UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 28 | Number 4 Article 14

6-1-1950

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Insurance—Liability—Injured Third Party in Action Against Insurer for Intentional Injuries

As a general rule, in the absence of statute, a liability insurance policy by its terms does not cover the claims of a third party arising by reason of assured's intentional[1] misconduct.[2] Most policies expressly exclude such coverage; and even when there is no contractual provision, courts ordinarily imply an exclusion of such liability.[3] Despite the existence of these contractual limitations, courts rarely invoke them to bar recovery by a third party against the liability insurer.[4] An understanding of judicial treatment of these liability insurance coverage provisions is important where the attorney represents either of the adverse parties, the willfully injured third person or the insurer.

A court faced with the problem of a third party intentionally injured by an assured may protect the third party and find against the insurer by following one of three principal approaches: (1) definition of certain key words in the coverage or exclusion provisions so as to achieve the desired result; (2) determination that a judgment against the assured predicated on negligence estops the insurer from subsequently asserting that the injury was willfully inflicted; and (3) construction of statutes

[1] Most courts distinguish between intentional or willful conduct and illegal conduct. On the theory that the assured cannot reasonably have intended to pay a premium for a "shadow" protection, courts have refused to so construe a policy as to make the degree of protection negligible. Zurich Gen. Acc. & Liability Ins. Co. v. Thompson, 49 F. 2d 860 (9th Cir. 1931) (drunken driving); Kautz v. Zurich Gen. Acc. & Liability Ins. Co., 293 Pac. 133 (Cal. App. 1931) (driving while intoxicated), *rev'd on other grounds*, 212 Cal. 576, 300 Pac. 34 (1931); Brock v. Travelers' Ins. Co., 88 Conn. 308, 91 Atl. 279 (1914) (unlicensed minor driving); McMahon v. Pearlman, 242 Mass. 367, 136 N. E. 154 (1922) (expired license); Fireman's Fund Ins. Co. v. Haley, 129 Miss. 525, 92 So. 635 (1922) (speeding); Messersmith v. Am. Fidelity Co., 232 N. Y. 161, 133 N. E. 432 (1921) (permitting minor to drive). See McNeely, *Illegality as a Factor in Liability Insurance*, 41 COL. L. REV. 26 (1941).

[2] Hotel Co. v. Zurich Gen. Acc. & Liability Ins. Co., 213 Ill. App. 334 (1917); Miller v. United States Fidelity & Cas. Co., 291 Mass. 445, 197 N. E. 75 (1935); Blair v. Travelers' Ins. Co., 291 Mass. 432, 197 N. E. 60 (1935); Sontag v. Galer, 279 Mass. 309, 181 N. E. 182 (1932); Baron v. Indemnity Co., 285 N. Y. Supp. 486 (1936); Am. 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); County Gas Co. v. Gen. Acc. Fire and Life Assurance Corp., 56 S. W. 2d 1088 (Tex. Civ. App. 1933). *Accord*, Jackson v. Maryland Cas. Co., 212 N. C. 546, 193 S. E. 703 (1937).

[3] Hill v. Standard Mut. Cas. Co., 110 F. 2d 1001 (7th Cir. 1940); Rothman v. Metropolitan Cas. Ins. Co., 134 Ohio St. 241, 16 N. E. 2d 417 (1938); Sontag v. Galer, 279 Mass. 309, 181 N. E. 182 (1932); Langford Elec. Co. v. Employers Mut. Indemnity Corp., 210 Minn. 289, 297 N. W. 843 (1941); Messersmith v. Am. Fidelity Co., 232 N. Y. 161, 133 N. E. 432 (1921).

[4] New Amsterdam Cas. Co. v. Jones, 135 F. 2d 191 (6th Cir. 1943). *Cf.* Columbia Cas. Co. v. Abel, 171 F. 2d 215 (10th Cir. 1948); Sciaraffa v. Debler, 304 Mass. 240, 23 N. E. 2d 111 (1939); Floralbell Amusement Corp. v. Standard Surety & Cas. Co., 9 N. Y. S. 2d 959 (1937); Westerland v. Argonaut Grill, 187 Wash. 437, 60 P. 2d 228 (1936); Archer Ballroom Co. v. Great Lakes Cas. Co., 236 Wis. 525, 295 N. W. 702 (1941); Fox Wisconsin Corp. v. Century Indemnity Co., 219 Wis. 549, 263 N. W. 567 (1935).

requiring the maintenance of liability insurance under certain circumstances as requiring that the insurance so maintained include coverage for willfully inflicted injuries.

In determining the meaning of the phrase, "injuries arising out of accident," in the coverage provision of liability policies, the word "accident" has been interpreted by some courts to include injuries which were intentionally inflicted by the assured but unintentionally sustained by the third person.[5] These courts describe the injury as accidental or intentional according to whether or not the injuries could be said to be designed or effected by the injured third person, himself.[6] This line of reasoning would, where the victim was innocent, effectually nullify provisions excluding willful acts from the coverage of liability insurance policies.[7] A majority of courts, however, hold that injuries are accidental or not according to the manner in which they were inflicted.[8]

The definition of the term "willful," the converse of "accidental," is likewise used by some courts to enlarge the coverage of liability insurance policies. It is generally held that injuries resulting from "reckless," "wanton," or "wanton and willful" acts, without actual intent to injure, are clearly not within the "willful" exclusion provision of the policy.[9] Some courts go further and hold, in cases where it appears

[5] New Amsterdam Cas. Co. v. Jones, 135 F. 2d 191 (6th Cir. 1943), *affirming* 45 F. Supp. 887 (E. D. Mich. 1942).

The rule is well-settled that intentional injuries may be "accidental" insofar as recovery under ordinary accident insurance, as distinguished from liability insurance, is concerned. Employers' Indemnity Corp. v. Grant, 271 F. 136 (6th Cir. 1921); McCullough v. Liberty Life Ins. Co., 125 Kan. 324, 264 Pac. 65 (1928); Peterson v. Aetna Life Ins. Co., 292 Mich. 531, 290 N. W. 896 (1940). The same rule applies in regard to recovery under workmen's compensation laws. Liberty Mut. Ins. Co. v. Thompson, 171 F. 2d 723 (5th Cir. 1949).

[6] New Amsterdam Cas. Co. v. Jones, 135 F. 2d 191 (6th Cir. 1943); Hartford Acc. & Indemnity Co. v. Wolbarst, 95 N. H. 40, 57 A. 2d 151 (1948); *cf.* E. J. Albrecht Co. v. Fidelity & Cas. Co., 289 Ill. App. 508, 7 N. E. 2d 626 (1937); Robinson v. United States Fidelity & Guaranty Co., 159 Miss. 14, 131 So. 541 (1931); Georgia Cas. Co. v. Alden Mills, 156 Miss. 853, 127 So. 555 (1930); Washington Theatre Co. v. Hartford Acc. & Indemnity Co., 9 N. J. Misc. 1212, 157 Atl. 111 (1931); Westerland v. Argonaut Grill, 187 Wash. 437, 60 P. 2d 228 (1936); Fox Wisconsin Corp. v. Century Indemnity Co., 219 Wis. 549, 263 N. W. 567 (1935). See Woodhead, *Insurance Against the Consequences of Willful Acts*, INS. L. J. 310:867, Nov. 1948.

[7] The Court in the *Wolbarst* case, *supra* note 6, argued that the result would not encourage the assured in misconduct by the unanswerable logic that the assured did not intend to injure anyone when he took out the policy. Obviously, it would be more difficult to prove that the policy was taken out in contemplation of committing a willful injury than to prove that the specific act itself was willfully inflicted. Moreover, where it could be shown that the assured had no such intent at the time he obtained the liability insurance policy, the insurer would be required to pay the third party even though the injuries were willfully and maliciously inflicted and admittedly so.

[8] See cases note 3 *supra*.

[9] Sheehan v. Goriansky, 321 Mass. 200, 72 N. E. 2d 538 (1947); Westgate v. Century Indemnity Co., 309 Mass. 412, 35 N. E. 2d 218 (1941); Rothman v. Metropolitan Cas. Ins. Co., 134 Ohio St. 241, 16 N. E. 2d 417 (1938); Herrell v. Hickok, 57 Ohio App. 213, 13 N. E. 2d 358 (1937); United Services Automobile Ass'n v. Zeller, 135 S. W. 2d 161 (Tex. Civ. App. 1939). *Cf.* Huntington Cab Co. v. Am. Fidelity & Cas. Co., 63 F. Supp. 939 (S. D. W. Va. 1945).

clear from the actual facts that the injuries were intentionally inflicted, that the unlawful conduct was no more than gross negligence.[10] To arrive at this result these courts consider that although the assured fully intended to commit the act which caused the injuries, he may not have anticipated or intended the injurious result.[11]

The second and more generally used approach where the facts are appropriate is to find that the insurer is estopped to deny liability because of the existence of a judgment recovered in an action for negligence by the deliberately injured third party against the assured. Where there is such a prior judgment with execution returned unsatisfied, the injured person would succeed in an action against the insurer in a majority of states,[12] including North Carolina,[13] for the reason that the adjudication of negligence in the prior action is binding upon the insurer, both as to the coverage of the policy as well as to the establishment of the original claim, regardless of whether or not the insurer participated in the original action.[14]

In an important recent decision of the United States Court of Appeals for the Fourth Circuit[15] where the liability insurer sought a declaratory judgment that it was not liable for injuries deliberately inflicted by its assured, the Court reached a decision directly opposed to the weight of authority. The majority of the Court ruled that a judgment in favor of the injured third person against the assured, although predicated on negligence, did not adjudicate negligence for the purpose of policy coverage.[16] The insurer had not taken part in any capacity in the prior action.

[10] Am. Fidelity & Cas. Co. v. Werfel, 230 Ala. 552, 162 So. 103 (1935); Hartford Acc. & Indemnity Co. v. Wolbarst, 95 N. H. 40, 57 A. 2d 151 (1948).

[11] In addition to cases cited in note 10 *supra,* see Union Acc. Co. v. Willis, 44 Okla. 578, 145 Pac. 812 (1915); Shea v. Olsen, 85 Wash. Dec. 124, 53 P. 2d 615 (1936).

[12] Miller v. United States Fidelity & Guaranty Co., 291 Mass. 445, 197 N. E. 75 (1935); Jusiak v. Commerce Cas. Ins. Co., 11 N. J. Misc. 869, 169 Atl. 551 (1933); Stefus v. London & Lancashire Indemnity Co., 111 N. J. L. 6, 166 Atl. 339 (1933). *Accord,* Robbins v. Chicago, 4 Wall. 657 (U. S. 1866); E. I. Du Pont de Nemours & Co. v. Guano Co., 297 F. 580 (4th Cir. 1924); B. Roth Tool Co. v. New Amsterdam Cas. Co., 161 Fed. 709 (8th Cir. 1908); United Services Automobile Ass'n v. Zeller, 135 S. W. 2d 161 (Tex. Civ. App. 1939); State Farm Mut. Automobile Ins. Co. v. Wright, 173 Va. 261, 3 S. E. 2d 187 (1939). *Cf.* State Farm Mut. Automobile Ins. Co. v. Coughran, 303 U. S. 485 (1938).

[13] Jackson v. Maryland Cas. Co., 212 N. C. 546, 193 S. E. 703. After stating the rule that the insurer would ordinarily be estopped by the prior judgment of negligent injury, the court worked an estoppel against the injured third party and held that the latter could not deny the willful nature of the injuries by reason of the fact that the complaint in the suit against the assured alleged willful and intentional injuries. *Cf.* Distributing Co. v. Ins. Co., 214 N. C. 596, 200 S. E. 411 (1938); Campbell v. Cas. Co., 212 N. C. 65, 192 S. E. 906 (1937).

[14] *Quaere* whether this result is proper where the insurer took part in the original action only to the extent of supplying counsel for the assured, or, *a fortiori,* where the insurer took no part whatever in the original action.

[15] Farm Bureau Mut. Automobile Ins. Co. v. Hammer, 177 F. 2d 793 (4th Cir. 1950), *reversing* 83 F. Supp. 383 (W. D. Va. 1949).

[16] Parker, Chief Judge, dissented, following the reasoning of the prevailing view. Farm Bureau Mut. Automobile Ins. Co. v. Hammer, *supra* note 15 at 802.

The correct solution is the more difficult to ascertain because of strong, conflicting equities in the opposing parties. The third party with a judgment against the assured should not be forced to retry the facts and again establish the negligent injury. From his point of view it would appear reasonable that the insurer be required to assert its position in the original action, or thereafter be estopped to question the nature of the injury. On the other hand, the insurer should not be bound by a determination of negligence adjudicated in an action brought by a stranger to the insurance contract, wherein the subject of policy coverage was not directly involved and to which the insurer was not a party. The alternative of intervention by the insurer in the original action appears rather inadequate in view of the fact that its interests are adverse to those of its assured.[17]

The dilemma created by the conflicting equities of the injured third party and the insurer is ordinarily resolved in favor of the former. The Fourth Circuit case outlined above, in resolving the dilemma in favor of the insurer rather than the injured third party, rejects the device of estoppel by judgment, which has been the approach most frequently used in reaching decisions favorable to third persons.

The third method by which courts justify a holding for a third party intentionally injured is through construction of financial responsibility statutes. One type of such statutes requires that all motorists maintain liability insurance.[18] Most such statutes, however, merely provide that in the event of failure to satisfy a judgment arising out of accident in the use, operation, or ownership of a motor vehicle, the motorist forfeits his driving privilege pending satisfaction of the judgment and proof by the motorist of his future financial responsibility.[19] Under either of the above types of statutes, regardless of whether the policy was voluntarily taken out, it is uniformly held that injuries caused by

[17] Judge Parker observed that the fact that the insurer could assert in the original case the intentional nature of the injury only with serious prejudice to the defense of that case, meant merely that the defense which it had undertaken was "difficult." Farm Bureau Mut. Automobile Ins. Co. v. Hammer, 177 F. 2d 793, 802 (4th Cir. 1950).

[18] Though there have been many attempts to pass statutes requiring insurance for all drivers (*e.g.*, eighteen bills were introduced in state legislatures in 1949), Massachusetts is the only state which actually has in force such an act. Three jurisdictions require liability insurance for certain poor-risk drivers: CONN. GEN. STAT. §1561 (1930) (minors); HAWAII REV. LAWS, §§7408, 7414 (1945) (minors); R. I. GEN. LAWS ANN., c. 98, §3 (1938) (minors and drivers having had two accidents). Compulsory insurance laws have been for years in effect in many European countries. See Deak, *Automobile Accidents: A Comparative Study of the Law of Liability in Europe*, 79 U. OF PA. L. REV. 271 (1931).

[19] Some forty-four states and the District of Columbia have adopted some type of financial responsibility law; lacking such statutes are Louisiana, Mississippi, South Carolina and Texas. See Billings, *Impact of Financial Responsibility on Automobile Liability Insurance*, INS. L. J. 323:871, Dec. 1949; note, *Motor Vehicle Financial and Safety Responsibility Legislation*, 33 IOWA L. REV. 522 (1948). North Carolina's Motor Vehicle Financial Responsibility Act is found in N. C. GEN. STAT. §§20-224 *et seq.* (1949 Supp.).

the willful act of the assured are within the coverage of liability insurance where the policy was at the time of accident being used to certify financial responsibility pursuant to the statute.[20] This result is both logical and just. The purpose of the statute, the protection of the traveling public from irresponsible motorists, is effected. At the same time, the insurer is not subjected to any risk he could not reasonably have foreseen and provided for by appropriate charges, and is subrogated to the rights of the indemnified third party in all cases where coverage would ordinarily be excluded by the terms of the policy were it not for the effect of the financial responsibility statute.[21] Thus, the public is protected from irresponsible motorists without relieving the assured of ultimate responsibility for his own willful misconduct.

Even where a liability insurance policy was not being used to certify financial responsibility under the more usual type of statute, it has been held that the insurer was liable to a third party for the assured's wrongdoing.[22] In this case the policy was worded to conform to the requirements of the responsibility act in the event that it should subsequently be invoked, and the court ruled that this reference immediately incorporated the public policy of the statute into the insurance policy, thereby enlarging coverage to include injuries deliberately inflicted.[23] This result would appear readily avoidable by more careful drafting of policy provisions guided by the light of experience.

Courts following either the first or third approach outlined above are primarily concerned with redressing the injury of the innocent third party, and only incidentally with the contractual relationship of the insurer with the assured.[24] They concede that the assured, bound by the terms of his contract, has no right to be indemnified for his own willful misconduct. But they hold the insurer liable, where the third party is the claimant, by recognizing a subjective rather than an absolute concept of coverage; that is, those which follow the "definition approach" view coverage from the point of view of the claimant, and those which use

[20] Compulsory insurance statute: Wheller v. O'Connell, 297 Mass. 549, 9 N. E. 2d 544 (1937). Note that the compulsory insurance act is not applicable to property damage, being intended to apply only to personal injuries resulting from the faulty and tortious use of a motor vehicle on a public way.

Ordinary financial responsibility act: Ambrose v. Indemnity Ins. Co., 127 N. J. L. 248, 199 Atl. 47 (1938). See 7 APPLEMAN, INSURANCE LAW AND PRACTICE 72 (1942).

[21] Ocean Acc. & Guaranty Corp. v. Peerless Cleaning & Dyeing Works, Inc., 10 N. J. Misc. 1185, 162 Atl. 894 (1932). See SAWYER, AUTOMOBILE INSURANCE 132 (1936).

[22] Hartford Acc. & Indemnity Co. v. Wolbarst, 95 N. H. 40, 57 A. 2d 151 (1948).

[23] Statutory provisions are held to supercede any conflicting terms in the insurance policy. Newton v. Employers' Liability Assurance Corp., 107 F. 2d 164 (4th Cir.), cert. denied, 309 U. S. 673, *rehearing denied*, 309 U. S. 698 (1939).

[24] For an extensive discussion of the problems of financial protection for the automobile accident victim, see 3 LAW AND CONTEMP. PROB. 465-608 (1936).

"construction of the statute" view coverage in the light of public policy. Instead of viewing the third party strictly as a subrogee to the rights of the assured, and therefor disallowing his claim against the insurer,[25] they attribute to him rights independent of the assured, in effect treating him as a third-party-beneficiary.[26]

On the other hand, courts which follow the second approach, estoppel by judgment, rather than basing their decisions on the actual terms of the policy, are under no necessity of rationalizing their judgment for the third party in terms of third-party-beneficiary or analogous concepts, and in fact do reject any such theory. North Carolina[27] is one of this majority of courts[28] which utilizes the estoppel by judgment approach and rejects any suggestion that the third party has any greater rights than the assured.

Automobile liability insurance is coming to be thought of more as a social device for the reparation of injuries sustained than as a business contract to be strictly construed for the protection of the assured. It would appear that until liability insurance is required by law for all drivers, the judicial attitude will seek to find coverage of intentional injuries in the policy itself, or estoppel to deny that coverage.

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Labor Law—Fair Labor Standards Amendments of 1949—Suits for Unpaid Wages

A fundamental objective of the Fair Labor Standards Act[1] is to secure for workers the wages which they are required to be paid. In October, 1949, a new enforcement provision designed to further this objective was added to the Act. This is Section 16(c),[2] which gives to the Administrator of the Wage and Hour Division the authority to

[25] See 8 APPLEMAN, INSURANCE LAW AND PRACTICE 189-196 (1942).

[26] New Amsterdam Cas. Co. v. Jones, 135 F. 2d 191 (6th Cir. 1943); Franklin v. Georgia Cas. Co., 225 Ala. 58, 141 So. 702 (1932); Indemnity Co. v. Bollas, 223 Ala. 239, 135 So. 174 (1931); Antichi v. New York Indemnity Co., 126 Cal. App. 284, 14 P. 2d 598 (1932); Hartford Acc. & Indemnity Co. v. Wolbarst, 95 N. H. 40, 57 A. 2d 151 (1948). See 8 APPLEMAN, INSURANCE LAW AND PRACTICE 196 (1942).

[27] State Farm Mut. Automobile Ins. Co. v. James, 80 F. 2d 802 (4th Cir. 1936); MacClure v. Cas. Co., 229 N. C. 305, 49 S. E. 2d 742 (1948); Sears v. Maryland Cas. Co., 220 N. C. 9, 16 S. E. 2d 419 (1941); Peeler v. Cas. Co., 197 N. C. 286, 148 S. E. 261 (1929).

[28] Farm Bureau Mut. Automobile Ins. Co. v. Hammer, 177 F. 2d 793 (4th Cir. 1950); Summers v. Travelers' Ins. Co., 109 F. 2d 845 (8th Cir. 1940); Clements v. Preferred Acc. Ins. Co., 41 F. 2d 470 (8th Cir. 1930); Royal Indemnity Co. v. Morris, 37 F. 2d 90 (9th Cir. 1930); Guerin v. Indemnity Ins. Co., 107 Conn. 649, 142 Atl. 268 (1928); Coleman v. New Amsterdam Cas. Co., 247 N. Y. 271, 160 N. E. 367 (1928). See 8 APPLEMAN, INSURANCE LAW AND PRACTICE 189-191 (1942).

[1] 52 STAT. 1060 (1938), 29 U. S. C. §201 *et seq.* (1946), as amended, 63 STAT. 910, 29 U. S. C. §201 *et seq.* (Supp. 1949).

[2] 63 STAT. 919, 29 U. S. C. §216(c) (Supp. 1949).