

# NOTES

## INTENTIONAL INJURY AS AN ACCIDENT WITHIN INSURANCE POLICIES

Ballantine defines accident as "an event which takes place without one's foresight or expectation; . . . if happening through human agency, an event which, under the circumstances, is unusual and not expected to the person to whom it happens."<sup>1</sup> Subjectively, from the standpoint of the assailant, an assault is an intentional tort, not an accident.<sup>2</sup> Viewed from the standpoint of the one assaulted, however, such conduct may be characterized as an accident for the purpose of bringing the injured party within the scope of insurance indemnification. He may have rights as a party who has paid a premium to an insurance company for accident benefits, or he may be the recipient of damage payments made by an insurer which has contracted with a person or an entity for indemnification against liability incurred as a result of a tort-feasor's actions. The foregoing briefly indicates the scope of this note. For the purpose of discussion, insurance policies have been divided into two broad categories.

The first category includes accident benefits payable to the policy holder under health, accident, and life policies. The law in this area is more settled than that in the second class of policies, and is here dealt with summarily.<sup>3</sup> It is stated for the purpose of background, orientation, and comparison.

The second category includes contracts for liability insurance. These policies typically cover certain activities of the automobile or home owner, common carrier, contractor, employer, or manufacturer. Such contracts provide indemnity for legal liability incurred as a result of injury to the person or property of another.

### I. HEALTH, ACCIDENT, AND LIFE POLICIES

Authorities generally agree that intentional injuries to the policyholder, caused by another, are accidents within the coverage of these policies. Thus, it has been said that when the injury or death is wrongly inflicted, "such injury or death may be regarded as an accident . . . and this whether the injury to or death of the insured

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1. Ballantine, *Law Dictionary* 13 (2d ed. 1948).

2. Prosser, *Torts* § 10 (2d ed. 1955).

3. This note is limited in scope to the area of liability insurance. It is here that the only real conflict remains.

was intended.”<sup>4</sup> That the injury is intentionally inflicted “does not of itself make it the less an accident.”<sup>5</sup>

The substance of the law, therefore, is that any unexpected injury to the policyholder is an accident, even if intentionally inflicted by another. This is termed a “well-established rule” by Couch in his treatise on insurance,<sup>6</sup> and the “overwhelming weight of authority” by Appleman.<sup>7</sup> Both writers indicate that neither the type of injury nor the agent inflicting it is determinative of its legal definition as an accident within these policies. For example, the injury or death may be from shooting, stabbing, or hanging,<sup>8</sup> and may be inflicted by a robber, burglar, murderer, or insane person.<sup>9</sup>

There are, however, qualifications to the equation of intentional injuries and accidents. An intentional injury is not covered by accident policies, or by health or life policies with an accident clause, if such injury is the result of misconduct or provocation by the policyholder.<sup>10</sup> This is the logical result of analyzing the occurrence in question from the insured’s point of view, as is done by the majority of American courts. Further, by underwriting practices, intentional injuries inflicted on the insured by another may be expressly excluded from policy coverage.

The previous discussion deals with injuries inflicted on the insured by another. No conflict arises where the policyholder has intentionally maimed or killed himself; to allow recovery would clearly violate public policy. But a “gray area” is presented by decisions in jurisdictions which distinguish “accident” from “accidental means.” Courts not following this distinction merely consider the end-result of an insured’s act (from his perspective) in determining whether the injury or death was accidental; those following the contrary view examine the *means* by which death or injury was caused. The latter rationale was illustrated in *Smith v. Travelers’ Ins. Co.*,<sup>11</sup> where, in administering a nasal douche to himself, the policyholder inhaled more forcefully than in prior treatments, permitting germs in his nasal passages to reach his brain, thereby causing death from spinal meningitis. The court denied recovery to the plaintiff-beneficiary, stating that the insured’s act of inhaling was *exactly what he intended*, and therefore was not accidental. A contrary and more desirable result would have been reached by that court had it applied

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4. 5 Couch, *Cyclopedia of Insurance Law* § 1157, at 4063 (1929).

5. *Id.* at 4064.

6. *Ibid.*

7. 1 Appleman, *Insurance Law and Practice* § 486, at 599 (1941).

8. *Id.* at 600-01.

9. 5 Couch, *op. cit.* supra note 4, at 4065-66.

10. *Id.* at 4064.

11. 219 Mass. 147, 106 N.E. 607 (1914).

the language of *Zimm v. Equitable Life Ins. Co.*,<sup>12</sup> where the court stated: "the language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense."<sup>13</sup> Interpreting the policy in the *Smith* case with Ballantine's definition of accident in mind,<sup>14</sup> it would appear that the death of the insured was an unusual and unexpected event, and was, therefore, a meritorious death claim to be honored by the insurance company.

## II. THE LIABILITY INSURANCE POLICY

Text writers, contributors to legal periodicals, and courts, all agree that the law relating to intentional injuries as accidents is less settled in the area of liability insurance than in the field of accident benefits payable under health, life, and accident policies. A possible explanation for the lack of unanimity in the former area is the presence there of certain public policy considerations not of importance in the latter. This aspect will be discussed later.

In the recent case of *Jernigan v. Allstate Ins. Co.*,<sup>15</sup> an aunt of the named insured<sup>16</sup> borrowed his vehicle and intentionally drove it over the body of plaintiff's intestate. The court held that intentional injuries so inflicted constituted an accident within the terms of an automobile liability insurance policy. Neither litigant cited any Louisiana cases in point. In testing the occurrence from the viewpoint of the injured person, and ruling against the insurance company, the federal court followed what is stated to be the majority view. This rule, with its qualifications, may be stated thus: An intentional injury is an accident within the meaning of a liability insurance policy, unless it is inflicted by or at the direction of the named insured, or one qualifying as an insured under the policy contract; or provoked by the injured complainant; or unless it is expressly excluded by policy provisions.

It is submitted that close analysis of cases repeatedly cited as contrary to the weight of authority will reveal that they are, for the most part, distinguishable. The few which are not distinguishable form negligible opposition to the majority, except within their respective jurisdictions.

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12. 6 Wash. 2d 379, 107 P.2d 921 (1940).

13. Id. at 384, 107 P.2d at 924.

14. See text supported by note 1 supra.

15. 269 F.2d 353 (5th Cir. 1959).

16. A named insured is the person whose name appears on the face of the insurance policy contract. Others, such as permissive users of the automobile, may qualify for coverage under the contract, although not named therein.

An understanding of the prevailing view is facilitated by examining its component parts. The following cases illustrate the rationale and scope of the rule and its exceptions.

*An Intentional Injury Is an Accident*

In *Westerland v. Argonaut Grill*,<sup>17</sup> an employer owned a public liability insurance policy indemnifying him for legal liability incurred as a result of injuries “suffered or alleged to have been suffered as a result of accidents . . . by any person . . . upon the premises . . . .”<sup>18</sup> A patron was intentionally assaulted by the night manager. He recovered a judgment against the employer, but being unable to collect, he brought a garnishment proceeding against the insurer. The court allowed recovery, emphasizing that the contract did not purport to cover injuries *caused* by the insured’s employees, but rather, bodily injuries *suffered* by third persons. “Suffered” is the key word. It indicates that an occurrence is to be tested from the injured individual’s perspective, and not from that of the agent inflicting the injury. “An injury may be said, subjectively, not to be accidental, although, objectively, it is.”<sup>19</sup>

This rule was reiterated and broadened a year later in the New York case of *Floralbell Amusement Corp. v. Standard Sur. & Cas. Co.*<sup>20</sup> The court here indicated that an intentional and unprovoked assault on a patron by a theatre manager was an accident from the point of view of the injured, *or of the insured theater*.

It is a familiar principle that “the meaning to be given to the words of the contract is the generally accepted meaning of such words . . . .”<sup>21</sup> Accordingly, an accident has been suffered from the standpoint of the named insured or of the person injured in the above cases. And, as indicated in the *Floralbell* case, “an assault by an employee . . . may be as catastrophic to the purse of the assured, . . . as it is to the body of the person assaulted.”<sup>22</sup>

*Injuries Inflicted by or at the Direction of the Named Insured, or One Qualifying as an Insured Under the Policy Contract*

The *Floralbell* case suggests the qualification to the majority rule that “the policy is not intended to shield the assured as to willful acts.”<sup>23</sup> Appleman states “that one cannot insure himself against the

17. 187 Wash. 437, 60 P.2d 228 (1936).

18. *Id.* at 438, 60 P.2d at 229.

19. *Id.* at 439, 60 P.2d at 229.

20. 170 Misc. 1003, 9 N.Y.S.2d 959 (N.Y.C. City Ct. 1937).

21. *Id.* at 1006, 9 N.Y.S.2d at 961.

22. *Id.* at 1007, 9 N.Y.S.2d at 962.

23. *Ibid.*

consequences of his willful acts, committed with the intent to inflict injury."<sup>24</sup> Such insurance would encourage crime and violence in obvious contravention of public policy. This exception is often incorporated into the policy as an exclusionary provision.

As indicated in the *Floralbell* case,<sup>25</sup> the intentional tort of the named insured's agent or employee generally results in the employer's liability under the doctrine of *respondet superior*. Here, however, the public policy argument does not act to remove the employer from insurance coverage. Although the third party is claiming against the named insured for injuries intentionally inflicted upon him, the named insured has not perpetrated the act. From this it is apparent that if it is not the named insured who inflicts the intentional injury, such injury will be considered an accident for insurance purposes. There are, however, problems of interpretation, as seen below.

In a similar fact situation, the Wisconsin Supreme Court<sup>26</sup> has reached the same result as the *Floralbell* case—an employee's intentional assault was termed an accident within policy coverage. The court reiterated the importance of the public policy limitations, but emphasized the correct limits of their application. "Although the appellant [theater] may be held liable for such tort, [in *respondet superior*] it cannot be said that it committed the assault, nor that it authorized it. Thus the appellant has not placed itself outside the terms of the policy . . . ."<sup>27</sup>

In *Georgia Cas. Co. v. Alden Mills*,<sup>28</sup> the insurer was held accountable under a public liability policy, when the named insured's foreman assaulted one Pendergraft. To the insurer's contention that such coverage was void as affording motivation for violation of law, the court countered with the statement that the named insured had not in any sense inflicted the assault. Therefore, "where a policy is legal on its face, and does not undertake to indemnify the insured against the consequences of its *own* illegal acts, it is not void because its effect is to indemnify the insured against the consequences of the illegal or criminal acts of others, without participation on the part of the insured."<sup>29</sup>

Thus far it has been indicated that if the liability policyholder or any other person qualifying as a named insured under the policy, assaults or directs an assault upon another, the majority will refuse coverage. Courts have, however, gone to great lengths to avoid

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24. 7 Appleman, *Insurance Law and Practice* § 4252, at 4 & n.8 (1941).

25. 170 Misc. 1003, 9 N.Y.S.2d 959 (N.Y.C. City Ct. 1937).

26. *Fox Wis. Corp. v. Century Indem. Co.*, 219 Wis. 549, 263 N.W. 567 (1935).

27. *Id.* at 552, 263 N.W. at 568.

28. 156 Miss. 853, 127 So. 555 (1930).

29. *Id.* at 863, 127 So. at 557 (Emphasis added.)

classifying the intentional tort-feasor as an insured, thereby allowing recovery within the rule. To further effectuate coverage, courts utilize the rule stated in a New Jersey case:<sup>30</sup> "In construing the policy, it must, of course, be borne in mind that in case of doubt, that construction must be adopted which favors the insured."<sup>31</sup> This is a well known rule of contract law<sup>32</sup> which "finds frequent application to policies of insurance which are ordinarily prepared solely by the insurance company and . . . therefore, are construed most strongly against it."<sup>33</sup>

This rule was utilized in *Glen Falls Indem. Co. v. Atlantic Bldg. Corp.*,<sup>34</sup> where the comprehensive liability policy involved specifically excepted injuries "committed by or at the direction of the insured."<sup>35</sup> The president of the insured corporation, while engaged in the business of hauling supplies in a truck, assaulted the plaintiff as she attempted to park her car. The insurer contended that the president's act was that of the corporation, and therefore expressly excluded from coverage. The court, however, applying the above rule of construction in favor of the insured, held: "[T]he liability of the Insurance Company is the same as if he [the president] had been an ordinary chauffeur in the company's employ."<sup>36</sup>

Similarly, in *Western Cas. & Sur. Co. v. Aponaug Mfg. Co.*,<sup>37</sup> the president of an insured manufacturing company committed an intentional assault. The insurer, citing public policy considerations, insisted that the coverage was illegal, as the insured's president was an "insured" within the meaning of the policy. But, said the court, although as to the particular insured, (the president) the assault was not an accident, "the clause is without effect as to other persons insured who neither committed nor directed the commission of the assault and battery."<sup>38</sup> Therefore, the company was covered and the insurer had to pay.

### *Provocation by the Injured Party*

A second qualification is that the injured party must not have provoked the assault leading to his injury. If he has, it cannot be said that such assault was unexpected or was an accident. The

30. *Washington Theater Co. v. Hartford Acc. & Indem. Co.*, 9 N.J. Misc. 1212, 157 Atl. 111 (Sup. Ct. 1931).

31. *Id.* at 1214, 157 Atl. at 112.

32. Restatement, Contracts § 236, comment d (1932).

33. 3 Williston, Contracts § 621, at 1789 (1936).

34. 199 F.2d 60 (4th Cir. 1952).

35. *Id.* at 61.

36. *Id.* at 63.

37. 197 F.2d 673 (5th Cir. 1952).

38. *Id.* at 674.

assault or injury, however, may be so unusual or unwarranted relative to the provocation that it retains its classification as an accident. Several cases where provocation was not in issue, have nevertheless recognized its significance.<sup>39</sup> In *Raven Halls, Inc. v. United States Fid. & Guar. Co.*,<sup>40</sup> provocation by the deceased removed the intentional assault from the definition of accident and from liability insurance coverage. Deceased was a patron at the insured's bathing establishment on Coney Island. He became "intoxicated," "boisterous," and "disorderly," and threatened to beat and kill the insured's cashier. Then, without provocation, the deceased struck an employee of insured repeatedly with a bottle, until the latter seized a knife and inflicted fatal wounds upon his assailant. Looking at the occurrence from the injured person's point of view, consistent with the majority approach, the court realized that the employee might have exceeded his authority and used excessive force, but concluded that "One repelling the attack of an infuriated assailant . . . cannot be expected to differentiate with exactness between lawful resistance and unjustifiable force."<sup>41</sup> Therefore, the death was "the direct result of the assault he [the deceased] committed upon Avitable [the employee] and not an accident, within the meaning of the policy."<sup>42</sup> Thus, an injury intentionally inflicted, if provoked, loses its character as an accident and is not within liability insurance coverage.

### *Specific Policy Provisions*

An insurance company may exclude intentional injuries from policy coverage by incorporating exclusionary provisions to that effect in the insurance contract.<sup>43</sup> Such clauses are present in many of the minority cases.<sup>44</sup> However, at least one method of circumventing these protective clauses has been discovered, as illustrated

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39. See, e.g., *Georgia Cas. Co. v. Alden Mills*, 156 Miss. 853, 127 So. 555 (1930); *Fox Wis. Corp. v. Century Indem. Co.*, 219 Wis. 549, 263 N.W. 567 (1935).

40. 142 Misc. 454, 254 N.Y. Supp. 589 (Sup. Ct. 1932).

41. *Id.* at 456, 254 N.Y. Supp. at 591.

42. *Id.* at 456, 254 N.Y. Supp. at 592.

43. The following is a typical exclusionary clause taken from the policy language of an insurance contract underwritten by a stock casualty insurance company:

This policy does not apply:

(b) to injury, sickness, disease, death or destruction caused intentionally by or at the direction of the insured; . . . .

44. See, e.g., *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949), cert. denied, 399 U.S. 914 (1950); *Soper v. Fidelity & Cas. Co. of N.Y.*, 198 Misc. 1117, 101 N.Y.S.2d 581 (Sup. Ct. 1951); *De Luca v. Coal Merchants Mut. Ins. Co.*, 203 Misc. 261, 59 N.Y.S.2d 664 (Sup. Ct. 1945); *Thomas v. American Universal Ins. Co.*, 80 R.I. 129, 93 A.2d 309 (1952).

by the *Glen Falls* case,<sup>45</sup> which allowed recovery against the insurer in spite of the presence of a typical exclusionary provision. Here the rationale was that since the president had exceeded his corporate authority as head of the board of directors, he was not acting in an executive capacity when he committed the assault, and therefore was not an insured, but rather a lower echelon employee.

### III. THE MINORITY VIEW

Upon close scrutiny, the cases in this group are generally found to be distinguishable, or of questionable significance because of their narrow treatment of the problem. The insurer escaped liability in these cases, but not *solely* because the intentional injury was not considered an accident under the insurance contract, and in some instances, the latter reasoning was in *no manner* the basis for decision. The cases will be discussed in several groups.

#### *Intentional Injury by the Insured*

In two minority cases the holder of the liability insurance policy inflicted the injury. As previously indicated, coverage in such an instance would violate public policy. Although the courts in these cases attempted to rationalize their decisions upon some basis other than the fact that the purchaser of the policy committed the assault, such fact still remained in the background. *Sontag v. Galer*<sup>46</sup> is typical. Here, the insured owner of an apartment building threw a heavy vessel at some annoying children, injuring one of them. The action was clearly intentional, and the possibility of its being provoked by the injured child was not mentioned. Plaintiff was awarded a judgment against the insured, and sought application of the policy proceeds in satisfaction thereof. The insurer's demurrer to this action was sustained, the court stating that, "It is the state of the 'will of the person by whose agency it [the injury] was caused' rather than that of the injured person which determines whether an injury was accidental . . . . Furthermore, [and this is the significant part] . . . an injury caused by the willful and deliberate act of the insured such as is described in the finding is one for which the insurance company would not be liable to her under the policy."<sup>47</sup>

In another case,<sup>48</sup> the named insured admitted ramming an automobile when he became provoked at his inability to pass. Because

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45. *Glen Falls Indem. Co. v. Atlantic Bldg. Corp.*, 199 F.2d 60 (4th Cir. 1952).

46. 279 Mass. 309, 181 N.E. 182 (1932).

47. *Id.* at 313, 181 N.E. at 183-84.

48. *Weis v. State Farm Mut. Auto. Ins. Co.*, 242 Minn. 141, 64 N.W.2d 366 (1954).



the intentional act was again that of the named insured, rather than of a permissive user, the case is not a direct holding that intentional injuries are not accidents.

### *Specific Policy Conditions*

In *Anton v. Fidelity Cas. Co. of N. Y.*,<sup>49</sup> a taxi driver assaulted a passenger during the course of the former's business. The incident occurred outside of the vehicle. The insurer was excused from liability because the injury was not "caused by accident and arising out of the ownership, maintenance, or use of the automobile."<sup>50</sup> The insured taxi driver indicated what he thought would be determinative of the lawsuit by insisting that the motor of the taxi was running during the entire affray. It is difficult to perceive whether the court held as it did because of the intentional nature of the injury, or whether there was no coverage because the injury did not arise out of the "ownership, maintenance, or use" of the cab. In any event, it cannot be flatly stated that the case directly holds that an intentional injury per se is not an accident within the scope of a liability insurance policy.

### *Provocation*

The *Raven Halls* case<sup>51</sup> is the only decision within this group. As previously indicated, in this case the employee of an insured bathing establishment stabbed his assailant to death during the operation of the concession. This case clearly does not hold that an injury intentionally inflicted by another is not an accident, but rather that such an injury is not within policy coverage if provoked by the injured person. Therefore, the case does not stand in derogation to the weight of authority, but poses an excellent illustration of an admitted qualification to the general rule.

### *Express Exclusion of Intentional Injury*

In four of the cases cited for the minority there are found express exclusions from coverage for injuries intentionally inflicted by the individual or corporate policyholder.<sup>52</sup> Illustrative is the *Hammer* case,<sup>53</sup> where the holder of an automobile liability policy intentionally

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49. 117 Vt. 300, 91 A.2d 697 (1952).

50. Id. at 302, 91 A.2d at 699.

51. *Raven Halls, Inc. v. United States Fid. & Guar. Co.*, 142 Misc. 454, 254 N.Y. Supp. 589 (1932).

52. See cases cited at note 44 supra.

53. *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949).

caused an automobile collision. The insurer was held not liable because "the policy issued . . . specifically excludes from its coverage the unlawful act . . ." <sup>54</sup> The court recognized the authority holding that an accident is tested from the standpoint of the injured party, but indicated that such a rule had no force when, as here, the insured's act had been expressly excluded from coverage.

### *The Indistinguishable Minority*

The three cases forming this group <sup>55</sup> are, from all indications, still valid authority within their respective jurisdictions. Earliest of these decisions is the *Briggs* case. <sup>56</sup> It holds that intentional injuries are not accidents, and are not to be indemnified by insurance coverage regardless of by whom or upon whom they are inflicted. Although this case is not overruled outright in Illinois, subsequent cases in that jurisdiction cite the majority rule, and one mentions the *Briggs* case, pointedly denying its effectiveness. <sup>57</sup>

Two Ohio cases complete the minority group. <sup>58</sup> The *Headers* case, <sup>59</sup> a 1928 decision, held that an intentional assault by a taxi driver employed by the insured company was not covered by the automobile liability policy. It was followed in the *Brinsky* case <sup>60</sup> six years later. The cases are still valid authority in that state, but they have not been followed in other jurisdictions. <sup>61</sup>

### CONCLUSION

To reiterate, the holder of a liability insurance policy or one qualifying as an insured under the contract of indemnity will, under the prevailing view, be indemnified from liability for injuries to third persons, to the extent that the one seeking indemnification has not intentionally caused the injury; to the extent that the injury pro-

54. *Id.* at 795.

55. *Briggs Hotel Co. v. Zurich Gen. Acc. & Liab. Ins. Co.*, 213 Ill. App. 334 (1919); *American Cas. Co. v. Brinsky*, 51 Ohio App. 298, 200 N.E. 654 (1934); *Commonwealth Cas. Co. v. Headers*, 118 Ohio St. 429, 161 N.E. 278 (1928).

56. *Briggs Hotel Co. v. Zurich Gen. Acc. & Liab. Ins. Co.*, 213 Ill. App. 334 (1919).

57. *Hawthorne v. Frost*, 348 Ill. App. 279, 108 N.E.2d 816 (1952) (citing majority rule); *E.J. Albrecht Co. v. Fidelity & Cas. Co. of N.Y.*, 289 Ill. App. 508, 7 N.E.2d 626 (1937) (citing *Briggs Hotel Co.* case).

58. *American Cas. Co. v. Brinsky*, 51 Ohio App. 298, 200 N.E. 654 (1934); *Commonwealth Cas. Co. v. Headers*, 118 Ohio St. 429, 161 N.E. 278 (1928).

59. *Commonwealth Cas. Co. v. Headers*, *supra* note 58.

60. *American Cas. Co. v. Brinsky*, 51 Ohio App. 298, 200 N.E. 654 (1934).

61. The case of *E.J. Albrecht Co. v. Fidelity & Cas. Co. of N.Y.*, 289 Ill. App. 508, 7 N.E.2d 626 (1937), rejects the Ohio cases specifically.

ducing assault was not provoked by the injured complainant; and to the extent that the act or acts in question were not expressly excluded from coverage.

The various minority rules are of little utility. Some are unwieldy, due to their complexity of interpretation and application. An element of unfairness is present in those jurisdictions which unqualifiedly hold that intentional injuries are never to be indemnified. The same holds true in those jurisdictions in which the duty of the insurer to defend an action is determined from the perpetrator's state of mind, rather than from the injured complainant's viewpoint.