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## Interpretation of Intentional Injury Clauses in Insurance Policies

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that would place the court in the inconsistent position of refusing to apply on the one hand, a principle which it freely applies on the other. Nor does it seem particularly strained to say, when the plaintiff is denied relief because of his laches,<sup>30</sup> because he refuses to do equity,<sup>31</sup> or because of unconscionable conduct,<sup>32</sup> that the court is but weighing the equities between the parties, and that these too are but applications of the general doctrine. However this may be, it is apparent that practical experience has demonstrated to our court the advisability of frankly recognizing the doctrine in order to prevent undue hardship to the defendant or the public, and to encourage our economic and industrial progress.<sup>33</sup>

C. E. G.

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### INTERPRETATION OF INTENTIONAL INJURY CLAUSES IN INSURANCE POLICIES

The West Virginia cases of *Harper v. Jefferson Standard Life Insurance Company*<sup>1</sup> and *Adkins v. Provident Life and Accident Insurance Company*<sup>2</sup> decided this year, raise the interesting question of the interpretation to be given clauses in insurance policies limiting the liability of the insurer where the injuries were inflicted on the insured intentionally by a third party. As respects wording, such clauses fall substantially into four classes, the limitation being imposed where the injury was (1) intentionally inflicted by a third party,<sup>3</sup> (2) the result of design on the part of any third party,<sup>4</sup> (3) an intentional injury inflicted by a third party,<sup>5</sup> and (4) inflicted by the intentional act of a third party.<sup>6</sup> Courts seem to be unanimous in treating the first three clauses as identical, but

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<sup>30</sup> *Smith v. Casto*, 107 W. Va. 1, 148 S. E. 566 (1929); *Carter v. Price*, 85 W. Va. 744, 102 S. E. 685 (1920); *Drake v. O'Brien*, 99 W. Va. 532, 130 S. E. 276 (1925).

<sup>31</sup> *Ice v. Barlow*, 85 W. Va. 490, 102 S. E. 127 (1920); *Watzman v. Unatin*, 101 W. Va. 41, 53, 131 S. E. 874 (1926).

<sup>32</sup> *Wood v. Snodgrass*, 116 W. Va. 538, 182 S. E. 286 (1935); *Thompson v. Hall*, 104 W. Va. 76, 138 S. E. 579 (1927); *Chicago Towel Co. v. Reynolds*, 108 W. Va. 615, 152 S. E. 200 (1930).

<sup>33</sup> *Accord*: *Griffin v. Southern R. Co.*, 150 N. C. 312, 64 S. E. 16 (1909).

<sup>1</sup> 196 S. E. 12 (W. Va. 1938).

<sup>2</sup> 196 S. E. 16 (W. Va. 1938).

<sup>3</sup> *General Accident, Fire, etc. Corp. v. Hymes*, 77 Okla. 20, 185 Pac. 1085, 8 A. L. R. 318 (1919).

<sup>4</sup> *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913 (1887).

<sup>5</sup> *Allen v. Travelers' Protective Ass'n*, 163 Iowa 217, 143 N. W. 574, 48 L. R. A. (N. S.) 600 (1913).

<sup>6</sup> *Wildblood v. Continental Casualty Co.*, 182 La. 202, 161 So. 584 (1935).

in clause four there is a decided tendency to impose an interpretation different from that in the other three.

The question raised in the *Harper* case is that of the interpretation of clauses one, two, and three. The clear case falling within the operation of these exceptions is that of *A* intending to injure *B* and in fact injuring *B*. The Indiana court pointed out that "the intent of Hoal at the time he inflicted the injury is alone material."<sup>7</sup> This proposition is well supported by cases,<sup>8</sup> the leading case on the point being *Travellers' Insurance Company v. McConkey*<sup>9</sup> in which the United States Supreme Court held that in case of murder of *B* by *A*, *A*'s act is intentional and comes within the scope of the exception. The doctrine was carried a step farther in the case of *Butero v. Travelers' Accident Insurance Company*.<sup>10</sup> There, *B* was shot and killed while at work in a coal shed, it not being known by whom the shot was fired or why, but the Wisconsin court held that since the circumstances strongly indicated that the killing was intentional, it would be within the exception though there was no particular individual to whom the intent could be attributed.

The other extreme, a case falling clearly outside the exception as embodied in clauses one, two, or three, is that of *A* causing injury by acting without regard to human safety, as by firing a gun, either not intending to injure anyone or not intending to injure any particular person. In *Travelers' Protective Association v. Fawcett*,<sup>11</sup> *A* entered a bank with the purpose of robbing it and while there fired shots indiscriminately at the ceiling and at the people in the bank. *B*, an employee, was killed. The Indiana court found that though under the criminal law *A* would have been presumed to have intended the natural and probable consequences of his acts, this presumption would not prevail in a civil case, and since *A* did not intend specifically to kill *B*, the killing was not intentional within the meaning of the policy. The same conclusion has been reached in cases of mistaken identity<sup>12</sup> where *A* injures or kills *B*

<sup>7</sup> *Travelers' Protective Ass'n v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991 (1914).

<sup>8</sup> *Travelers' Protective Ass'n v. Langholz*, 86 Fed. 60 (C. C. A. 5th, 1898); *Jarnagin v. Travelers' Protective Ass'n*, 133 Fed. 392 (C. C. A. 6th, 1904).

<sup>9</sup> 127 U. S. 661, 32 L. Ed. 108 (1888).

<sup>10</sup> 96 Wis. 536, 71 N. W. 811 (1897).

<sup>11</sup> 56 Ind. App. 111, 104 N. E. 991 (1914). Seemingly in accord is *Jefferson Standard Life Ins. Co. v. Myers*, 256 Ky. 174, 75 S. W. (2d) 1095 (1934), in which *B*, a sheriff protecting miners going to their work, was killed by strikers whom the jury found intended to kill only the miners. Killing held unintentional.

<sup>12</sup> *Newsome v. Travelers' Ins. Co.*, 143 Ga. 785, 85 S. E. 1035 (1915); *Mah*

believing *B* to be *C*. The West Virginia court by dictum in the *Adkins* case, which is one of mistaken identity, says that if these facts should arise under an exception worded as those under consideration here, the killing would be deemed unintentional.

The difficult problem with respect to the interpretation of clauses one, two, and three arises in the cases falling between these two extremes, cases where *A* injures *B*, not knowing the identity of *B* at the time of the injury, not having in mind to injure any particular person known to him, but yet, intending to injure the individual before him, whoever that individual may be. Courts in deciding this problem of interpretation admit that there is an ambiguity<sup>13</sup> in the use of the words "intentional" or "design" in each of the first three clauses, the possible meanings being: (a) intent on the part of *A* to perform an act; (b) intent to inflict an injury, but not necessarily on *B*; (c) intent to injure a particular individual whose presence is perceived by *A* but whose identity is unknown to him; and (d) intent to injure a particular person *B* whose identity is known to *A* at the time of the injury. In attempting to clear up this ambiguity, courts generally employ a rule of interpretation which states that "When a stipulation or exception to a policy of insurance, emanating from the insurer, is capable of two meanings, the one is to be adopted which is most favorable to the insured."<sup>14</sup> This leads to a finding in favor of the insured in cases (a) and (b) as indicated by cases previously cited, but as also heretofore pointed out, permits protection of the insurer in case (d). In spite of this tendency to favor the insured, class (c) still remains contestable territory. The leading American case involving these facts is *Utter v. Travelers' Insurance Company*,<sup>15</sup> a case labeled by the West Virginia court in the *Harper* case as one of mistaken identity, but presenting facts hardly seeming to warrant its being classified as such. There, *A*, a deputy sheriff in search of *B*, a deserter from the army, opened the door to the room in which he believed he would find *B* and was immediately confronted by one of several occupants of the room who pointed a gun at him. *A*, not knowing the identity of the individual, fired, killing him. *A* later learned that his victim was *B*. In holding that the case should be

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See *v. North American Accident Ins. Co.*, 190 Cal. 721, 213 Pac. 42, 26 A. L. R. 123 (1923).

<sup>13</sup> *Ibid.* Also dictum in *Adkins v. Provident Life & Ins. Co.*, regarding the policy in question in *Harper v. Jefferson Standard Life Ins. Co.*

<sup>14</sup> *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473 (1881).

<sup>15</sup> 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913 (1887).

submitted to the jury and that they would be warranted in finding in favor of the insured, the Michigan court said, "If, when Berry fired this shot, he did not know the man he fired at was Utter, and did not intend to kill Utter, it can not be said that Utter lost his life by the design of Berry." Another case presenting substantially this same situation is that of *General Accident, Fire & Life Assurance Corporation v. Hymes*,<sup>16</sup> also considered in the *Harper* case as one of mistaken identity. *B*, leaving a negro dance hall on a dark night, spoke a phrase involving the name of *A*. *A*, hearing this, immediately fired at the speaker and killed him, not knowing at the moment of firing that his victim was his friend *B*. There was no evidence shown of an intent on the part of *A* to injure any third party *C*, but only that he intended to injure the one whose voice he heard. Here also the court found that the killing was not intentional within the meaning of the exception. Another situation, differing but slightly from the two above cited and seeming likewise to fall within class (c), is that involved in *Hutchcraft's Executor v. Travelers' Insurance Company*.<sup>17</sup> *B* was waylaid and robbed by *A*. In the course of the robbery, *A* shot and killed *B*. Here, the Kentucky court does not emphasize the fact that *A* was unaware of the identity of *B*, the fact which seems to be the determining one in the *Utter* and *Hymes* cases, and holds the killing an intentional one within the meaning of the policy. The feeling of the court seems to be that it is enough that the assailant be aware that there is an individual in his presence and that he intend to injure that individual regardless of his identity. This same view seems to have been taken by the West Virginia court in the *Harper* case when saying, "We can not say that knowledge on the part of Scalf that it was Harper at whom he was shooting is necessary to create the intent required under the policy provision." In the *Harper* case, *B*, who was returning home on a dark night, heard *A* approaching and and shone his flashlight in the direction of *A* who fired, killing *B*, not knowing at that moment the identity of the person flashing the light. *P*, as beneficiary, brought an action against the insurance company on *B*'s policy which provided for double indemnity in case of accidental death, and stating further that, "these provisions do not apply . . . in case death results from bodily injury inflicted by the insured himself or intentionally by

<sup>16</sup> 77 Okla. 20, 185 Pac. 1085, 8 A. L. R. 318 (1919).

<sup>17</sup> 87 Ky. 300, 8 S. W. 570 (1888). Presenting a similar situation, DeGraw v. National Accident Society, 4 N. Y. Supp. 912 (1889).

another person." At the trial, *B*'s death was found to have been accidental and not intentional within the meaning of the exemption, and thus double indemnity was allowed. On error to the supreme court the finding was set aside on the ground that the death of *B* was intentional, the court stating, "This being the undisputed factual situation, we are driven to the conclusion that Scalf, having no other particular person in mind whom he intended to kill, intentionally killed the man who flashed the light in his face." It seems that the distinction noted by the West Virginia court between the situation presented by the *Harper* case and those of the *Utter* and *Hymes* cases is slight, if in fact there be any at all. Apparently, the West Virginia court in interpreting these exceptions as stated in clauses one, two and three is adopting the meaning of the word "intentional" as applied in class (c), intent to injure a particular individual whose presence is perceived by *A* but whose identity is unknown to him at the time.

The remaining question is that raised by the *Adkins* case concerning the interpretation of the exception as worded in example four, where the injury was inflicted "by the intentional act of a third person." The possible interpretations seem to be first, to treat this phrase as synonymous with those of the other three classes, or second, to give strict construction to the clause thus bringing it within class (a) of the possible meanings of the word "intentional" as enumerated heretofore and greatly expanding the scope of the exception in favor of the insurer. In *Wildblood v. Continental Casualty Company*,<sup>18</sup> *A* killed *B*, mistaking *B* for *C*, a deputy sheriff. In an action on the insurance policy of *B* limiting the liability of the insurer in case of "injury resulting from the intentional act of the insured or of any other person," the Louisiana court, without discussing any distinction, treated this wording as synonymous with that in the other three classes, and since this was a case of mistaken identity, held the killing not intentional. Supporting the distinction ignored in the *Wildblood* case is *National Life Insurance Company v. Coughlin*,<sup>19</sup> in which, *A*, a lady at home

<sup>18</sup> 182 La. 202, 161 So. 584 (1935), affirming *Brooks v. Continental Casualty Co.*, 13 La. App. 502, 128 So. 183 (1930). In *Railway Officials & Employees Accident Ass'n v. McCabe*, 61 Ill. App. 565 (1895), the policy read "death resulting from the intentional act of any person". In deciding the case the court treats the clause as though it were synonymous with "intentional injuries inflicted", and cites *McConkey v. Travellers' Ins. Co.* A recognition of the distinction between these phrases, however, would not have changed the decision of this case.

<sup>19</sup> 72 Colo. 440, 212 Pac. 486 (1923). In *Continental Casualty Co. v. Cunningham*, 188 Ala. 159, 66 So. 41 (1914), *A*, who was escaping from a group of

at night alone, was frightened by a noise at the rear of the house and fired from the back door into the dark, killing *B* of whose identity she was unaware. The Colorado court inferred in its opinion that it might have adopted the view enunciated in the *Utter* case had the provisions of the policy in question permitted it, but instead, emphasis was placed on the wording of the exception reading "by the intentional act of any person," and the killing was held intentional. In line with this and not with the view in the *Wildblood* case is the holding of the West Virginia court in *Adkins v. Provident Life & Accident Insurance Company*.<sup>20</sup> There, *A* killed *B*, mistaking *B* for *C*. In action on a policy limiting the liability of defendant company when the death was caused by an injury inflicted by the "intentional act" of another, the supreme court reversed the trial court on the basis of the distinction noted above, the court stating, "Though the injury was not inflicted on the person whom Ratti intended to strike, it is nevertheless obvious that his striking the blow or blows was an intentional act on his part." The court sustained the distinction made between the wording of the exception here and that of the exception in the *Harper* case purely on contract principles, that the phrase "by the intentional act" is not ambiguous and admits of only one interpretation. An argument worthy of note, however, exists in support of the contrary view assumed by the Louisiana court in that the extreme similarity existing between the wording of each of the four forms of the exception leaves little doubt but that the insurance companies in using these different phrases intended them to bear identical meanings. This argument is particularly forceful in light of the present tendency on the part of courts to break away from the policy of applying contract principles in the determination of problems in insurance law, and to substitute in its stead a doctrine of a fair relation between the parties.<sup>21</sup>

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officers, killed *B*, another officer attempting to capture him. The court distinguished this from the *Utter* case on the ground of the difference in the term of the exception in the two cases, the clause here limiting the insurer's liability "where the injury causing the loss results . . . from the intentional act of the insured or any other person."

<sup>20</sup> 196 S. E. 16 (W. Va. 1938).

<sup>21</sup> "Taking no account of legislative limitations upon freedom of contract, in the purely judicial development of our law we have taken the law of insurance practically out of the category of contract, and we have established that the duties of public service companies are not contractual, as the nineteenth-century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public." POUND, SPIRIT OF THE COMMON LAW (1921) 29.

If the clause excepts "intentional injuries" or "injuries intentionally inflicted", the insured will be protected if the injury was accidentally or mistakenly inflicted upon him, but if the exception relates to injuries from "intentional acts", he will be excluded from recovery if the third party has performed an intentional act.

A. F. G.

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### THE PRESUMPTION AGAINST SUICIDE IN INSURANCE CASES

The exact date of the origin, or the place or decision in which the presumption against suicide was first applied to a specific case seems to be unknown. In the early days of the common-law system suicide was not only a felony but was considered a more heinous crime than murder in those times when the rigors of the laws punishing crimes were in no sense comparable to the standards of the present.<sup>1</sup> As described by Blackstone, the suicide was given an ignominious burial by the highway, with a stake driven through his body; moreover, all his goods and chattels were forfeited to the Crown.<sup>2</sup> This severity of penalties meted out by the English law to restrain the practice of self-destruction fell heavily upon the family of the suicide, and it is easy to see how the lawyers of the day would seek to devise some method to ease this burden cast upon the guiltless. Thus, seemingly, arose the oft-utilized presumption against suicide in case of an otherwise unexplained violent death. This presumption has suffered strange and illogical abuses; so it is not to be wondered at that some courts have taken the attitude that it has outlived its usefulness.<sup>3</sup> That this presumption against suicide has become rather firmly embedded in our law is not to be doubted.<sup>4</sup> In the language of the courts it is based upon two principles: First, that man's natural instinct is to avoid injury and to preserve life, and it would be highly improbable that he

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<sup>1</sup> Hartman, *The Presumption Against Suicide as Applied in Insurance Cases* (1935) 19 MARQ. L. REV. 20.

<sup>2</sup> 4 BL. COMM.

<sup>3</sup> *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, 173 Atl. 644 (1934).

<sup>4</sup> *Grand Lodge v. Bannister*, 80 Ark. 190, 96 S. W. 472 (1906); *Van Norman v. Modern Brotherhood*, 143 Iowa 536, 121 N. W. 1080 (1900); *Green v. N. Y. Life Ins. Co.*, 192 Iowa 32, 182 N. W. 808 (1921); *Vicars v. Aetna Life Ins. Co.*, 158 Ky. 1, 164 S. W. 106 (1914); *Massachusetts Protective Ass'n v. Cranford*, 137 Miss. 876, 102 So. 171 (1924); *Wharton v. N. Y. Life Ins. Co.*, 178 N. C. 135, 100 S. E. 266 (1919); *Lamb v. Union Ry.*, 195 N. Y. 260, 88 N. E. 371 (1909).