense. The court had no difficulty in holding that the action by Beulah Johnson resulted from an "accident," applying the rule which views the event from the aspect of the person injured. The court further had no difficulty in holding that by its terms the policy covered actions for malicious prosecution. It went on to hold, however, that "respondent insurer cannot under the public policy of this state indemnify the insured against liability for his own willful wrong." This result was reached by equating the "malice" which Beulah Johnson would have had to prove in order to recover on a theory of malicious prosecution with the "wilful act" phrase of section 533. The court further held that since the insurer could not have been compelled to indemnify the insured had the insured lost the case, it was not obligated to defend him.

The value of the court's holding on the duty to defend is doubtful in the light of Gray v. Zurich Insurance Company, decided three years later, although the court in Gray v. Zurich cited Maxon in a footnote without disapproval. Assuming that liability for malicious prosecution is uninsurable, the complaint still might be one within the potential coverage of the policy. The complaint might, for example, be amended to state a cause of action for defamation. Further, the insured at all times maintained that the allegation of malice was false and that he was not liable at all. The case seems to present, in fact, precisely the type of situation dealt with in Gray v. Zurich, where the insured is sued on a claim, which, if wholly true, would at least in theory not be covered because of public policy and section 533, but where his own version of the case includes a denial of the very fact relied upon to defeat the coverage. The issue presented was really not the insurability of malicious prosecution, but rather the duty to defend a claim against an insured based on malicious prosecution. Section 533 it should be noted, does not speak of defense, but rather of liability for loss. It is thus doubtful whether it should apply to the facts of Maxon at all.

133 Id. at 607, 29 Cal. Rptr. at 587.
134 Id. at 615, 29 Cal. Rptr. at 592.
136 Id. at 275, 419 P.2d at 176, 54 Cal. Rptr. at 112.
137 See Turner, Can a Plaintiff, by a False Allegation, Destroy Your
Tomerlin and Maxon provide an interesting contrast. In Tomerlin, coverage was upheld for an assault and battery on a theory of estoppel in spite of the court's concessions that the harm inflicted was intentional, that it would not have been covered under the policy as written, and that if the policy had purported to cover it, the coverage would have been illegal. In Maxon, coverage was refused, even to the extent of a defense, in spite of the fact that the policy clearly covered the claim and the fact that the insured conclusively demonstrated that he was not guilty of inflicting harm intentionally. The contrast is all the more striking when it is asked whether the availability of coverage for malicious prosecution would encourage merchants to file criminal complaints out of improper motives to the same extent that intentional injuries to the person would be encouraged by the availability to the general public of coverage for all forms of battery. The temptation to commit physical violence that coverage for intended harm might arouse is undoubtedly one of the major reasons for the public policy rule. Even if the premise is accepted that the incidence of battery would increase if it were commonly insured, it does not necessarily follow that the class of person likely to purchase coverage for malicious prosecution would similarly become more aggressive once in possession of such coverage. Each situation ought to be analyzed on its own facts, but the all inclusive formulation of the rule precludes such analysis.

Consider two other problematical cases. In Arenson v. National Automobile & Casualty Insurance Company, 138 a parent was sued under a special statute for damages caused by his child in setting fire to school property. Both the parent and the child were insureds under a comprehensive liability policy. The court held that public policy would not prohibit coverage on the parent, since the loss did not result from his willful act. Quite possibly the result would have been different had the question been whether the coverage could be afforded to the child. In Haser v. Maryland Casualty Company, 139 the plaintiff, while a taxicab passenger, was raped by another passenger with the assistance of the driver. Suit was filed against the driver for the plaintiff's injuries. The court had no difficulty holding that no coverage was available to satisfy a judgment against the driver on the argument that the rape was not accidental, as viewed from the aspect of the driver. This conclusion is undoubtedly correct as an

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139 78 N.D. 893, 53 N.W.2d 508 (1952).
interpretation of the insurance contract, given the definition of "accident" applied by the court. The court went on to say that a North Dakota statute\textsuperscript{140} identical to section 533 expresses a public policy which would prohibit coverage for this injury.

The question which might be posed in connection with \textit{Arenson}, although it was not presented in the case itself, is whether public policy should prohibit insurance for the intentional wrongdoings of a child. \textit{Haser} poses a question in the same vein: Should insurance for intended wrongdoing be illegal where the insured is functioning as a common carrier? To answer these questions requires that the likelihood of encouraging tortious conduct be weighed against the probability that accident victims, who would otherwise be presented with a fund against which they could recover, will be deprived of compensation.

What the foregoing cases illustrate is simply that the law is unselective. It makes no distinctions as to the various forms of intentional wrongdoing and does not admit the possibility that some torts might not be particularly encouraged if insurance were available for them. It also makes no distinctions as to the classes of persons insured. Rather it assumes that anyone insured in any manner for the consequences of his own intentional wrongdoing will be encouraged to engage in such wrongdoing. The availability of coverage to selected insureds and for selected forms of intentional wrongdoing indicates that neither the insurance purchaser nor the insurance underwriter accepts these assumptions. The insurance industry has begun to discriminate among various risks of intended wrongdoing, has been able to establish a loss rate on some of these risks and to fix a premium for covering them. In continuing to assert a broad rule of public policy which would prohibit such selective coverage, the law takes an archaic view of the insurance industry and resists a rational approach to loss distribution.

\textbf{IV. A New Approach}

The development of rational criteria for deciding what coverage should and should not be available for intended wrongdoing is not an impossible task. The public policy rule probably originated in a feeling that physical violence would be encouraged if it were insurable. The automobile "bump" case, four instances of which have been cited in this article,\textsuperscript{141} is a common enough occurrence to give some

\textsuperscript{140} N.D. Cent. Code § 26-0604 (1960).
support to the argument that persons would be more inclined to commit such acts if they could be sure of insurance for the consequences. Cases such as *Stout v. Grain Dealers Mutual Insurance Company*,\(^{142}\) in which the insured shot the Peeping Tom, could be pointed to in suggesting that many persons might be encouraged in the use of excessive force to defend personal and property rights if they could be sure of insurance protection. Some torts might be encouraged which the law has taken special pains to deter. Trespass to timber can give rise to treble damages because of the ease with which the wrong can be committed under a pretended mistake as to boundaries.\(^{143}\) The damage remedies of the anti-trust laws are similarly structured to create a special deterrent.\(^{144}\) Insurance for such forms of conduct might well lead to irresponsibility.

On the other hand, torts such as false arrest and malicious prosecution, which most commonly originate in the setting of the retail store, might be influenced very little by the availability of insurance. The conduct of the potential tortfeasor is more likely to be influenced by the desire to maintain good customer relations than by the insurability of his conduct. Outside the mass media, defamation and invasion of privacy are relatively unusual, and it would seem very difficult to demonstrate empirically that insurance would increase the temptation to commit them. The validity of the entire assumption that insurance would encourage intended wrongdoing becomes suspect when one considers the experience of society with mass insurance since the development of the automobile. Although a vast segment of the adult population is now insured for negligence in the operation of automobiles, no one has ever seriously argued that the availability of coverage has encouraged negligence. Even if such encouragement could be demonstrated, no one would seriously argue for the abolition of automobile insurance. On the contrary, a trend toward broader auto coverage and, perhaps, compulsory insurance, continues because of the demand to secure better compensation for victims.

The question whether intentional wrongdoing would be encouraged by insurance may be not so much a matter of what is insured as of who is insured. Obviously some persons are better risks than others. Certain classes of persons can be isolated whose propensity for intentional wrongdoing would not be measurably affected by the availability of insurance. Obvious examples are the employees of common carriers and other public service industries, whose behavior the employer is likely to regulate carefully as a matter of company image. The rule of public policy fails to recognize such distinctions

\(^{142}\) *307 F.2d* 521 (4th Cir. 1962).
\(^{143}\) CAL. CIV. CODE § 3346.
and precludes coverage for good risks and bad risks alike, although
the insurance industry has shown itself well able to distinguish be-
tween them.

It can be argued that the insurance industry rather than the law
would be the most effective agency to regulate the sale of insurance
for intended wrongdoing. The fact that such insurance is legal does
not mean that it will be sold to everyone. Since the insured has it
within his power deliberately to bring about the loss for which cover-
age is afforded, no sensible insurer is likely to sell such coverage ex-
cept to an insured who is very unlikely to create such losses. Further,
the policy itself can be and frequently is drafted in such a manner as
to deter the insured from committing the covered offenses. The most
familiar device for restraining the insured is to expose his own fi-
nances, along with those of the insurer, to liability for the loss.
Coinsurance provisions usually take the form of a deductible policy,
in which the insured must pay the initial cost of the liability up to a
stated amount, beyond which the insurer is liable up to the limits of
its policy. Another common form is the participating policy, in
which the insured participates in the cost of the loss along with the
insurer at a percentage stated in the policy. The standard personal
injury endorsement discussed above contains such a participation
clause. The public policy argument becomes highly specious when
applied to coverage requiring the insured to pay a substantial de-
ductible or percentage of participation.

Obviously, if the law is to accommodate the new forms of cover-
age now being written some changes must be made. Those jurisdic-
tions in which the public policy rule is of judicial origin should be
able to reexamine the doctrine without the aid of legislation. States
such as California having statutes proscribing coverage for intended
harm will require legislative action in order to bring about a sub-
stantial alteration in public policy. Such states are now faced with a
choice of leaving the law as it stands, of attempting to develop a
system for rational distinction between those forms of coverage which
might produce antisocial consequences and those which will not, or
of abandoning affirmative public policy altogether and letting the
insurance industry select the risks to be insured. The first alterna-
tive has many undesirable aspects. The existing law seems unre-
realistic in many instances. Further, many insureds are now pay-

145 "If a participation percentage is stated in the schedule for the in-
sured, the company shall not be liable for a greater proportion of any loss than
the difference between such percentage and one hundred per cent, and the
balance of the loss shall be borne by the insured; provided, the company may
pay the insured's portion of a loss to effect settlement of the loss, and, upon
notification of the action taken, the named insured shall promptly reimburse
the company therefor." Standard General Liability Policy, supra note 86.
ing a premium for personal injury coverage written on forms similar to the standard endorsement which do not contain a blanket exclusion of intended harm. Enforcement of the rule against such insureds will produce results like that in Maxon v. Security Insurance Company, in situations where the insured purchases a policy, the terms of which cover certain losses, only to be told that such coverage is illegal once he has incurred a claim. Restitution of the premium may seem a highly inadequate remedy to such an insured against whom a claimant has recovered a judgment. Of the two remaining alternatives, most observers would undoubtedly conclude that some legislative regulation is preferable to abandoning the matter wholly to the insurance industry. Such a conclusion is undoubtedly appropriate in light of the involvement of coverage for punitive damages in the problem and the possible merit to the argument that physical violence might be encouraged if intended harm coverage were sold on a mass basis. The fact that insurers tend to avoid bad risks may not be sufficient to quiet such doubts.

The most satisfactory solution would thus seem to be legislative action. Such action would necessarily have to be predicated on a thorough investigation to determine what forms of conduct really ought to be uninsurable. As a rough outline of the possible new legislation, it might be suggested that coverage be prohibited for all forms of civil damages intended to deter the wrongdoer rather than compensate the victim, including punitive or exemplary damages and such analogous devices as double or treble damages. Coverage for the intentional infliction of bodily injury has always been avoided by insurers and is the form of coverage which comes to mind most readily as an encouragement to wrongdoing. Beyond these suggestions the appropriate rule to be applied is unclear. The central problem is selecting whom to insure. Altering the law involves both a decision as to the extent to which insurers may make the selection and the formulation of some rule of public policy regarding those to be selected. The problem will require more discussion and analysis than it has received to date before such doubts can be resolved.