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Insurance -- Insurer's Liability for Injuries Intentionally Inflicted by Insured by Use of Automobile

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ful" conduct theory and the analogy to public welfare offenses, and of allowing the common law mistake of fact defense. In this manner, past precedents on the issue of intent could be overruled.

The legislative approach is applicable because under the present classification, the age limit of twelve reasonably corresponds to the purpose of the law and a declaration by the legislature that mistake of age will not be given credence would be appropriate. During the prohibited period of twelve to sixteen, the legislature has already recognized the consequences of the "at peril" doctrine and tempered it by requiring that it must be the female's first intercourse. This requirement will not always be sufficient to protect the male from injustice. To alleviate any possible injustice, the legislature could declare that intent is a necessary element or that mistake of age is to be a defense of this offense.

Punishment at the discretion of the court does not minimize the fact that the defendant is branded a felon, which in many cases is an unnecessary attribution of guilt to individual defendants and an irrational response by a society which cannot realistically expect to derive any general deterrence thereby.

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Insurance—Insurer's Liability for Injuries Intentionally Inflicted by Insured by Use of Automobile

In *Nationwide Mut. Ins. Co. v. Roberts*,[1] the North Carolina Supreme Court held that a person injured by one insured under a "compulsory" or "asigned risk" automobile liability insurance policy issued under the North Carolina Motor Vehicle Safety and Financial Responsibility Act of 1953[2] could recover from the insurer, notwithstanding the fact that the insured had intentionally inflicted the injury by assault and battery. The insurer disclaimed liability on three bases: that the coverage extended only to those persons injured as the result of an "accident"[3] and that injuries resulting

[1] 261 N.C. 285, 134 S.E.2d 654 (1964).
[2] N.C. GEN. STAT. §§ 20-279.1 to -279.39 (Supp. 1963).
[3] The term "accident" has been defined as follows:
An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event .... Hence, ... an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a mishap resulting in injury to a person or damage to a thing; a casualty. ... ... an unexpected happening not due to any negligence or malfeasance of the party concerned.

from an intentional tort are not "accidentally sustained";[4] that an exclusionary clause in the policy provided that an assault would be considered an accident unless committed by or at the direction of the insured; and that public policy precluded indemnifying an insured against the consequences of his own intentional acts. The court followed the decisions of other compulsory insurance states[5] and the more widely accepted view that an assault constitutes an "accident" within the coverage of automobile liability insurance.[6]

The assault was an accident, reasoned the court, from the viewpoint of the injured person if not from that of the insured.[7] It thus placed North Carolina in accord with the majority of jurisdictions that have decided this issue.[8] As the basis for this view, the court

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WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1959). The standard liability policy usually defines it as an undesigned or unforeseen occurrence of an afflictive or unfortunate character, resulting in bodily injury to a person other than the insured. See, *e.g.*, Raven Halls, Inc. v. United States Fid. & Guar. Co., 142 Misc. 454, 254 N.Y. Supp. 589 (Sup. Ct. 1932).

[4] In Scarborough v. World Ins. Co., 244 N.C. 502, 94 S.E.2d 558 (1956), it was held that one injured as the result of assaulting or voluntarily entering into a affray with another has not suffered an "accident" within the meaning of an accident insurance policy. In order for an injury to have been an accident it must have been unforeseen. *E.g.*, Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

[5] Wheeler v. O'Connell, 297 Mass. 549, 9 N.E.2d 544 (1937); Hartford Acc. & Indem. Co. v. Wolbarst, 95 N.H. 40, 57 A.2d 151 (1948).

[6] Jernigan v. Allstate Ins. Co., 269 F.2d 353 (5th Cir. 1959) (applying Louisiana law); Huntington Cab Co. v. American Fid. & Cas. Co., 155 F.2d 117 (4th Cir. 1946) (applying West Virginia law); New Amsterdam Cas. Co. v. Jones, 135 F.2d 191 (6th Cir. 1943) (applying Michigan law); Georgia Cas. Co. v. Alden Mills, 156 Miss. 853, 127 So. 555 (1930); Hartford Acc. & Indem. Co. v. Wolbarst, 95 N.H. 40, 57 A.2d 151 (1948); Malanga v. Manufacturers Cas. Ins. Co., 28 N.J. 220, 146 A.2d 105 (1958); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Haser v. Maryland Cas. Co., 78 N.D. 893, 53 N.W.2d 508 (1952); Wendell v. Union Mut. Fire Ins. Co., 123 Vt. 294, 187 A.2d 331 (1963); Wisconsin Transp. Co. v. Great Lakes Cas. Co., 241 Wis. 523, 6 N.W.2d 708 (1942).

[7] If looked at from the viewpoint of the insured, the obvious conclusion would have been that there was no "accident" because the occurrence would not have been unexpected or unforeseen, as is set out in the definition of that term. See note 3 *supra*.

[8] The following jurisdictions have elected to look at the occurrence from the viewpoint of the injured person: Jernigan v. Allstate Ins. Co., 269 F.2d 353 (5th Cir. 1959) (applying Louisiana law); Huntington Cab Co. v. American Fid. & Cas. Co., 155 F.2d 117 (4th Cir. 1946) (applying West Virginia law); New Amsterdam Cas. Co. v. Jones, 135 F.2d 191 (6th Cir. 1943) (applying Michigan law); Georgia Cas. Co. v. Alden Mills, 156 Miss. 853, 127 So. 555 (1930); Hartford Acc. & Indem. Co. v. Wolbarst, 95 N.H. 40, 57 A.2d 151 (1948); Malanga v. Manufacturers Cas. Ins. Co., 28 N.J. 220, 146 A.2d 105 (1958); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Haser v. Maryland Cas. Co., 78 N.D. 893, 53

applied the provisions and underlying purpose of the North Carolina compulsory act to the terms of the policy.[9] It found:

> The primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists. Its purpose is not, like that of ordinary [voluntary] insurance, to save harmless the tortfeasor himself. Therefore, there is no reason why the victim's right to recover from the insurance carrier should depend upon whether the conduct of its insured was intentional or negligent. In order to accomplish the objective of the law, the perspective . . . must be that of the victim and not . . . the aggressor.[10]

This rationale was also used by the court in deciding that the "assault and battery" exclusionary clause[11] contained in the liability policy did not control. It reasoned, in effect, that since the compulsory act is in itself a declaration of the policy that innocent victims should be compensated, any provision in a liability policy to the contrary would contravene the purpose of the act and therefore be invalid.[12]

In order to resolve the question concerning public policy against indemnifying an intentional tortfeasor, the court used the reasoning as applied to the first question[13] and also a specific provision of the compulsory act.[14] This section contains an authorization for a provision in each liability policy requiring the insured to reimburse the

N.W.2d 508 (1952); Wendell v. Union Mut. Fire Ins. Co., 123 Vt. 294, 187 A.2d 331 (1963); Wisconsin Transp. Co. v. Great Lakes Cas. Co., 241 Wis. 523, 6 N.W.2d 708 (1942).

The following jurisdictions have elected to look at the occurrence from the viewpoint of the insured: Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950) (applying Virginia law); Sontag v. Galer, 279 Mass. 309, 181 N.E. 182 (1932) (but only as to voluntary insurance); Commonwealth Cas. Co. v. Headers, 118 Ohio St. 429, 161 N.E. 278 (1928); Wendell v. Union Mut. Fire Ins. Co., 123 Vt. 294, 187 A.2d 331 (1963) (but only as to voluntary insurance).

[9] N.C. GEN. STAT. §§ 20-279.1 to -279.39 (Supp. 1963).

[10] 261 N.C. at 290-91, 134 S.E.2d at 659.

[11] The policy in *Roberts* provided that "an assault will be considered an accident unless committed by or at the direction of the insured." *Id.* at 290, 134 S.E.2d at 658-59.

[12] *Id.* at 290, 134 S.E.2d at 659. See, *e.g.*, Georgia Cas. Co. v. Alden Mills, 156 Miss. 853, 127 So. 555 (1930); Howell v. Travelers Indem. Co., 237 N.C. 227, 74 S.E.2d 610 (1953).

[13] See text accompanying note 10 *supra*.

[14] N.C. GEN. STAT. § 20-279.21(h) (Supp. 1963), which provides that "any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this article."

insurer for any payment made by the latter for which it would not have been obligated under the terms of the policy but were, nevertheless, required to be made because of the provisions of the act. By this reasoning, assuming the insured is not insolvent, the argument against allowing recovery is at once shown to be ill founded[15] as the ultimate burden of payment will remain on him and not the insurer.[16]

As stated, *Roberts* followed the majority rule in allowing recovery under a compulsory policy.[17] In regard to voluntary policies, however, the court had previously placed North Carolina in the minority by denying recovery for intentional injuries inflicted by the insured.[18] This result was reached in *Jackson v. Maryland Cas. Co.*,[19] which was decided before the enactment of the compulsory liability insurance provisions and therefore was based on an entirely voluntary policy. However, *Jackson* has been modified to some extent by the compulsory insurance provisions. After the adoption of compulsory insurance, *Swain v. Nationwide Mut. Ins. Co.*[20] announced the rule, which was reiterated in *Roberts,* that all policies are compulsory up to the statutory requirements and only the excess is voluntary. [21]

Thus, if an insured goes beyond compliance with the compulsory

[15] This rationale was not heavily relied on by the court. If the insured is obligated to reimburse the insurer and is in fact financially able to do so, allowing initial recovery from the insurer results in a possible circuity of action.

[16] Prior to the enactment of the compulsory liability insurance laws in North Carolina, if the insured failed to cooperate, failed to give the insurer notice of the accident, failed to aid the insurer in the manner provided for by the policy, or was guilty of an intentional tort, neither the insured nor the injured party would be allowed to recover. See, *e.g.*, Peeler v. United States Cas. Co., 197 N.C. 286, 148 S.E. 261 (1929). After the enactment of the compulsory law this result was overruled so that the injured party was no longer bound by the provisions in the policy setting out the insured's duties with respect to the insurer. The result today is that if the insured fails to cooperate with the insurer, the insurer can seek reimbursement from him. See, *e.g.*, Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960).

[17] See notes 5 & 6 *supra.*

[18] For cases representative of the minority, see Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949), *cert. denied,* 339 U.S. 914 (1950) (applying Virginia law); Sontag v. Galer, 279 Mass. 309, 181 N.E. 182 (1932); Commonwealth Cas. Co. v. Headers, 118 Ohio St. 429, 161 N.E. 278 (1928); Wendell v. Union Mut. Fire Ins. Co., 123 Vt. 294, 187 A.2d 331 (1963).

[19] 212 N.C. 546, 193 S.E. 703 (1937).

[20] 253 N.C. 120, 116 S.E.2d 482 (1960).

[21] *Id.* at 127, 116 S.E.2d at 487 (1960).

act and insures, for his own protection, in excess of the required amount, the insurer would be liable under *Roberts* up to the amount required by the compulsory act. But the *Jackson* rule would preclude liability beyond that amount.[22]

The next logical step from *Roberts* may well be to hold an insurer liable for punitive damages within the same limits. Generally, punitive damages are allowed when a tortfeasor is guilty of gross negligence, of an intentional or deliberate tort, or of conduct evincing a conscious and deliberate disregard of the interests of others.[23] Such conduct is usually described as willful, wanton, reckless, or intentional—*i.e.*, the type of conduct for which compensatory damages were held recoverable in *Roberts*. Punitive damages are justified on the theories that they punish the wrongdoer as well as deter him and others from similar wrongdoings.[24]

Using these general rules as a basis, the insurer may advance the following argument in an attempt to avoid liability for punitive damages: For such damages to deter, the burden of payment must remain on the wrongdoer; by allowing recovery on the policy, the burden would ultimately be shifted to the premium-paying public.

If a jurisdiction is committed to the general rule that punitive damages are awarded to punish the tortfeasor, the argument set out above for disallowing such damages would apparently have some merit if the burden of payment would be borne by the insurer and premium-paying public. This result, however, is not necessary in North Carolina because of the provisions of the compulsory act.[25] The North Carolina statute authorizes a provision in every liability policy that the insured reimburse the insurer for payments made by it as required by the act but not by the terms of the policy.[26] By this provision, assuming the insured was solvent, the ultimate burden of payment would remain on the tortfeasor.

If this argument against the allowance of punitive damages is

[22] Under N.C. GEN. STAT. § 20-279.1(10) (Supp. 1963), the result would be that the insurer is liable up to $5000 for injuries to one person; up to $10,000 for injuries to two or more persons; and up to $5000 for property damage.

[23] See, *e.g.*, Scott v. Donald, 165 U.S. 58, 87 (1897); Kirschbaum v. Lowrey, 165 Minn. 233, 236, 206 N.W. 171, 173 (1925); Gostkowski v. Roman Catholic Church, 262 N.Y. 320, 324-25, 186 N.E. 798, 800 (1933); McCORMICK, DAMAGES § 77 (1935).

[24] See PROSSER, TORTS § 2, at 9-12 (2d ed. 1955).

[25] See note 14 *supra* and accompanying text.

[26] N.C. GEN. STAT. § 20-279.21(h) (Supp. 1963). See note 14 *supra*.

overcome, an affirmative rationale may be found in the North Carolina standard policy, which specifies that the insurer agrees to pay "all sums which the insured shall become legally obligated to pay . . . for damages sustained by any person, caused by accident."[27] Several courts have decided, without discussing the question of reimbursement, that such language is sufficient to permit the recovery of punitive damages.[28] Reimbursement, however, would appear crucial to such a recovery in North Carolina because of its rule that punitive damages are awarded solely as punishment.[29] For the burden of punishment to fall on the insured, a rationale for reimbursement must be found. It is doubtful that reimbursement could occur if punitive damages were allowed under this clause of the policy.[30] While the court's liberal interpretation in *Roberts* could possibly be extended to allow recovery of punitive damages, a further argument against such recovery remains: Such recovery has no bearing on making the injured party whole, which is the purpose of the compulsory act.

Recovery of punitive damages up to the compulsory amount of liability insurance may have three adverse results. First, if the insured is solvent and reimburses the insurer, the former bears the burden of the award—just as he would if he initially satisfied the judgment. Since the insurer may have to take action to be reimbursed, a circuity of action is possible. Second, where the insured is insolvent, the insurer and the premium-paying public must bear the burden. Third, if the recovery is upon an assigned risk policy and the insured is insolvent, an anomaly results: To enable the insured to operate a vehicle on the public highways, he was assigned to an insurer who in turn must pay damages designed to punish the insured for his willful misuse of the highways. A greater

[27] Brief for Plaintiff, p. 7, Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

[28] See, *e.g.*, Ohio Cas. Ins. Co. v. Welfare Finance Co., 75 F.2d 58 (8th Cir. 1934) (applying Missouri law); United States Fid. & Guar. Co. v. Janich, 3 F.R.D. 16 (S.D. Cal. 1943); American Fid. & Cas. Co. v. Werfel, 230 Ala. 552, 162 So. 103 (1935); Maryland Cas. Co. v. Baker, 304 Ky. 296, 200 S.W.2d 757 (1947).

[29] *E.g.*, Waters v. Western Union Tel. Co., 194 N.C. 188, 196, 138 S.E. 608, 612 (1927).

[30] Under N.C. GEN. STAT. § 20-279.21(h) (Supp. 1963), a policy may provide for reimbursement of "any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this article." Thus, for reimbursement to occur, an award of punitive damages would have to be based on the act, not the policy itself.

punishment would be achieved by denying such a person the use of the highways and thus sparing innocent victims in the first place. But, however desirable, such a law would be indeed difficult to contrive.

RICHARD L. BURROWS

Investment Company Act—Procedure—Demand on Shareholders

The Investment Company Act of 1940[1] is a statutory attempt to regulate the internal structure and business conduct of investment companies. It specifically authorizes the Securities and Exchange Commission to investigate violations,[2] issue orders,[3] and seek injunctions.[4] A private right of action by the shareholder is not specifically authorized. The case of *Levitt v. Johnson*[5] faced squarely for the first time the problem of the source of the law to be applied in a private suit under the act.

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[1] 54 Stat. 789, as amended, 15 U.S.C. § 80a (1958), as amended, 15 U.S.C. § 80a (Supp. V, 1963).

[2] 54 Stat. 842 (1940), 15 U.S.C. § 80a-41 (1958).

[3] 54 Stat. 841 (1940), 15 U.S.C. § 80a-37 (1958); 54 Stat. 842 (1940), 15 U.S.C. § 80a-39 (1958).

[4] 54 Stat. 841 (1940), 15 U.S.C. § 80a-35 (1958); 54 Stat. 842 (1940), 15 U.S.C. § 80a-41 (1958).

[5] 334 F.2d 815 (1st Cir. 1964), *reversing* 222 F. Supp. 805 (D. Mass. 1963). The plaintiff, a minority shareholder, brought a derivative suit under the Investment Company Act of 1940, against the directors of the Fidelity Capital Fund, Inc., a Massachusetts corporation, on behalf of himself and other stockholders. The allegations generally were that the directors had paid excessive fees that constituted a waste of corporate assets. As to the condition precedent of making a demand on shareholders, the plaintiff alleged as excuse for failure to make demand that

> the Fund has more than 48,000 stockholders scattered all over the United States whose identity is subject to frequent changes. A demand upon the stockholders to take action would cast an unconscionable financial burden on the plaintiff in that the plaintiff would have to solicit proxies from all of the stockholders residing in every State of the Union and foreign countries. It would involve the conduct of a proxy fight, a proxy fight which would entail prohibitive expenses and would cause undue loss of time with the danger that the claims alleged might be barred by the Statute of Limitations.

222 F. Supp. at 807. The court then ruled that the Massachusetts law was to be applied; it provides that it "is only when the complaint alleges that the majority are corrupt or are otherwise incapable of acting in good faith that the demand upon the body of stockholders may be excused." *Id.* at 812. The circuit court reversed on the grounds that the application of the Massachusetts rule "negates the intendment of the act and underestimates the role to be played by the federal courts in the implementation of national regulatory legislation." 334 F.2d at 819.