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# INSURANCE—THE STANDARD OF INTENT IN INSURANCE CONTRACT INTERPRETATION—Ambassador Insurance Company v. Montes, 76 N.J. 477, 388 A.2d 603 (1978)

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INSURANCE—THE STANDARD OF INTENT IN INSURANCE CONTRACT INTERPRETATION—*Ambassador Insurance Company v. Montes*, 76 N.J. 477, 388 A.2d 603 (1978).

The exclusion of intentional injury from [insurance] coverage stems from a fear that an individual might be encouraged to inflict injury intentionally if he was assured against the dollar consequences . . . . Pulling the other way is the public interest that the victim be compensated, and . . . the victim is aided by the narrowest view of the policy exclusion consistent with the purpose of not encouraging an intentional attack. And the insured, in his own right, is also entitled to the maximum protection consistent with the public purpose the exclusion is intended to serve.<sup>1</sup>

In the early morning hours of May 11, 1973, a fire broke out in the stairwell of a two-and-a-half story, four-family house in Passaic, New Jersey. The blaze spread rapidly through the old wooden tenement building and killed four persons. Joseph Satkin, a real estate agent and landlord of the building, had procured Dennis Priest<sup>2</sup> to set the fire. Satkin hoped to collect the proceeds of a fire insurance policy covering the building.<sup>3</sup> Instead, he was tried and convicted of arson, conspiracy to commit arson, and felony murder for having intentionally caused the fire.<sup>4</sup> Rafael Montes, as administrator *ad prosequendam* and as general administrator, brought a civil action against Satkin for the death of Marilyn Ortega Perez, an infant who perished in the blaze.<sup>5</sup>

The Ambassador Insurance Co., which had issued a comprehensive general liability policy to Satkin, instituted a declaratory judgment proceeding. The insurance company contended that

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1. *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 267 A.2d 7, 15 (1970) (citations omitted).

2. *Ambassador Ins. Co. v. Montes*, 147 N.J. Super. 286, 290, 371 A.2d 292, 294 (App. Div. 1977), *aff'd*, 76 N.J. 477, 388 A.2d 603 (1978). The policy was issued to Satkin on or about April 18, 1973, approximately one month before the fire. Brief for Defendants-Appellants at 3.

3. It should be noted that "[o]ne who commits arson may be found guilty of the murder of an inhabitant of the dwelling who lost his life in the fire although personal injury was neither intended nor expected." R. PERKINS, *PERKINS ON CRIMINAL LAW* 38 (2d ed. 1969).

4. *Ambassador Ins. Co. v. Montes*, 76 N.J. 477, 388 A.2d 603 (1978).

5. *Id.* The wrongful death action was placed on the inactive trial calendar pending final disposition of the insurer's declaratory judgment proceeding.

Satkin was not entitled to coverage under the policy because he deliberately started the fire. Since insurance coverage is generally denied for injuries caused by intentional acts,<sup>6</sup> the trial court examined Satkin's intent. It concluded that the deaths and injuries were the intended results of a deliberate act. Consequently, the court denied coverage under the policy. The New Jersey Superior Court reversed, reasoning that although Satkin's act was in wanton and reckless disregard for the safety of those living in the building, he did not specifically intend to injure or kill anyone. The deaths and injuries were, according to the court, the unintended consequences of a wilful act. Since there was no intent to injure, coverage under the policy was allowed. In *Ambassador Insurance Company v. Montes*,<sup>7</sup> the New Jersey Supreme Court affirmed the appellate court's decision but omitted any discussion of the issue of intent. The court determined that the insurance policy clearly obligated Ambassador to pay, on Satkin's behalf, the damages for the Perez child's death.<sup>8</sup> The court reached this decision by ignoring the language in Satkin's insurance policy which was designed to exclude coverage for injuries caused by intentional acts. Had the court given effect to this exclusionary language, it could then have resolved the question of what level of intent should be necessary to provide insurance coverage under a liability policy.

The *Ambassador* decision can best be understood by viewing it in the context of the gradual developments in insurance law. Throughout its history, insurance has been alternately hailed as a promoter of commercial welfare and damned as a generator of evil.<sup>9</sup> Fire insurance was once regarded with suspicion as a temptation to commit arson.<sup>10</sup> Liability insurance was considered illegal because it encouraged the insured to disregard the safety of others.<sup>11</sup> Opponents of insurance argued that the protection afforded the insured by the liability policy removed the financial deterrent against negligent and criminal acts.<sup>12</sup> Under the modern view, however, insurance is an accepted arrangement for transferring and distributing risk.<sup>13</sup>

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6. See notes 72-95 *infra* and accompanying text.

7. 76 N.J. 477, 388 A.2d 603 (1978).

8. *Id.*

9. McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26 (1941).

10. Simon, *Insurance Coverage for Illegal Acts*, 8 AM. BUS. L.J. 37 (1970).

11. *Id.*

12. McNeely, *supra* note 9 at 26.

13. R. KEETON, *INSURANCE LAW* § 1.2(a), at 2 (1971).

True liability insurance apparently started with employers' liability insurance.<sup>14</sup> It was initiated, not to provide compensation for injured employees, but to protect the employer against litigation growing out of employers' liability acts.<sup>15</sup> Liability insurance began as a measure of individual protection rather than as a scheme for social betterment. Since then, however, there has been a substantial reversal in popular thinking, in the approach of courts today and in legislative trends towards the socialization of risk through insurance.<sup>16</sup>

The legality of liability insurance was accepted by courts partly due to the fairness of insurers in settling early claims.<sup>17</sup> As insurance satisfied these claims, new demands were made for protection against new risks.<sup>18</sup> Liability insurance expanded "like a New England farmhouse, with unplanned additions stuck on as occasion demanded."<sup>19</sup>

The scope of insurance has reflected these changes in public policy. Courts first accepted the right to insurance protection for a wrongdoer's acts in cases involving an insured's own negligence.<sup>20</sup> Other decisions concerning wanton and reckless conduct permitted recovery where the insured's act was unintentional.<sup>21</sup> Current attitudes toward the scope of insurance coverage are exemplified by the New Jersey Superior Court's decision of *Rotwein v. General Accident Group*.<sup>22</sup> The court held that for an insurance contract to

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14. McNeely, *supra* note 9 at 28.

The idea of indemnity against the legal liability of one person for injuries he has caused to a person or the property of a third person is not a recent invention. An interesting analogy can be drawn between the modern institution of liability insurance and the wergeld of the Anglo-Saxons in which a group stood mutually liable for the criminal acts of its members. A less superficial analogy may be found in the provision of marine insurance whereby an insurer undertook the risk of liability of the insured for damage inflicted on other ships through collision.

*Id.* at 27.

15. *Id.* at 28.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Waters v. Merchants Ins. Co.*, 36 U.S. (11 Pet.) 213 (1837). The steamboat *Lioness* was lost by an explosion of gun powder cargo due to an employee's negligence. The Court held, "There is nothing unreasonable, unjust, or inconsistent with public policy, in allowing the insured to insure himself against all losses from any perils not occasioned by his own personal fraud." *Id.* at 221.

21. Simon, *supra* note 10 at 40.

22. 103 N.J. Super. 406, 247 A.2d 370 (1968). "It must be emphasized that public policy will usually not be applied to invalidate a contract unless there is some de-

be unenforceable, it must be patently offensive or inimical to the public welfare and have a clear capacity to support or encourage conduct which is deleterious, antisocial or unlawful.

Although courts recognize that a wrongdoer has a right to coverage, they have only reluctantly extended that coverage to individuals who intentionally cause injury.<sup>23</sup> They have held that public policy prohibits an insurer from agreeing to indemnify an insured against the civil consequences of his own wilful acts.<sup>24</sup> Most courts assume that antisocial conduct would be encouraged if insurance were available to shift the financial cost of the loss from the wrongdoer to his insurer.<sup>25</sup> This public policy is further rationalized as a matter of moral principle, since a wrongdoer should not be permitted to receive insurance proceeds for an intentionally inflicted injury.<sup>26</sup> If insurance coverage is allowed when the insured intentionally injures a third party, the wrongdoer is spared the financial cost of his own wrong. Denying the wrongdoer the right to shift the financial responsibility to his insurer is a means of punishing the wrongdoer for his wilful act.<sup>27</sup>

With this background, the New Jersey Supreme Court analyzed the comprehensive general liability policy issued to Joseph Satkin. The policy provided:

The company will 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 to which this

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finite basis therefor in law, legal precedent or recognized governmental policy affecting the general welfare." *Id.* at 416-17, 247 A.2d at 376 (citation omitted).

23. "If the single insured is allowed through intentional or reckless acts to consciously control risks covered by the policy, a central concept of insurance is violated." *Bituminous Cas. Co. v. Bartlett*, 240 N.W. 2d 310, 313 (Minn. 1976).

24. *See Taylor v. John Hancock Mut. Ins. Co.*, 11 Ill. 2d 227, 142 N.E.2d 5 (1957); *Ruvolo v. American Cas. Co.*, 39 N.J. 490, 189 A.2d 204 (1963); *Malanga v. Manufacturers Cas. Co.*, 28 N.J. 220, 146 A.2d 105 (1958); *Lyons v. Hartford Ins. Group*, 125 N.J. Super. 239, 310 A.2d 485 (App. Div. 1973), *cert. denied*, 64 N.J. 332, 315 A.2d 411 (1974).

25. *Farbstein & Stillman, Insurance for the Commission of Intentional Torts*, 20 HASTINGS L.J. 1219, 1245-46 (1969). One judge cited testimony in a case stating that as the plaintiff and defendant were riding in the latter's car, the plaintiff protested against the defendant's reckless driving. "'Don't worry,' the defendant said, 'I carry insurance.' A moment later came the crash." *McNeely*, *supra* note 9, at 33. The case was *Herschensohn v. Weisman*, 80 N.H. 557, 119 A. 705 (1923).

26. *Farbstein & Stillman, supra* note 25; *Ruvolo v. American* 490, 189 A.2d 204 (1963). In this declaratory judgment action brought by the Ambassador Insurance Co., however, it is not the insured who would be benefited by receiving the insurance proceeds, but the Perez family.

27. *See* note 26 *supra*.

Insurance applies, caused by an occurrence and the company shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent. . . .<sup>28</sup>

Both parties agreed that the record was limited to the policy in evidence which contained neither a definition of "occurrence" nor a provision which excluded coverage for intentional acts.<sup>29</sup> With the record so limited, the court found that, on its face, the insurance policy obligated Ambassador to defend this action. The court held that the policy ostensibly obligated Ambassador to pay on Satkin's behalf any amount, up to the policy's stated limits, for the injuries suffered and for the death of Marilyn Ortega Perez.<sup>30</sup>

Once the court clarified Ambassador's obligation under the insurance contract, it then examined the policy considerations involved in allowing insurance coverage. Ambassador had contended that public policy prohibits an insurer from agreeing to indemnify an insured against the civil consequences of his own wilful acts.<sup>31</sup> The court rationalized, however, that when an innocent third person receives the protection afforded by the wrongdoer's insurance, this policy should not prevail.<sup>32</sup> The court employed the equitable remedy of subrogation to provide the Perez family the protection afforded by Satkin's insurance.<sup>33</sup> The court held that this remedy would give Ambassador a cause of action against Satkin for its payment of his debt to the Perez family while also effectuating the

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28. 76 N.J. at 481, 388 A.2d at 605.

29. *Id.* at n.1, 388 A.2d at 605 n.1. The court, contending it was bound by stipulations of fact, did not discuss the meaning of "occurrence" or the exclusionary provisions for injuries resulting from intentional acts.

30. *Id.* at 481-82, 388 A.2d at 605-06.

31. See note 24 *supra* and accompanying text.

32. 76 N.J. at 482, 388 A.2d at 606.

33. Subrogation is an ancient equitable device to compel the ultimate discharge of an obligation by one who in good conscience ought to pay it. In a comprehensive review of the nature of the doctrine and its relation to indemnity, Mr. Chief Justice Vanderbilt pointed out that the right 'does not arise out of contract but rather exists without the consent of the insured, although of course the parties may by agreement waive or limit the right'; the subrogee 'in effect steps into the shoes of the insured and can recover only if the insured likewise could have recovered'; and it is now the settled rule that generally an action in subrogation 'on the contractual obligation of the defendant to an insured exists in favor of the insurer.'

George M. Brewster & Son v. Catalytic Constr. Co., 17 N.J. 20, 28-29, 109 A.2d 805, 809 (1954) (citations omitted).

public policy of forcing the wrongdoer to accept the financial responsibility arising from his intentional act.<sup>34</sup>

The *Ambassador* court recognized the importance of compensating individuals who have been injured by some criminal act.<sup>35</sup> Never questioning whether Satkin intended the death of Marilyn Ortega Perez, it sought some means to provide compensation to the Perez family. The court determined that Ambassador had contracted to pay an innocent person for the damages caused by its insured. It held such payments should be made, even though ascribable to a criminal event, so long as the benefit of the payment would not inure to Satkin.<sup>36</sup> The court stated that it was equitable and just for Ambassador to pay Satkin's debt and subsequently be indemnified by Satkin for its payment to the Perez family.<sup>37</sup>

The New Jersey Court's use of subrogation comports with the idea that it is used "to compel the ultimate discharge of an obligation by one who in good conscience ought to pay it."<sup>38</sup> The basic premise of subrogation is that one person, having paid the obligation of another, is substituted as the owner of a lawful claim or

34. 76 N.J. 477, 388 A.2d 603 (1978).

35. This public policy has been codified in the New Jersey Criminal Injuries Compensation Act of 1971. N.J. STAT. ANN. § 52:4B-10 (West Supp. 1978).

§ 52:4B-10. Persons entitled to compensation; order

In any case in which a person is injured or killed by any act or omission of any other person which is within the description of the offenses listed in section 11 of this act, the board may . . . order the payment of compensation in accordance with the provisions of this act:

a. to or on behalf of the victim,

. . . .

c. in the case of the death of the victim, to or for the benefit of the dependents of the deceased victim, or any one or more of such dependents.

In determining whether to make an order under this section, the board may consider any circumstances it determines to be relevant, including provocation, consent or the behavior of the victim which directly or indirectly contributed to his injury or death, the prior case history, if any, of the victim and any other relevant matters.

An order may be made under this section whether or not any person is prosecuted or convicted of any offense arising out of such act or omission. . . .

Some of the offenses to which the statute applies are as follows: assault constituting a high misdemeanor; mayhem; threats to do bodily harm; lewd, indecent, or obscene acts; murder; manslaughter and rape. N.J. STAT. ANN. 52:4B-11 (1971).

36. 76 N.J. at 483, 388 A.2d at 606.

37. *Id.* at 486, 388 A.2d at 608.

38. *George M. Brewster v. Catalytic Constr. Co.*, 17 N.J. 20, 28, 109 A.2d 805, 809 (1954).

right.<sup>39</sup> The substitute succeeds to the other in relation to the debt or claim and its rights, remedies or securities.<sup>40</sup> In the absence of subrogation, either the insured would collect twice and be unjustly enriched,<sup>41</sup> or, if the insured were not entitled to double recovery, the third party wrongdoer would avoid the financial obligation arising from his tortious act.<sup>42</sup>

The New Jersey Supreme Court also realized that subrogation does not depend on contract language.<sup>43</sup> An insurer is generally entitled to subrogation, either by contract or in equity for the amount of the indemnity paid.<sup>44</sup> "The right of subrogation, or more properly indemnification where sought from its own insured, is enforced where denying such a remedy would be inequitable."<sup>45</sup> It will be applied according to the dictates of equity, good conscience and considerations of public policy.<sup>46</sup> This doctrine is founded

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39. Meyers, *Subrogation Rights and Recoveries Arising out of First Party Contracts*, 9 FORUM 83 (1973).

40. *Id.*

41. "The general rule is that the assured should make no profit from his insurance, the insurance being an indemnity and nothing more." Hodgin, *Subrogation in Insurance Law*, 1975 J. BUS. L. 114, 116. In this declaratory judgment action brought by Ambassador, however, it is not the insured who is seeking the benefit of the insurer's payment, but an innocent third party.

42. *Standard Accident Ins. Co. v. Pellicchia*, 15 N.J. 162, 104 A.2d 288 (1954). "Manifestly it would be unjust to compel the insurer to suffer the consequences of the wrongful act of another." *Auto Owner's Protective Exch. v. Edwards*, 82 Ind. App. 558, 563, 136 N.E. 577, 579 (1922). In this declaratory judgment action brought by Ambassador, however, it is not a third party wrongdoer who would avoid financial responsibility by the insurer's payment, but Satkin, the named insured.

43. 76 N.J. 477, 388 A.2d 603 (1978). See generally 6A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4054, at 142-46 (1962).

44. *Id.*

45. 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4935, at 461 (1973). The distinction between indemnification and subrogation should be noted. The term "indemnification" refers to those situations in which an individual is compensated for a loss already incurred. *United States Fidelity & Guar. Co. v. Williams*, 148 Md. 289, 129 A. 660, 664 (1925). The term "subrogation," however, is used to describe the situation in which an individual who has paid the debt of another is substituted to all rights and remedies of the other. The debt is treated in equity as still existing for the benefit of the person who actually paid the debt. *Callan Court Co. v. Citizens & S. Nat'l Bank*, 184 Ga. 87, 133, 134, 190 S.E. 831, 856 (1937). In the typical subrogation situation, the insurance company indemnifies the insured for its loss and is then subrogated to any rights that the insured may have against a third party who caused the loss. *George M. Brewster & Son v. Catalytic Constr. Co.*, 17 N.J. 20, 109 A.2d 805 (1954). In this declaratory judgment action, however, it is a third party who has sustained a loss and is seeking the benefit of the insured's comprehensive general liability policy. The proper term for describing the payment Satkin must make to Ambassador is "indemnification."

46. 6A J. APPLEMAN, INSURANCE LAW AND PRACTICE, § 4054, at 142-46 (1962).



upon equitable principles and upon the relationship of the parties.<sup>47</sup> "Subrogation rests on the maxim that no one should be enriched by another's loss."<sup>48</sup> Consequently, courts usually invoke subrogation unless its application would be inimical to public policy.<sup>49</sup>

The court further supported its decision by referring to cases in which individuals have been allowed to recover losses occasioned by an insured's intentional act.<sup>50</sup> *In re Estate of Gardiner*,<sup>51</sup> suggests that when an accident happens, an injured party acquires an interest in the insurance policy which cannot be foreclosed by litigation or agreement between the insurer and the insured alone.<sup>52</sup> Thus, the Perez family obtained beneficiary status in the liability policy.

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47. *Id.*

48. *Id.* at 143.

49. *Burford v. Glasgow Water Co.*, 223 Ky. 54, 2 S.W.2d 1027 (1928).

50. 76 N.J. at 483-84, 388 A.2d at 606. *See Malanga v. Manufacturers' Cas. Ins. Co.*, 28 N.J. 220, 146 A.2d 105 (1958). An insurance policy issued to a partnership was held to provide insurance coverage to partners not involved in an assault and battery committed by one partner. The issue of that partner's "liability to the defendant insurer under its right of subrogation" was in no way affected. 28 N.J. at 230, 146 A.2d at 110. *Morgan v. Greater N.Y. Tax Payers Mut. Ins. Ass'n*, 305 N.Y. 243, 112 N.E.2d 273 (1953). The New York Court of Appeals held that a public liability policy extended coverage to the individual insured for liability for assault and battery committed by him or at his direction, even though committed by his partner. The policy was issued to the members of the copartnership as individuals and insured against liability for assault and battery unless committed by or at the direction of the insured. "To indemnify him does not save him from the consequences of his criminal act for he committed none." 305 N.Y. at 248, 112 N.E.2d at 275. *Fidelity-Phenix Fire Ins. Co. v. Queen City Bus & Transfer Co.*, 3 F.2d 784 (4th Cir. 1925). A fire insurance company was compelled to pay the proceeds of a fire insurance policy to the corporation to be used for creditors and stockholders other than the wrongdoing president who had intentionally set fire to a bus owned by the corporation and on which he held a mortgage. The dissenting opinion distinguished the cases relied upon by the majority by pointing out that in each case the "party recovering from the insurance carrier was an express beneficiary. . . ." 76 N.J. at 497, 388 A.2d at 613 (Clifford, J., dissenting).

51. 40 N.J. 261, 191 A.2d 294 (1963).

52. *Id.* Liability insurance has come to be used openly and extensively as a device for securing compensation to victims. Liability policies usually provide that, "No action shall lie against the company . . . until the amount of the insured's obligation shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company." Consequently, the insured may proceed against an insurer under the payment provisions when a victim obtains a tort judgment. "[A]t that time, the victim may proceed against the insurer by garnishment or otherwise, even without the insured's cooperation. . . . in this limited sense, the victim may be referred to as a third party beneficiary of the liability insurance contract." R. KEETON, *INSURANCE LAW* § 4.8(b), at 233-34 (1971).

As beneficiaries under this theory of recovery, the Perez family's interest in the policy could not be denied because of Satkin's arson. This theory was discussed in *Howell v. Ohio Casualty Co.*<sup>53</sup> In *Howell*, an innocent spouse received the proceeds from a fire insurance policy after her husband intentionally set fire to the property they owned as tenants by the entirety. The court declined to impute the husband's fraud to the wife.<sup>54</sup> It stressed that one party having rights under the policy is not penalized for the wrongful acts of another. Applying this principle to the Perez family's right to recovery, Satkin's criminal act would not preclude the family's right to insurance coverage.

The New Jersey Supreme Court's conclusion is sound. If a liability policy ostensibly provides coverage for an insured intentional wrongdoer, an injured third party should be afforded insurance coverage. The insurer can subsequently be indemnified by the insured.<sup>55</sup> In the instant case, however, this approach is flawed because of two erroneous assumptions. The first is that Satkin intended to cause Marilyn Ortega Perez' death. The second is that the policy contained no provision which would exclude insurance coverage for injuries caused intentionally. The latter assumption completely overlooks the major purpose of insurance, the socialization of risk from accidental rather than intentional losses.<sup>56</sup>

Satkin's policy explicitly limited insurance coverage to damages "caused by an occurrence."<sup>57</sup> "Occurrence" was defined as "an accident . . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."<sup>58</sup> If Satkin meant to cause the Perez child's death, then

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53. 130 N.J. 350, 327 A.2d 240 (App. Div. 1974).

54. *Id.* at 354.

55. See notes 31-49 *supra* and accompanying text.

56. R. KEETON, INSURANCE LAW § 1.2(a), at 2 (1971).

57. In 1966, insurance companies began using the term "occurrence" in their liability insurance forms, hoping that the use of this term would eliminate the need for an exclusion of intentionally caused injury. It had once been common for all liability policies to express coverage intent by way of the word "accident" but, because of the many legal problems which arose from its use in that context, it was abandoned. Other reasons for using "occurrence" were to eliminate the necessity of proving the exact moment at which damage was sustained (i.e., to clarify whether an accident must happen "suddenly" or whether it may result from a gradual process) and to guarantee that the incident happened within the policy period. 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 the accident should be viewed from the position of the insured or injured party. [Cas. and Sur. Section]. FIRE CAS. & SUR. BULLETINS (Nat'l Underwriters Co.) Occ-1 (1978).

58. 76 N.J. at 493, 388 A.2d at 611-12 (Clifford, J., dissenting) (quoting from Satkin's policy).

the insurance company would have no obligation to pay the Perez family.

The majority of the court justifies disregarding the definition of "occurrence" because the parties to the suit agreed that the factual record was limited to the policy in evidence.<sup>59</sup> The policy in evidence did not contain a definition of "occurrence" because Ambassador's counsel failed to include the page containing definitions.<sup>60</sup> Holding that it was bound by stipulations of fact,<sup>61</sup> the court made its decision without referring to Ambassador's definition of the term. It thereby avoided any analysis of the provision which was intended by Ambassador to exclude coverage for intended injuries.<sup>62</sup>

The majority's reasoning was justifiably attacked by both the concurring and dissenting opinions.<sup>63</sup> Even without Ambassador's definition of "occurrence,"<sup>64</sup> the court should have examined the meaning and the reasons for the term's use. New Jersey's Rules of Evidence allow judicial notice to be taken of such terms<sup>65</sup> so long

59. *Id.* at 481, 388 A.2d at 605.

60. *Id.* at 493-94 n.1, 388 A.2d at 612 n.1.

61. *Id.* Stipulations are agreements between attorneys regulating matters incidental to the proceedings or trial. *See Lewis v. The Orpheus*, 15 F. Cas. 492 (D. Mass. 1858) (No. 8,330), *aff'd*, 30 F. Cas. 859 (C.C.D. Mass. 1861) (No. 18,169); *Southern Colonization Co. v. Howard Cole & Co.*, 185 Wis. 469, 201 N.W. 817 (1925). They are not binding unless assented to by the parties or their representatives and are usually required to be in writing. *Holland Banking Co. v. Continental Nat. Bank*, 9 F. Supp. 988 (W.D. Mo. 1934). It is generally held that a stipulation may be repudiated if it was inadvertently or mistakenly made, provided the motion is made in sufficient time to prevent prejudice to the opposite party. *See, e.g., Miller v. Schafer*, 102 Ariz. 457, 432 P.2d 585 (1967). Consequently, Ambassador's attorney could have moved that such stipulation be withdrawn.

62. *See* notes 57-58 *supra* and accompanying text.

63. The concurring opinion "is based on uneasiness over whether the majority opinion demonstrates coverage under the policy, given the definition of 'occurrence.'" 76 N.J. at 487, 388 A.2d at 608 (Pashman, J., concurring). The dissent observes that "[c]onspicuously absent from the majority's analysis . . . is any discussion of the definition of 'occurrence,' which the policy defines as 'an accident . . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.'" 76 N.J. at 493, 388 A.2d at 611 (Clifford, J., dissenting). Accompanying this statement the dissent notes:

I do not understand how we can properly—or—intelligently decide this case without application of the policy's definition of 'occurrence.' I would accept as part of the record so much of the insuring agreement filed with us as contains the definitions of terms used elsewhere in the policy, see R. 2:5-4(a), or at the very least give the attorneys the opportunity to present any argument relating to the definition of occurrence as they might wish to make.

*Id.* at 481-82 n.1, 388 A.2d at 612 n.1 (Clifford, J., dissenting).

64. *See* notes 57-58 *supra* and accompanying text.

65. N.J. STAT. ANN. § 2A:84A (West 1976). Rule 9 Facts and law which must or

as "sources of reasonably indisputable accuracy"<sup>66</sup> are consulted.

As an alternative to Ambassador's definition, the court could have construed the term as a layman would understand it.<sup>67</sup> In *Wilkinson & Son, Inc. v. Providence Washington Insurance Co.*,<sup>68</sup> the New Jersey Superior Court held that in the absence of a definition in a policy, "the term must be given its plain, ordinary, and popular meaning and must be interpreted as understood by the average insured when purchasing the policy."<sup>69</sup> Thus, a layman might find "occurrence" defined as "[a] coming or happening; any incident or event, *especially one that happens without being designed or expected.*"<sup>70</sup> This definition provides the exclusionary language that the New Jersey Supreme Court said did not exist.

By failing to discuss the insurer's definition of "occurrence," the court missed the opportunity to clarify the standard of intent to be used in interpreting insurance policies. Because the insurer's definition of "occurrence" excluded intended injuries,<sup>71</sup> the court, by giving effect to this language, could have squarely faced the is-

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may be judicially noticed.

(1) Judicial notice shall be taken . . . of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

(2) Judicial notice may be taken, without request by a party, of . . . (d) such facts as are so generally known or of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute; and (e) specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources of reasonably indisputable accuracy.

N.J. STAT. ANN. § 2A:84A (West 1976). Rule 12 Judicial notice in proceedings subsequent to trial.

(1) The failure or refusal of the judge to take judicial notice of a matter or to instruct the trier of fact with respect to it shall not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

(2) The reviewing court in its discretion may take judicial notice of any matter specified in Rule 9, whether or not judicially noticed by the judge.

66. N.J. STAT. ANN. § 2A:84A (West 1976). Rule 9. See note 65 *supra*. In his dissent, Judge Clifford turned to Webster's Third New International and Black's Law Dictionaries to help construe the term. 76 N.J. at 495, 388 A.2d at 612. (Clifford, J., dissenting).

67. See generally Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

68. 124 N.J. Super. 466, 307 A.2d 639 (1973). The Supreme Court construes "occurrence" to mean an event or incident. 76 N.J. at 482 n.2, 388 A.2d at 606 n.2. This definition, however, ignores the fundamental principle of insurance that loss must be fortuitous.

69. 124 N.J. Super. at 469, 307 A.2d at 641.

70. *Farmers & Merchants Nat'l Bank v. Arrington*, 98 S.W.2d 378, 382 (Tex. Civ. App. 1936) (emphasis added).

71. 76 N.J. at 493, 388 A.2d at 611-12.

sue whether Joseph Satkin intended his tenants to suffer injuries or death. Had it done so, the court would have found that it could provide insurance coverage to the Perez family despite this exclusionary provision.

American courts have used three distinct approaches in attempting to define intent when construing insurance policies.<sup>72</sup> Some courts have held that "intentional" refers to the volitional act which produces an injury.<sup>73</sup> If the insured acted deliberately, the resulting injury is intentional and not accidental for purposes of the insurance policy. Other courts have held that intentional refers to the result achieved. Only where the insured meant to inflict the precise injury or degree of injury which in fact resulted should the injury be considered as not accidental.<sup>74</sup> Other courts have used an intermediate standard. These courts have held that "intentional" refers to the volitional performance of an act with a desire to cause some injury, although it need not necessarily be the precise injury or severity of damage that actually results.<sup>75</sup>

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72. *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240, 242 (Ind. Ct. App. 1975). *Compare Kraus v. Allstate Ins. Co.*, 379 F.2d 443 (3d Cir. 1967) with *Smith v. Moran*, 61 Ill. App. 2d 157, 209 N.E.2d 18 (1965); *Putman v. Zeluff*, 372 Mich. 553, 127 N.W.2d 374 (1964); and *Baldinger v. Consol. Mut. Ins. Co.* 15 App. Div.2d 526, 222 N.Y.S.2d 736 (1961), *aff'd*, 11 N.Y.2d 1026, 183 N.E.2d 908, 230 N.Y.S.2d 25 (1962). In *Kraus*, the court held that an intentional injury exclusion clause will operate to relieve an insurer of its duty to indemnify under a liability policy where the nature of the intentional acts of the insured is such that intent to cause harm may be inferred as a matter of law. In *Smith*, the Illinois Appellate Court allowed coverage to Glenna M. Smith when she was wounded by a gun shot by Dorothy Moran. Since Moran had intended to shoot another waitress in the restaurant, Smith's injury was the unintentional result of an intended act. Similarly, the *Putnam* court held that a boy who shot at a dog to stop the onrush of the animal, did not intend to destroy it. Consequently, insurance coverage was allowed under a comprehensive personal liability policy. The *Baldinger* court, in a tort action, held that insurance coverage existed when Allan Banks pushed Barbara Jane Baldinger and caused her injury. The court held that the injury was the unintended result of an intended act. Since the exclusion clause was unclear and ambiguous and because the clause did not express an intention to exclude from liability unintentional injuries resulting from deliberate acts, coverage was provided.

73. *Kraus v. Allstate Ins. Co.*, 379 F.2d 443 (3d Cir. 1967); *Wigginton v. Lumbermens Mut. Cas. Co.*, 169 So.2d 170 (La. Ct. App. 1964). See notes 77-82 *infra* and accompanying text.

74. *Hawkeye Sec. Ins. Co. v. Shields*, 31 Mich. App. 649, 187 N.W.2d 894 (1971); *Lyons v. Hartford Ins. Group*, 125 N.J. Super. 239, 310 A.2d 485 (App. Div. 1973), *cert. denied*, 64 N.J. 322, 315 A.2d 411 (1974); *Lumbermens Mut. Ins. Co. v. Blackburn*, 477 P.2d 62 (Okla. 1970). See notes 87-95 *infra* and accompanying text.

75. *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240 (Ind. Ct. App. 1975); *Continental W. Ins. Co. v. Toal*, 244 N.W.2d 121 (Minn. 1976); *Oakes v. State Farm Fire & Cas. Co.*, 137 N.J. Super. 365, 349 A.2d 102 (App. Div. 1975). See notes 83-86 *infra* and accompanying text.

Some courts have held that if a volitional act produced an injury, the exclusionary language for intentionally caused injuries applies.<sup>76</sup> The Restatement (Second) of Torts<sup>77</sup> adopts the position that if the insured acted, the resulting injury is intentional. This view holds that one intends the natural and probable consequences of his acts. Using such a standard, insurance coverage could be denied when an insured's intentional act resulted in an unintended injury.<sup>78</sup>

This view has been roundly rejected by the courts in liability insurance policy cases.<sup>79</sup> These courts recognize that although most acts are intentional in some sense, many unintended results flow from intentional acts.<sup>80</sup> Another reason for rejecting the Restatement position lies in the way courts construe insurance policies. When the language of an exclusionary clause is ambiguous, any doubts as to its meaning are resolved against the insurer who drafted the policy and who, therefore, could have prevented such ambiguity.<sup>81</sup> Since one purpose of liability insurance is to protect injured third parties, as between the liability insurer of a culpable actor and an innocent third party, it is better to place the risk of loss on the insured when intent to injure is unclear.<sup>82</sup> In *Ambassador*, the language of Satkin's policy did not expressly exclude coverage for unintended injuries which resulted from a deliberate act.

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76. *Kraus v. Allstate Ins. Co.*, 379 F.2d 443 (3d Cir. 1967); *Wigginton v. Lumbermens Mut. Cas. Co.*, 169 So. 2d 170 (La. Ct. App. 1964).

77. RESTATEMENT (SECOND) OF TORTS § 8A (1965) provides:

§ 8A. Intent

The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.

78. Judge Clifford followed this approach in his dissenting opinion. 76 N.J. at 494, 388 A.2d at 612 (Clifford, J., dissenting).

79. *Id.* at 488, 388 A.2d at 609 (Pashman, J., concurring). See *Grange Mut. Cas. Co. v. Thomas*, 301 So. 2d 158, 159 (Fla. Dist. Ct. App. 1974); *Cloud v. Shelby Mut. Ins. Co.*, 248 So. 2d 217, 218 (Fla. Dist. Ct. App. 1971); *Continental W. Ins. Co. v. Toal*, 244 N.W.2d 121, 124 (Minn. 1976); *Lumbermens Mut. Ins. Co. v. Blackburn*, 477 P.2d 62, 65 (Okla. 1970); *City of Burns v. Northwestern Mut. Ins. Co.*, 248 Or. 364, 371, 434 P.2d 465, 469 (1967).

80. *State Farm Mut. Auto. Ins. Co. v. Worthington*, 405 F.2d 683, 688 (8th Cir. 1978). An insured farmer fired his gun in the air to scare some boys who were stealing watermelons and killed one of the boys. Garnishment was allowed against his insurance company.

81. *Caspersen v. Webber*, 298 Minn. 93, 98, 213 N.W.2d 327, 330 (1973). In an action by a hatcheck girl who had been pushed by a patron against a metal message rack attached to the wall, the Minnesota Supreme Court held that, where no bodily injury was intended, such assault did not come within the exclusionary clause for intentionally caused injuries. See note 94 *infra*.

82. 76 N.J. at 489, 388 A.2d at 609 (Pashman, J., concurring).

The limits of the insurance policy, therefore, should be resolved against the insurer so that insurance coverage will be provided. This would not be possible, however, if the Restatement position were adopted in construing Satkin's insurance policy.

An intermediate standard for intent requires the volitional performance of an act with an intent to cause injury.<sup>83</sup> Under this view, intent is established either by showing an actual intent to injure, or by showing the nature and character of the act to be such that intent to cause harm to the other party may be inferred as a matter of law.<sup>84</sup> Applying this standard in the instant case, Satkin's arson conviction could be used to establish such intent thereby excluding insurance coverage. Certainly, one who starts a fire in an old, multistoried building at 3 a.m., without warning any of the inhabitants, should know that some of those persons could be seriously injured or killed.

This standard requires the insured to intend some injury, even if it is not the precise injury which results, before his conduct will be deemed intentional for purposes of denying insurance coverage. Nevertheless, the scope of insurance coverage is still ambiguous. The standard remains subject to the criticism that many unintended consequences flow from deliberate acts.<sup>85</sup> This would still exclude coverage to many innocent third parties and, therefore, fails to take into account the strong public policy of providing compensation to innocent victims.<sup>86</sup>

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83. *Lyons v. Hartford Ins. Group*, 125 N.J. Super. 239, 310 A.2d 485 (App. Div. 1973), *cert. denied*, 64 N.J. 322, 315 A.2d 411 (1974). *See Home Ins. Co. v. Neilsen*, 332 N.E.2d 240 (Ind. Ct. App. 1975). In this declaratory judgment action, the court held that, where two neighboring farmers had had a dispute and one had hit the other, the policy, which excluded liability for bodily injury caused intentionally, was ambiguous. Further, the court decided the policy would be construed to exclude coverage which was intended to cause injury. Although the defendant acted in self-defense and did not intend the injury to his neighbor, his actions fell within the exclusion. *Id.*

84. *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240 (Ind. Ct. App. 1975); *Continental W. Ins. Co. v. Toal*, 244 N.W.2d 121, 125 (Minn. 1976); *Oakes v. State Farm Fire & Cas. Co.*, 137 N.J. Super. 365, 367, 349 A.2d 102, 103 (App. Div. 1975); *City of Burns v. Northwestern Mut. Ins. Co.*, 248 Or. 364, 369, 434 P.2d 465, 468 (1967).

85. *State Farm Mut. Auto. Ins. Co. v. Worthington*, 405 F.2d 683, 688 (8th Cir. 1978).

86. *See note 35, supra.* In addition, it should be noted that this second standard is usually used in assault and battery cases where the insured specifically intends an assault but not the actual injury sustained. Thus, the question in such cases is not whether any harm was intended, but rather the severity of the harm intended. Since Satkin's act was not in the nature of an assault, these cases do not apply. This view is also often espoused in dicta by courts which go on to apply the principal that for the policy's exclusionary provisions to apply, the injury must be the intended result of

The third standard of intent, announced in *Lyons v. Hartford Insurance Group*,<sup>87</sup> is the one used by a majority of courts<sup>88</sup> and adopted by Judge Pashman in his concurring opinion.<sup>89</sup> Following this view, "coverage exists under insuring and exclusion clauses . . . for the unintended results of an intentional act, but not for damages assessed because of an injury which was intended to be inflicted."<sup>90</sup> The tortfeasor, therefore, must have an actual subjective desire to inflict a specific injury before insurance coverage is denied his victim.<sup>91</sup> "The rationale underlying the general rule is that the insurance contract excludes only intended injuries and there is no need or public policy justification for expanding this exclusion through presumptions of intent."<sup>92</sup> Certainly, sound public policy is furthered by compensating innocent victims.<sup>93</sup> Furthermore, if any term in an insurance contract is ambiguous, it should be construed against the insurance company which drafted the policy.<sup>94</sup> When these cases occur, courts will interpret the insurance

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an intentional act. *See, e.g.*, *City of Burns v. Northwestern Mut. Ins. Co.*, 248 Or. 364, 434 P.2d 465 (1967); *Vanguard Ins. Co. v. Cantrell*, 18 Ariz. App. 486, 543 P.2d 962 (1973).

87. 125 N.J. Super. 239, 310 A.2d 485 (App. Div. 1973), *cert. denied*, 64 N.J. 322, 315 A.2d 411 (1974). Lyons, who had been a police officer for 20 years, shot and killed a man after a long drinking bout. Dazed from the alcohol and a recent beating, he drew his gun to fire a warning shot, without an intent to kill or inflict bodily harm. Although he would have had no right to coverage had he meant to maim or kill, Lyons only intended to fire a warning shot and accidentally fired prematurely. Therefore, insurance coverage was allowed.

88. *E.g.*, *Smith v. Moran*, 61 Ill. App. 2d 157, 209 N.E.2d 18 (1965). *Putman v. Zeluff*, 372 Mich. 553, 127 N.W.2d 374 (1964); *Morrill v. Gallagher*, 370 Mich. 578, 122 N.W.2d 687 (1963); *Baldinger v. Consolidated Mut. Ins. Co.*, 15 App. Div. 2d 526, 222 N.Y.S.2d 736, *aff'd*, 11 N.Y.2d 1026, 183 N.E.2d 908, 230 N.Y.S.2d 25 (1962).

89. 76 N.J. at 608, 388 A.2d at 609.

90. 125 N.J. Super. at 245, 310 A.2d at 488. "It is not sufficient that the insured's intentional, albeit wrongful, act has resulted in unintended harm; it is the harm itself that must be intended before the exclusion will apply." *City of Burns v. Northwestern Mut. Ins. Co.*, 248 Or. 364, 369, 434 P.2d 465, 468 (1967).

91. *Id.*

92. *Continental W. Ins. Co. v. Toal*, 244 N.W.2d 121, 125 (Minn. 1976).

93. *See* note 35 *supra*.

94. *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240 (Ind. Ct. App. 1975); *Deodato v. Hartford Ins. Co.*, 143 N.J. Super. 396, 363 A.2d 361 (1976); *Hanover Ins. Group v. Cameron*, 122 N.J. Super. 51, 298 A.2d 715, (Ch. 1973); *Bowler v. Fidelity & Cas. Co.*, 53 N.J. 313, 250 A.2d 580 (1969); *Cincinnati Ins. Co. v. Mosley*, 41 Ohio App. 2d 113, 322 N.E.2d 693 (1974). Adherence to this method of policy construction is the result of the typical disparity between the bargaining positions of the insurer and the insured. The insurer's opportunity to draft the proposed terms of the agreement is also an opportunity for overreaching. Insurance contracts continue to be contracts of adhesion under which the insured is left little choice beyond electing among



contract to provide protection to the victims.<sup>95</sup>

Despite Satkin's conviction for felony-murder, the third standard would provide insurance protection to the Perez family. For the felony-murder rule to apply, it is not necessary to prove that the death or even the act resulting in death was intended.<sup>96</sup> The death may have been quite unexpected.<sup>97</sup> Consequently, although Satkin's arson may have been in wanton and wilful disregard of the safety of his tenants, it does not follow that he subjectively intended to kill or injure anyone. As the court stated:

The whole purpose behind Satkin's act of arson was to defraud the insurance company and to obtain payment for the value of his property. He never desired that his tenants suffer injury or death. While he certainly displayed a callous disregard for their safety, he did not want to see them harmed by his act. Thus, Satkin did not "expect or intend" the deaths of his tenants in the subjective sense that is required for his act to be excluded from the definition of "occurrence."<sup>98</sup>

The New Jersey Court concluded that Satkin's insurance policy obligated Ambassador to pay on Satkin's behalf those sums which Satkin was legally indebted to pay for the death of Marilyn Ortega Perez.<sup>99</sup> Because this indicates the strong public policy favoring compensating victims, the result is a desirable one. Conspicuously absent from the court's discussion, however, was any mention of whether the policy provides coverage given the definition of "occurrence."<sup>100</sup> The court avoids any analysis of policy language which was intended by the insurance company to exclude in-

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standardized provisions offered to him, even when the standard forms are prescribed by public officials rather than insurers. In most instances, regulation is relatively weak and even the provisions prescribed or approved by legislative or administrative action are in essence adoptions of proposals made by insurers' draftsmen. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970). See Appleman, "Jabberwocky" Revisited—Or, What Does My Policy Cover? 1977 INS. L. J. 279; See also Hollman, *Insurance as a Contract of Adhesion*, 1978 INS. L. J. 274. The insured usually has no participation in the arrangement or selection of words used, yet, the language of the insurance contract is selected with considerable care and deliberation by legal advisors and experts employed by and acting exclusively in the interest of the insurance company. Therefore, it is the insurance company who is at fault for any uncertainty. *Id.* at 276.

95. See Appleman, *supra* note 94, at 281.

96. R. PERKINS, PERKINS ON CRIMINAL LAW 42 (2d ed. 1969).

97. *Id.*

98. 76 N.J. at 491-92, 388 A.2d at 611. (Pashman, J., concurring).

99. *Id.* at 486, 388 A.2d at 608 (Schreiber, J.).

100. *Id.* (Pashman, J., concurring).

insurance coverage for injuries which are "either expected or intended from the standpoint of the insured."<sup>101</sup>

Because the court chose to disregard Ambassador's definition of "occurrence," the court also avoided any clarification of the standard of intent to be used in interpreting insurance contracts. Although three distinct approaches have been used,<sup>102</sup> most courts require proof of an actual, subjective desire to bring about the specific injury which is suffered before the injured party will be denied insurance protection.<sup>103</sup> This position has the advantage of providing maximum insurance protection to innocent victims without altering any provisions in the insurance contract. This standard

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101. Judge Clifford in his dissent argues that even if the policy in question can be read to provide coverage in its insuring agreement, there is an implied exclusion for the situation in which the insured burns a residential dwelling. He further contends that this implied exclusion is based, not on public policy, but on the expectations of the parties to the insurance contract. *Id.* at 495, 388 A.2d at 612-13. He quotes from Professor Robert E. Keeton's *Insurance Law*:

First, insurance contracts do not ordinarily cover economic detriment occurring so regularly that it is regarded as a cost rather than a risk of that activity or enterprise. Second, insurance contracts do not cover economic detriment that is not fortuitous from the point of view of the person (usually the insured) whose detriment is asserted as the basis of the insurer's liability.

R. KEETON, *INSURANCE LAW* § 5.3(a), at 278 (1971) (footnote omitted). Professor Keeton, however, specifically mentions a solution, similar to that adopted by the majority opinion, to provide coverage to an innocent victim:

Certainly fidelity to the principle that loss must be fortuitous may be preserved without precluding liability of the insurer to the victim. The victim, as to whom loss is fortuitous, can be allowed protection without giving coverage to a tortfeasor who intentionally injured him. For example, the insurer may be required to pay the victim but granted a right of reimbursement from the tortfeasor.

R. KEETON, *INSURANCE LAW* § 5.4(b), at 291 (1971) (citations omitted).

Although this remedy does adhere to the principle that loss must be fortuitous from the standpoint of the insured, other considerations must be examined. Current legislative trends seek to spread loss rather than fix responsibility. Veitch, *Criminality Insured: Law and Judicial Policy in Canada*, 44 *INS. COUNSEL J.* 73 (1977). It may also be true that the threat of criminal prosecution is a much better deterrent to criminal conduct than is the denial of insurance coverage under a liability policy. *Id.* Nevertheless, giving an insurer a cause of action against an insured may be an inadequate remedy. For example, if the insured has gone bankrupt, this cause of action is worthless. The time and expense required for litigation may also preclude an insurer from bringing an action against the insured when small amounts are involved. It should be recognized that denying insurance proceeds to a wrongdoer is not a sanction against criminal conduct but a matter of contract. By reforming the insurance contract to provide coverage for criminal acts, other insureds will be forced to bear the cost of such illegal conduct by paying increased insurance rates.

102. See notes 72-95 *supra* and accompanying text.

103. *Id.*

is further rationalized as a means to extend the insurance contract to its limits. There is no need or public policy justification for expanding the scope of exclusions through presumptions of intent.<sup>104</sup> Such a standard has the added advantage of putting insurers on notice of the degree of specificity courts require to prove intent when construing insurance policies. Without such a clarification, insurance companies are given little guidance in drafting their policies and, consequently, face more litigation to clarify these contract terms in the future.

Had the New Jersey Supreme Court not wished to enter the intent imbroglio, however, the majority opinion still could have provided a more satisfactory analysis to reach its result. First, the remedy the court granted to Ambassador should properly be termed a right to indemnification from its insured rather than a right of subrogation. Viewing *Ambassador* as a subrogation case yields the anomalous result that the insurance company was subrogated to a cause of action against its own insured. Subrogation does not embrace this situation. By analyzing the case in terms of subrogation, the New Jersey court created an unnecessary source of confusion for courts seeking to follow *Ambassador*.

Second, the comprehensive liability policy issued to Joseph Satkin was not an indemnity contract, but a contract to pay third parties in the event Satkin was responsible for the injuries sustained by such third parties. Ambassador's obligations under the contract were not conditioned on Satkin first being held legally liable for damages. Under this view of the contract, the court could have required Ambassador to pay the Perez family the proceeds from Satkin's policy. It then could have implied a right of indemnification.<sup>105</sup> The right of indemnity depends on the principle that everyone is responsible for the consequences of his own wrong, and if others are compelled to pay damages that ought to have been paid by the wrongdoer, they may recover from him.<sup>106</sup> This implied cause of action would, therefore, effectuate the policy of deterring intentional wrongdoing by making the wrongdoer suffer the financial consequences of his wilful act.

R. Stephen Lee

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104. *Continental W. Ins. Co. v. Toal*, 244 N.W.2d 121, 125 (Minn. 1976).

105. *Westville Land Co. v. Handle*, 112 N.J.L. 447, 171 A. 520 (N.J. 1934).

106. *Mayer v. Fairlawn Jewish Center*, 38 N.J. 549, 186 A.2d 274 (1962).