

# Fortuity Clauses in Liability Insurance: Solving Coverage Dilemmas for Intentional and Criminal Conduct

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*The fundamental insurance principle of fortuity is protected by policy clauses which exclude coverage for losses resulting from intentional or criminal acts. However, Canadian courts have interpreted those clauses unevenly, in some cases diverging from the fortuity principle. One must ask: what is meant by “intentional” and “criminal”? Courts have used three perspectives—the objective, hybrid and subjective perspectives—to interpret the intentional act clause. The author advocates a wholly subjective approach, which would only exclude coverage for losses wilfully caused by the insured. Following the Ontario Court of Appeal in the Eichmanis case, courts have denied coverage for losses resulting from any criminal act, even those with no intent requirement. In the author’s view, this is inconsistent with both the fortuity principle and the comprehensive nature of liability insurance policies, which play a central role in the Canadian accident compensation system.*

*Courts have pushed the fortuity principle to the background in coverage cases because they are drawn to the morality of denying coverage for acts that are criminal or intentional. Instead of denying coverage only where the insured subjectively intended to do the loss-causing act, courts tend to mistakenly focus on punishing and deterring anti-social behaviour. However, insurance law, unlike tort law, is not a fault-based system designed to assess moral wrongdoing. Transforming fortuity clauses into morality clauses undermines the dual purposes of liability insurance—to compensate the innocent third party victim and to protect the insured’s wealth. The deterrent effect on moral hazard when such coverage is removed is also questionable. The author proposes a two-step approach to help courts focus on an insured’s subjective intent in deciding whether a criminal or intentional act is excluded from insurance coverage through operation of a fortuity clause.*

## Introduction

### I. Insurance Covers Fortuitous Losses

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and with public policy. Part III analyzes three distinct interpretive perspectives to intentional act fortuity clauses—the subjective, objective and hybrid perspectives. Part IV discusses how courts have further problematized the exclusion for losses resulting from an insured’s criminal conduct. In order to ground the proposed interpretive solution, Part V examines how the intentional and criminal act fortuity clauses tempt courts and litigants to shift their focus from a story about fortuity to a story steeped in inscrutable morality concerns. Part VI canvasses the importance of seeing insurance as a buttress of the public accident compensation system in order to ground the proposed interpretive solution. Part VII proposes a two-step interpretive approach designed to ensure that courts adhere to a subjective perspective when deciding whether a particular act is excluded from coverage by a fortuity clause. This solution maintains the coherence of fortuity in insurance.

## I. Insurance Covers Fortuitous Losses

The basic premise behind insurance is that it only protects against fortuitous losses, not against losses that are certain to occur.<sup>1</sup> This premise, however, has been so loosely applied that it has lost its innate helpfulness to courts and litigants.<sup>2</sup> Insurers can still operate profitable

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1. See e.g. *Non-Marine Underwriters, Lloyd’s of London v Scalera*, 2000 SCC 24, [2000] 1 SCR 551 [*Scalera*] (“insurance usually makes economic sense only where the losses covered are unforeseen or accidental. . .” at paras 68–69 per Iacobucci J); *Progressive Homes Ltd v Lombard General Insurance Co of Canada*, 2010 SCC 33 at paras 46–47, [2010] 2 SCR 245 (discussing definition of “accident”); *Liberty Mutual Insurance Co v Hollinger Inc* (2004), 236 DLR (4th) 635 at para 16, 183 OAC 146. For academic commentary, see e.g. Craig Brown, *Insurance Law in Canada*, loose-leaf, (Toronto, Ont: Thomson Carswell, 2002), ch 8 at 27–35 [Brown, “Insurance Law”]; Craig Brown, “‘Accidental Loss’ and Liability Insurance” (1984) 5:4 Otago L Rev 523 at 523 [Brown, “Accidental Loss”]; Bruce Chapman, “Allocating the Risk of Subjectivity: Intention, Consent and Insurance” (2007) 57:2 UTLJ 315; Jeffrey W Stempel, *Stempel on Insurance Contracts*, loose-leaf, 3d ed (New York, NY: Aspen Publishers, 2006), ch 1 at 37–68 [Stempel, “Insurance Contracts”].

2. See e.g. Kenneth S Abraham, “Peril and Fortuity in Property and Liability Insurance” (2000) 36:3 Tort & Ins LJ 777 (principle not self-evident); James A Fischer, “The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the

ventures by insuring a surprising spectrum of uncertainty, including many losses resulting from intentional or criminal behaviour.

Before considering what losses are excluded, one must understand what liability insurance covers. Today's standard non-automobile liability insurance policy provides broad-spectrum, all-risks coverage for loss-causing behaviour.<sup>3</sup> Commercial general liability insurance (CGL) and homeowners insurance are the two most common forms of non-automobile liability insurance available in Canada.<sup>4</sup> CGL policies insure commercial entities from risks associated with business, and are often hybrid policies that contain both property and liability coverage.<sup>5</sup> Homeowners insurance is also a hybrid, in that it provides property coverage for the home and its contents as well as liability coverage for the insured and those living with the insured. Both types of policies allow the loss-causing behaviour to occur anywhere in the world because the policies typically cover any damage or injury losses that the insured becomes "legally obligated to pay". As such, these policies operate as tort insurance.<sup>6</sup> The broad nature of coverage thus demands that insurers rely on exclusion clauses to control their risk exposure.

Most CGL and homeowners insurance policies actually do cover some intentional or criminal conduct including defamation, trademark

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Insured: A Policy in Search of a Justification" (1990) 30:1 Santa Clara L Rev 95 ("it is easier to state the concept than apply it in practice or to reconcile the applications" at 96).

3. See e.g. Erik S Knutsen, "Confusion About Causation in Insurance: Solutions for Catastrophic Losses" (2010) 61:4 Ala L Rev 957 at 962-63 [Knutsen, "Confusion about Causation"]; *Canadian Indemnity Co v Walkem Machinery & Equipment Ltd*, [1976] 1 SCR 309 [Walkem] ("negligence is by far the most frequent source of exceptional liability which [an insured] has to contend with. Therefore, a policy which would not cover liability due to negligence could not properly be called 'comprehensive'" at 316-17).

4. This article is not concerned with automobile liability insurance because it is designed by legislation to help spread the social costs of driving risks and thus does not exclude from coverage much standard fortuity-based behaviour that is excluded from coverage in other private market-based liability insurance products.

5. See e.g. Heather A Sanderson, Robert DG Emblem & J Lyle Woodley, *Commercial General Liability Insurance* (Markham, Ont: Butterworths, 2000).

6. The standard liability policy also provides coverage for the cost of a legal defence in the event the insured is sued as a result of the loss (which is how the insured becomes "legally liable" to compensate the third party accident victim).

and copyright infringement, employment discrimination, wrongful termination and invasion of privacy.<sup>7</sup> Insurers can also provide coverage for vicarious liability arising from certain intentional and criminal acts, such as sexual abuse. There can also be insurance coverage for negligent supervision of children or employees who may act intentionally or criminally. Intentionality and criminality alone, then, do not make a loss uninsurable. In seeking to understand what kinds of behaviour are insurable, it is helpful to think of insurable uncertainties as belonging to one of three categories: factual, temporal or extent uncertainties. Factual uncertainty exists when it is not clear whether an event will or will not occur.<sup>8</sup> Temporal uncertainty refers to a situation where an event is certain to happen but when it will happen is unpredictable. Life insurance is perhaps the best example of insurance built around temporal uncertainty. Extent uncertainty refers to a situation where monetary value of a loss is unknown. An example would be after-the-event insurance for damage to a large metropolitan building as a result of a fire. Both the insurer and insured know the event has occurred and they know it occurred in the past, but they do not know the value of the extent of the loss. The fact that losses are chance events within a risk pool allows the insurer to distribute payouts and control premium intake in a commercially sensible fashion.

It is key that insurers do not encourage insureds to seize control of these uncertainties, thereby making losses certain. Because insurance relies on fortuity, it unravels when the insured has complete control over whether a risk will materialize. Insurers know that people are generally risk-averse, and they design their products for the risk-averse insured who is reasonably prudent and reasonably concerned about protecting his own assets.

The presence of available insurance, however, could prompt insureds to behave less rationally and in a less risk-averse manner. Insurers must

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7. There is also insurance for punitive damages in some policies. In the property insurance context, there is insurance coverage for losses arising from a host of intentional and criminal conduct, including theft and robbery.

8. See e.g. Stempel, "Insurance Contracts", *supra* note 1, ch 1 at 38-39 (describing three kinds of certainty).

combat this moral hazard.<sup>9</sup> For this reason, insurers use fortuity clauses to attempt to exert control over the fortuity-frustrating behaviour of the insured.

## II. Controlling Fortuity in Insurance

Because insurers have written intentional and criminal act fortuity clauses into their liability policies, courts and legislatures have had to navigate coverage issues reflecting the moral hazard problem referred to above.

### *A. Public Policy: Criminals Cannot Insure against Their Own Crimes*

A common law public policy principle attempts to ensure that criminals should not be permitted to profit from their crime through insurance.<sup>10</sup> In *Brisette*,<sup>11</sup> where a husband had murdered his wife and

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9. The history of the term “moral hazard” itself tracks the normative transition of fortuity clauses into morality clauses, which will be described later. Moral hazard was originally coined to distance the burgeoning business of insurance from commercial gambling. Gambling has been, of course, a historically immoral pursuit. If one purposely changes the odds while gambling (like in insurance), this act creates a moral problem among the gamblers and the whole point of gambling (on chance) becomes pointless. The game becomes fixed when certainty is introduced. The same story applies to insurance. If an insured purposely brings about a certain loss because the insured has the safety net of insurance, and if an insurer is banking on that loss as a chance event, the insured’s behaviour frustrates the insurer’s reliance on rational actor-based fortuity for its actuarial calculation of the likelihood of risks materializing. See Tom Baker, “On the Genealogy of Moral Hazard” (1996) 75:2 Tex L Rev 237.

10. See e.g. Brown, “Insurance Law”, *supra* note 1, ch 8 at 35–38; Barbara Billingsley, *General Principles of Canadian Insurance Law* (Markham, Ont: LexisNexis Canada, 2008) at 169–76; *Demeter v Dominion Life Assurance Co* (1982), 35 OR (2d) 560, 132 DLR (3d) 248 (CA) (husband arranged for wife’s murder; daughter claimed for insurance proceeds but policy void due to public policy; “[t]he basic rule of public policy which is not disputed is that the courts will not recognize a benefit accruing to a criminal from his crime” at 562 cited to OR); *Brisette v Westbury Life Insurance Co*, [1992] 3 SCR 87 [*Brisette*]; *Oldfield v Transamerica Life Insurance Co of Canada*, 2002 SCC 22, [2002] 1 SCR 742 [*Oldfield*]; *Goulet v Transamerica Life Insurance Co of Canada*, 2002 SCC 21 at 738–39, [2002] 1 SCR 719 [*Goulet*] (public policy principle did not bar coverage where life

tried to claim available life insurance, the Supreme Court of Canada held that public policy prevents such an incongruous result. In contrast, in *Oldfield*,<sup>12</sup> the life insured (a drug smuggler) died when a cocaine-filled condom ruptured in his stomach, and the Supreme Court decided that the criminal nature of his actions did not preclude the beneficiary of the policy from collecting the proceeds. In *Brissette*, the husband had committed an intentional criminal act in order to benefit personally from the insurance, whereas in *Oldfield*, the insured expected to live, and did not intend his criminal act to produce any insurance benefits. This reasoning is based in fortuity—if the insured does not intend the loss, public policy does not oust coverage. The public policy principle acts as a safeguard against the moral hazard of incentivizing criminal conduct. But because that principle prompts a court to think about insureds profiting from crime, it risks being stretched beyond its fortuity-based purposes. For example, in *Lindal*,<sup>13</sup> the principle barred

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insured died while planting a car bomb which unexpectedly exploded); *Mousseau v Budget Car Rentals Toronto Ltd* (1998), 35 MVR (3d) 50 (available on QL) (Ont Ct J (Gen Div)) (benefits denied due to public policy when insured intentionally backed vehicle into another person); *Taylor v Co-operative Fire and Casualty Co*, [1984] 35 Alta LR (2d) 77, 57 AR 328 (QB) (public policy did not bar coverage when shotgun unintentionally discharged while insured was wrestling with victim, even though insured was convicted of criminal negligence, because insured did not intend to injure victim).

11. In *Brissette*, *supra* note 10 at para 9, Sopinka J said that “a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds”. However, in both *Oldfield*, *supra* note 10 at para 3 and *Goulet*, *supra* note 10 at para 55, the Supreme Court later held that the public policy principle did not apply to an innocent beneficiary claiming through the estate of a deceased wrongdoer.

12. *Oldfield*, *supra* note 10 at para 16.

13. *Home Insurance Co v Lindal*, [1934] SCR 33 [*Lindal*]. The court held that public policy barred a drunk driver from relying on automobile liability insurance coverage because he acted criminally in bringing about the loss and should not “benefit” from the protection of liability insurance. The Court acknowledged that this would remove any possible source of compensation for the third party accident victim. Such a result seems nonsensical: the public policy principle could have had no deterrent effect because the driver did not intend to cause the loss. The Ontario Court of Appeal held as much in *Stats v Mutual of Omaha Insurance Co* (1976), 14 OR (2d) 233 at 243, 73 DLR (3d) 324 (CA) [*Stats*]. The Alberta Court of Appeal also refused to follow *Lindal*, above, in *Devlin v Co-operative Fire and Casualty Co*, [1978] 11 AR 271 at 295, 90 DLR (3d) 444 (CA)

automobile liability coverage for a drunk driver, leaving the injured victim uncompensated. Fortunately, the case now has little application.<sup>14</sup>

If criminals should not profit from their crimes, is a criminal insured who causes injury to a third party accident victim “profiting” from the fact that liability insurance pays for the damages? It is true that the insured can shirk the personal responsibility to pay for the victim’s losses. However, the insurer, in paying the criminal insured, is actually primarily benefitting the injured accident victim and not the criminal insured, who will likely not have sufficient assets to satisfy a judgment in favour of the victim. Therefore, competing public policy principles—ex post deterrence of criminal acts versus ex ante compensation for the victim—must be balanced.<sup>15</sup> Provincial legislatures have come down in favour of compensation in the automobile insurance context by providing, for example, that automobile liability coverage is not ousted when a negligent driver acts criminally and causes harm to a third party. It should also be remembered that many acts deemed criminal are

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[*Devlin*], holding that “it would be an error to apply public policy to preclude a passenger from recovering from her driver’s insurer” in a motor vehicle accident. Provincial mandatory automobile insurance regimes now stipulate that automobile liability coverage is not removed if the insured driver acts criminally in bringing about the loss. See e.g. *Insurance Act*, RSO 1990, c I.8, s 258(4)(c); *Insurance Act*, RSA 2000, c I-3, s 635(4); *Insurance (Vehicle) Act*, RSBC 1996, c 231, s 76(6); *Jochin v Abel* (2003), 64 OR (3d) 475, 170 OAC 294.

14. In fact, the proceedings of a 1942 meeting indicates that, despite *Lindal*, *supra* note 13, the Association of Superintendents of Insurance of the Provinces of Canada agreed that public policy should not be invoked as a defence to coverage unless the loss itself was intended by the insured who committed the crime in a deliberate fashion (the insured’s subjective intent would govern application of the public policy principle). See G William Reed, “Insurance–Automobile–Passenger Hazard–Public Policy–Attempt to Commit Murder and Suicide–Degree of Proof” (1953) 31:3 Can Bar Rev 319 at 325–26.

15. See e.g. Brown, “Insurance Law”, *supra* note 1 at 8–35 (“[T]o the extent that denial of coverage is supposed to inflict (as opposed to mitigate) punishment, it seems misplaced. It is one thing to deny indemnity for a fine or other punishment, another to suggest that forfeiture of insurance money will succeed where criminal sanctions and societal disapproval have failed. A rule denying recovery also ignores the fact that, in liability insurance cases, it is the victim who is penalised for the insured’s anti-social behaviour”); Billingsley, *supra* note 10 at 175 (results could be “manifestly unfair” to remove proceeds of insurance to be payable to innocent third party claimants).

themselves fortuitous accidents at heart, such as losses resulting from criminal negligence or from any other crime where the subjective mental component, or *mens rea*, is not a required element. Under the public policy principle, a criminal would only lose coverage if the loss, or “profit” to the insured, was intended as a result of the criminal conduct.

### *B. Legislation Refining the Application of the Public Policy Principle*

Provincial legislatures refined the application of the public policy principle in those instances where the criminal insured acted with intent to bring about the loss, unless the insurance contract provides otherwise.<sup>16</sup> This approach moves away from the morality-based reasoning in *Lindal* and towards a fortuity-based understanding of insurance.<sup>17</sup>

Because nearly all non-automobile liability insurance contracts provide some guidance on when an insured’s intentional conduct (criminal or not) ousts coverage for a loss, these statutory responses are rarely determinative in insurance coverage disputes.<sup>18</sup> The standard homeowners liability exclusion, which excludes coverage for intentional or criminal acts, is not necessarily an answer to provincial insurance

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16. See e.g. *Insurance Act*, RSO 1990, c I.8, s 118 which states:

Unless the contract otherwise provides, a contravention of any criminal or other law in force in Ontario or elsewhere does not, by that fact alone, render unenforceable a claim for indemnity under a contract of insurance except where the contravention is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage, but in the case of a contract of life insurance this section applies only to insurance undertaken as part of the contract whereby the insurer undertakes to pay insurance money or to provide other benefits in the event that the person whose life it insured becomes disabled as a result of bodily injury or disease.

Other provinces have similarly worded statutes. See e.g. *Insurance Act*, RSA 2000, c I-3, s 529(2); *Insurance Act*, RSNS 1989, c 231, s 13(2); *Insurance Act*, RSBC 1996, c 226, s 2.3.

17. See Reed, *supra* note 14 at 323–26 (the genesis of a British Columbia statutory section enacted in 1948 tracked an insurance industry agreement that the public policy principle should only be applied in situations where the insured committed a deliberate crime and intended to cause the loss).

18. *Supra* note 16.

statutes. The wording of the intentional or criminal act clause does not clarify the requisite intent to deem the loss-causing action “criminal”. It is unclear whether merely adding “criminal act” to the intentional act portion of the exclusion in a liability insurance policy ousts coverage for non-fortuitous criminal behaviour.<sup>19</sup> As will be discussed below, one arrives at ludicrous insurance coverage results if one interprets this “criminal act” extension on the intentional act exclusion so that it removes coverage for all criminal acts, whether those acts are fortuity-frustrating or not.

### *C. Fortuity Clauses in Insurance*

Insurers have by no means relied entirely on either the public policy principle or provincial statutory provisions to keep moral hazard in check,<sup>20</sup> but have also included fortuity clauses in their policies. A fortuity clause is a contractual memorial of the fortuity principle inserted into an insurance policy. It is drafted so an insured can ex ante adjust his behaviour to avoid bringing about a certain loss in question. Fortuity clauses exist in a variety of forms in various insurance policies.<sup>21</sup> In the liability insurance market, fortuity clauses are particularly challenging to draft because coverage for loss-causing behaviour is so broad and the character of loss-causing behaviour is so varied and

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19. Yet that is what the Ontario Court of Appeal held in *Eichmanis v Wawanesa Mutual Insurance Co* (2007), 84 OR (3d) 668, 278 DLR (4th) 15 (CA) [*Eichmanis* cited to OR] (commission of criminal act alone removes liability coverage, regardless of insured’s intent).

20. Abraham, *supra* note 2 at 782–90 notes that there should be no need for independent, extra-contractual legal principles about fortuity in insurance when the contractual language of the insurance policy itself provides for fortuity considerations. Indeed, he argues that looking both to the contractual language and to the public policy fortuity principle is to duplicate effort and risk inconsistent decisions.

21. An exclusion preventing life insurance proceeds to be paid if the insured commits suicide is one example of a life insurance fortuity clause. Another example is the coverage definition of “accident” in accidental death and dismemberment insurance policies, which is discussed in the note below. In property insurance, a clause excluding coverage if a dwelling is vacant or unoccupied is also aimed at prompting an insured to exert control over the fortuity of a loss occurring.

unpredictable. Insurers seek to exclude from coverage those identifiable categories of behaviour which they deem a priori to be non-fortuitous.<sup>22</sup> One example is the “intentional act” exclusion clause, which excludes coverage for damages resulting from the “intentional acts” of the insured—acts where an insured wilfully brings about a loss. Similarly, a “criminal act” exclusion clause excludes coverage for losses arising from criminal behaviour. Insurers found in crimes a ready-made sub-group of a number of non-fortuitous losses, as most crimes involve some ensuing loss plus the mental intent to bring about that loss. The losses arising from crimes such as murder, arson, and assault are examples of nonfortuitous losses which an insured could consciously avoid bringing about.

Nearly all liability policies have a specific clause ousting coverage for intentional fortuity-frustrating behaviour that results in a loss.<sup>23</sup> The phrasing of the clause varies with each insurance product line. CGL policies exclude losses “expected or intended from the standpoint of the

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22. The first conduct-based fortuity clause, designed to ensure that an insured did not unreasonably increase the risk of a loss, was actually a clause granting coverage to insureds. Insurers simply defined what they would pay for: “accidents”, which are necessarily fortuitous events. So if insurance covered only accidents, and not certainties, insurers could keep fortuity in check. See e.g. *Stats, supra* note 13 (in the context of the definition of “accidental bodily injuries” resulting from drunk driving).

Over time, the market became segmented with a variety of insurance products—life and health insurance, accident insurance, property insurance and so on. Merely using the word “accident” as a coverage limitation was no longer an appropriate tool to rein in moral hazard for all lines of insurance. The most popular insurance products today are hybrid policies which offer both property and liability insurance: homeowners insurance, which insures the property of the home and provides comprehensive liability coverage to the insured; and automobile insurance, which insures the vehicle itself and protects against liability arising from its use or operation. Using “accident” to denote what is covered by such a wide variety of property and liability losses is problematic, so other phraseology has been adopted for various types of insurance. For accidental death and dismemberment insurance, however, the term “accident” is still relied upon as the predominant way of expressing the concept of fortuity.

23. See e.g. Mary Coate McNeely, “Illegality as a Factor in Liability Insurance” (1941) 41:1 *Colum L Rev* 26 at 39–40 (criminal act exclusion serves the same end as public policy principle).

insured” (the “expected or intended” exclusion clause).<sup>24</sup> Homeowners insurance policies remove coverage for losses arising out of the insured’s “intentional acts”<sup>25</sup> or “intentional, wilful conduct” (the “intentional act” exclusion clause), or losses resulting from an insured’s “intentional or criminal act or failure to act”<sup>26</sup> (the combined “intentional/criminal” act exclusion clause). In Canada, this difference in the phrasing of these specific fortuity clauses, as between homeowners policies and CGL policies, has resulted in different outcomes in litigation.

#### *D. The Litigation Experience: Commercial General Liability Policies versus Homeowners Policies*

There has been a remarkable amount of litigation about the meaning of the intentional and intentional/criminal act exclusion clauses in homeowners policies. Where an insured’s conduct can be seen as intentional or criminal, courts struggle to determine coverage because the meaning of such clauses is not clear from their wording. Should intentional acts be interpreted from the perspective of the reasonable person, or the subjective perspective of the insured? Are acts that cause only some of the loss, but not all of it, intentional? Will the commission of any crime trigger the intentional/criminal act exclusion clause, regardless of the insured’s intent?

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24. See e.g. *Thorne v Royal & SunAlliance Insurance Co of Canada* (2003), [2004] 261 NBR (2d) 119, 230 DLR (4th) 587 (CA) [*Thorne*] and *Bluebird Cabs Ltd v Guardian Insurance Co of Canada* (1999), 173 DLR (4th) 318, 66 BCLR (3d) 86 (CA). While this article examines fortuity clauses in non-automobile liability insurance, its analysis and its conclusions apply equally to fortuity clauses in other types of insurance, including property and life insurance. See also Mark G Lichy & Marcus B Snowden, *Annotated Commercial General Liability Policy*, looseleaf (Aurora, Ont: Thomson Reuters Canada, 2010), ch 14 at 1, 10–11 and Gordon G Hilliker, *Liability Insurance Law in Canada*, 4th ed (Markham, Ont: LexisNexis Canada, 2006) at 235–36 (most commercial liability policies use the “expected or intended” exclusionary language).

25. Or sometimes “intentional, wilful acts”. Often in conjunction with an exclusion for “criminal” conduct.

26. See e.g. the exclusion in *Eichmanis*, *supra* note 19 (“intentional or criminal act or failure to act” at 678).

In contrast, there are only a handful of reported cases on the CGL fortuity clause, which excludes losses “expected or intended” from the standpoint of the insured.<sup>27</sup> Each has merely confirmed that unless the insured subjectively intended the loss, coverage will be granted.<sup>28</sup>

Despite the relatively litigation-free history of the CGL “expected or intended” exclusion, insurers have refrained from using the “expected or

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27. *Thorne*, *supra* note 24 (self-defence not “expected or intended” in CGL context for fight in gentlemen’s hockey game; duty to defend owed by insurer); *Dyne Holdings Ltd v Royal Insurance Co of Canada*, [1995] 127 Nfld & PEIR 211 (available on WL Can) (PEISC (TD)) (allegations of malicious conspiracy cannot be anything but intentional, so no duty to defend arises); *Pilot Insurance Co v Tyre King Tyre Recycling Ltd* (1992), 8 OR (3d) 236, 10 CCLI (2d) 264 (Ct J (Gen Div)) (fire by vandals not expected or intended by “insured” (as opposed to by vandals), so coverage attaches).

28. Most American insurers revised the fortuity clauses in their CGL policies in 1966, moving from wording similar to that of the Canadian homeowners clause (“caused intentionally by or at the direction of the insured”) to a format identical to the Canadian CGL “expected and intended” clause. There was confusion with the original wording because it was not clear whether coverage could be granted where the insured had, for example, assaulted a third party as long as the third party did not provoke the attack. This produced unpredictable litigation results, so most insurers in the United States revised the clause to oust coverage for losses “expected or intended from the standpoint of the insured”. This confirmed that it was the insured’s intent which governed coverage determination, not the intent of the third party victim.

However, despite this revision to the “expected or intended” clause, American courts continue to diverge on how to interpret it. In contrast to litigation with the identically-worded Canadian CGL clause, American courts interpreting the “expected or intended” clause split along the same three lines as the Canadian courts have in interpreting the “intentional/criminal act” exclusion in homeowners policies. See Stempel, “Insurance Contracts”, *supra* note 1, ch 1 at 69; Robert H Jerry II & Douglas R Richmond, *Understanding Insurance Law*, 4th ed (New Jersey: LexisNexis, 2007) at 459. It is a puzzle why the importation of the American phraseology into Canadian CGL policies effectively shut down coverage litigation in Canada while litigation over the same wording has continued in the United States. One reason may lie in the fact that Canada has a much more literalist and contractualist tradition in insurance contract interpretation. Also, the United States had a much longer and more active history of litigation over fortuity clauses before the CGL wording changed in 1966, and the pre-1966 precedents likely guided the interpretation of the “expected or intended” clause in that country. Litigation over the homeowners exclusion is just as active in the United States as in Canada, and involves the same interpretive questions that have arisen with respect to the exclusion in Canada.

intended” wording in homeowners policies. The reasons for this are likely simple: path dependence and judicial precedent.<sup>29</sup> Insurers have enjoyed frequent success in court because of the ambiguity of the “intentional act” and “criminal act” wording in the intentional/criminal act exclusion, which has at times enabled them to avoid covering a loss. If the insurer’s litigation costs are less than the amount it might save by revising the clause, it pays to leave the wording unclear. Therefore, this article deals with fortuity clauses in homeowners insurance policies that target intentional and criminal conduct, because there appears to be no interpretive issue with the CGL “expected or intended” exclusion. That phenomenon, in itself, may be evidence that commercially sensible insurance coverage requires that the subjective intent of the insured should govern the applicability of fortuity clauses.

### III. Excluding Coverage for Intentional Conduct

Nearly all Canadian homeowners policies seek to exclude coverage for losses brought about by some kind of intentional conduct on the part of the insured, using either the intentional act or intentional/criminal act terminology. Intentional conduct does not include negligence,<sup>30</sup> gross negligence, recklessness, carelessness, foolishness and stupidity. Each of those types of behaviour may have the potential to bring about loss, but they all still lie somewhere along the spectrum of uncertainty. An intentional act lies beyond the end of the spectrum and makes loss a certainty. In determining whether the intentional act exclusion clause applies, the only relevant intent is the insured’s intent to cause a particular type of harm.<sup>31</sup> A gun is fired with the intent to murder. A punch is thrown with the intent to hurt the

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29. See e.g. Knutsen, “Confusion About Causation”, *supra* note 3 at 998 (insurers incentivized not to redraft policies).

30. See e.g. *Stats*, *supra* note 13 at 1165 (in the context of the definition of “accidental bodily injuries” resulting from drunk driving).

31. See e.g. *Scalera*, *supra* note 1 (coverage ousted only for intent to injure, not intent to act because “most every act of negligence can be traced back to an ‘intentional. . .act or failure to act’” at para 92 per Iacobucci J); Billingsley, *supra* note 10 at 160.

target. A fire is lit with the intent to burn a building. If the insured lacks the intent to bring about the harm that results from that particular crime or tort, the moral hazard envisioned by the fortuity clause is not present. Without the intent to commit a specific harm, none of the losses resulting from these types of behaviour would occur.

The exclusion clause seeks to keep moral hazard at a level that is consistent with the basic idea of insurance as protection against fortuitous occurrences. First, by acting as an explicit *ex ante* signaling mechanism, it warns insureds (at least those who read their policy) that losses resulting from intentional acts are excluded from coverage. Second, it acts as an *ex post* check on behaviour by precluding coverage after the intentional behaviour has caused a loss. This communicates to the insured, to those in the same risk pool, and to those who hear about what has happened, that coverage is lost when deliberate actions move a risk from the realm of fortuity to the realm of certainty.

An exclusion removing coverage for losses resulting from intentional conduct is simple to apply when the insured demonstrates both the intent to commit the act and the intent to bring about the loss. When a bar brawler intentionally punches another patron and intends to break his nose, the exclusion certainly applies. These simple cases are not litigated. However, what if the bar brawler only means to brush his fist by the patron's nose, in an attempt to scare him, but the fist accidentally connects? Would this trigger the exclusion clause? The behaviour featured in the cases at the interstices of this particular fortuity clause is not easily categorized as either intentional or unintentional. The clause is deceptively complex. It cannot mean "every physical action committed by an insured" because every action requires some level of intent. In a baseball game, if the catcher moves his arm intentionally to catch the ball and accidentally strikes the umpire with his glove, the resulting injury is not an intentional act. Interpreting it as such for the purposes of a fortuity clause would render illusory the broad and comprehensive liability coverage in the policy. The key to interpreting the intentional act exclusion is to remember its purpose to combat moral hazard and to maintain the principle of fortuity.

### A. The Objective Interpretive Perspective

Some Canadian courts apply an objective interpretive perspective when determining whether an intentional act exclusion clause removes coverage. Under this approach, a loss resulting from the “natural and probable consequences” of the insured’s actions triggers the exclusion clause. This test is akin to the tort standard of reasonable foreseeability: what would a reasonable insured have expected to be the natural and probable consequences of her actions? In a leading example—*Co-operative Fire & Casualty Co v. Saindon*—the insured lunged at a neighbour with a whirling lawnmower, intending to scare him.<sup>32</sup> The neighbour put up his hands to protect himself and was cut by the rotating blades. In denying coverage to the insured, the Supreme Court of Canada found that a reasonable person would expect injury to follow from such an act, no matter what subjective intent was behind it.<sup>33</sup>

The objective perspective is the most coverage unfriendly of the three perspectives. It ignores what the insured subjectively intended, favouring a more broad-based societal view of the consequences of intentional acts. As a check on moral hazard, the objective perspective is heavy-handed and over-deters an insured’s behaviour. Failure to act reasonably in a situation of uncertainty—be it factual, temporal or extent uncertainty—is not the type of moral hazard that fortuity clauses are designed to target for insurers. Furthermore, evaluating an insured’s conduct after the fact—using the lens of “reasonableness”—can put coverage at risk for conduct that most insureds at the time would think attracts insurance coverage, like negligence, gross negligence,

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32. [1976] 1 SCR 735 [*Saindon*]. See also *Long v Dominion of Canada Gen Insurance Co* (1998), 9 CCLI (3d) 81 at para 51 (available on QL) (Ont Ct J (Gen Div)) (insurer had no duty to defend allegations arising from sexual assault; *Saindon* did not establish a subjective test for intention); *Raywalt Construction Co v Allstate Insurance Co of Canada*, 2010 ABCA 320, 439 AR 287 [*Raywalt*] (insured lost coverage because he was aware of the real risk of harm and knew or ought to have known of risk of damage to property from fire); Malcolm A Clarke, *The Law of Insurance Contracts*, 4th ed (London, UK: LLP, 2002) at 600-02 [Clarke, “The Law of Insurance”] (noting three interpretation trends for excluding expected losses).

33. *Saindon*, *supra* note 32.

recklessness, and stupidity. Because this perspective “eviscerates” coverage for virtually any actions that could be deemed risky, most American courts and insurance law scholars have also rejected it.<sup>34</sup> It restricts coverage in an unpredictable fashion and is mostly unrelated to controlling fortuity.

### *B. The Hybrid Interpretive Perspective for Unintended Consequences*

Some Canadian courts have used a hybrid subjective-objective perspective to determine whether an intentional act exclusion clause removes coverage for losses where the insured intended some injury but the resulting damage was worse than expected. For example, in *Buchanan*,<sup>35</sup> one student punched another student in the head, intending only to make some contact, but caused some more serious injuries. The Ontario Court of Appeal examined the insured’s conduct through the lens of reasonable foreseeability and inferred a specific intent to cause the full extent of the injuries, even though the insured may not have

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34. See Stempel, “Insurance Contracts”, *supra* note 1, ch 1 at 75; Jerry & Richmond, *supra* note 28 at 63C.

35. *Buchanan v GAN Canada Insurance Co* (2000), 50 OR (3d) 89, 21 CCLI (3d) 147 (CA) (schoolyard fight; intentional act exclusion removed coverage for all injuries assailant caused, even though gravity of injuries went beyond assailant’s intention). See also *Emeneau v Lombard Canada Ltd*, [2002] 206 NSR (2d) 174, 39 CCLI (3d) 107 (CA) (insured’s attempt to commit suicide via exploding truck which resulted in third party property damage was deemed an intentional loss, even though actual damage was more extensive than the insured contemplated; general intent to commit harm is sufficient to trigger exclusion); *Makowchik v RBC General Insurance Co*, 2010 ONSC 526 (available on WL Can) (Sup Ct J) (insured in bar fight committed intentional act that ousted coverage; act causing injury was not negligence since insured got drunk at bar first); *Meadows v Meloche Monnex Insurance Brokers Inc*, 2010 ONCA 394, 102 OR (3d) 312 (fighting in self-defence is still an intentional act caught by the intentional act exclusion, and it is not a negligent act; it is irrelevant if the result is more harmful than intended); Billingsley, *supra* note 10 at 160–62. *Contra* with *Graham v Coakley*, 2008 CarswellOnt 3277 (WL Can) (Sup Ct J) (forty-year-old black belt judo instructor acted in self-defence and threw nineteen-year-old who allegedly attacked the instructor first in a mall; no summary judgment on defence and indemnity issues because instructor denied he intentionally hurt the youth).

subjectively foreseen the consequences. The Court held that it would not be acceptable to find that some of the consequences of the insured's intentional conduct were covered (that is, the consequences he did not subjectively intend) but that other consequences of that same conduct were excluded from coverage (that is, the consequences he did subjectively intend). The insured will be deemed to have specifically intended all consequences of his intentional act.

This hybrid perspective holds the insured to a more flexible standard of behavioural control than the purely objective perspective. It is a less heavy-handed way of controlling factual and temporal uncertainty, since the insured benefits from a subjective perspective for evaluating whether or not he intended to increase moral hazard by controlling those types of uncertainty. However, because the hybrid perspective uses an objective test (reasonable foreseeability) for controlling extent uncertainty, the insured must still adhere to reasonable conduct when her acts increase the risk of a more severe injury than intended.

### *C. The Subjective Interpretive Perspective*

Many courts in Canada have rightly applied a subjective interpretive perspective to determine insurance coverage issues. This perspective deems the control of fortuity to be entirely within the hands of the insured, and looks to whether he intended both the injury and its specific consequences.<sup>36</sup> In *Scalera*,<sup>37</sup> a case about an intentional sexual

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36. See e.g. *RDF v Co-operators General Insurance Co* (2004), 246 DLR (4th) 461, 16 CCLI (4th) 5 (Man CA) (insured had duty to defend schoolboys who started a small fire in school because consequences of fire may not have been intended, although there was intent to start a fire); *Misirlis (Trustee of) v Continental Insurance Co* (2002), 47 CCLI (3d) 162 (available on CanLII) (Ont CA) (insured did not intend to cause economic harm to client); *Newcastle (Town of) v Mattatall* (1988), 52 DLR (4th) 356, 87 NBR (2d) 238 (CA) ("intentional act" exclusion inapplicable for boys who broke into a skating rink to steal, despite the fact that boys pled guilty to arson; intent of boys was to light a cigarette package to be able to see in the dark, not to burn down the rink); *Long Lake School Division No 30 of Saskatchewan Board of Education v Schatz* (1986), 18 CCLI 232, 49 Sask R 244 (CA) [*Schatz*] (teen intended to start fire while vandalizing school but thought he put it out; no intent to burn down the school and cause damage); *Lambton Cartage & Warehousing Ltd v Barraclough (Litigation Guardian of)* (1998), 10 CCLI (3d) 107 (available

assault on a school bus, the Supreme Court held that the intentional/criminal act exclusion clause was not triggered unless the insured subjectively intended to cause injury.<sup>38</sup> This reasoning echoes the dissent of Laskin CJC in *Saindon*,<sup>39</sup> where the insured only intended to scare, and not injure, the neighbour.

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on WL Can) (Ont Ct J (Gen Div)) at para 34 (genuine issue for trial as to whether “wilful and malicious acts” exclusion applied when a man lit a can of paint on fire to see in the dark, while attempting to steal paint in a warehouse; relevant issue was whether insured acted with specific intent); *Ellis Estate v Pilot Insurance Co*, [1991] OJ no 748 (QL) (Ct J (Gen Div)), aff’d [1995] OJ no 1040 (CA) (insured convicted of criminal negligence causing death when he gave victim a soft drink bottle containing methanol to drink; “caused intentionally” exclusion does not permit imputed intent nor exclude criminally negligent actions); *Board of Governors of University of Western Ontario v Yanush* (1989), 67 OR (2d) 525, 56 DLR (4th) 552 (HC) (insurance coverage for boys who piled toilet paper on drunk roommate and lit paper on fire for a joke; consequences were covered as “accident” because harm not deliberately intended); *Kaler v Red River Valley Mutual Insurance Co* (1995), 126 DLR (4th) 700, 30 CCLI (2d) 1 (Man CA) (taxi driver who defended himself in altercation with patron pled guilty to manslaughter when patron was stabbed by him; loss could be unintentional, even if criminally negligent); *Taylor v Co-Operative Fire and Casualty Co* (1984), 57 AR 328, 35 Alta LR (2d) 77 (QB) (coverage when shotgun unintentionally discharged while insured was wrestling with victim—even though insured convicted of criminal negligence—because insured did not have intent to injure); *Mitsios v Aviva Insurance Co of Canada* (2008), 89 OR (3d) 556, 58 CCLI (4th) 215 (Sup Ct J) (insurer had duty to defend store worker who put fellow worker in headlock and caused injuries, because no intent to injure).

37. *Scalera*, *supra* note 1.

38. The Court in *Scalera*, *ibid*, created a special exception to the subjective perspective when proving intent for sexual assault—intent is presumed. This is a policy choice—who could “negligently” sexually assault someone? However, as Denise G Réaume notes, the ones paying the price for this policy choice are the victims of sexual assault. It is the victims who are denied compensation as a result of the presumption of an insured’s intent because the end result is a removal of insurance coverage. See Denise G Réaume, “Insurance and Intentional Torts: The Case of ‘Sexual Battery’” (2004) 12:1 Torts Law Journal 76 (critiquing Iacobucci J’s analysis of the intentional conduct at issue in *Scalera*, *supra* note 1 as imputing intent for arguably negligent conduct). A similar abrogation of the subjective perspective appears to be in instances of liability coverage for defamation, where the intentional/criminal exclusion is held to apply to exclude the losses. See e.g. *Hodgkinson v Economic Mutual Insurance Co* (2003), 68 OR (3d) 587, 235 DLR (4th) 1 (CA).

39. *Saindon*, *supra* note 32.

The subjective perspective best balances both the interests of the insurer and that of the insured. It meets an insurer's moral hazard concerns by keeping factual, temporal and extent uncertainty within the control of the insured. It also keeps insurance coverage predictable for the insured because he knows that only the subjectively intended extent of the losses brought about will be excluded. This interpretive standard is therefore the most effective moral hazard behavioural deterrent of the three perspectives. Canadian insurance law scholars have consistently concluded that the subjective perspective is the most sensible solution to interpreting the intentional act fortuity clause.<sup>40</sup> At present, most

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40. See e.g. Chapman, *supra* note 1 at 316–19 (insurance coverage needs to be tied to the nature of the conduct because an insured's intentional conduct can turn an unpredictable risk into a more predictable loss for the insured and insurer); Brown, "Accidental Loss", *supra* note 1 ("it is only when the conduct goes beyond negligence to such an extent that the fortuity principle is undermined, that cover is appropriately precluded" at 535; the Supreme Court's decision in *Walkem* and Laskin CJC's dissent in *Saindon* reflects the correct approach, at 536–37); Billingsley, *supra* note 10 at 162 (a court should first search for subjective evidence of an insured's intent, in order to maintain consistency with other Canadian insurance contexts (which calls for a subjective test of the insured's intentions) and to avoid having coverage and exclusion clauses working at cross purposes); Réaume, *supra* note 38 (arguing that when intentional conduct is confused with actual intent in intentional torts in *Scalera*, *supra* note 1, even some negligent conduct is excluded).

American courts follow the subjective perspective,<sup>41</sup> and American insurance law scholars also support it.<sup>42</sup> The American insurance law context differs little from Canadian law in terms of interpretive

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41. See e.g. Christopher C French, "Debunking the Myth that Insurance Coverage is Not Available or Allowed for Intentional Injuries or Damage" *Hastings Business Law Journal* [forthcoming in 2011] at n 51; Lee R Russ et al, *Couch on Insurance*, loose-leaf, 3d ed (Deerfield, IL: Clark Boardman Callaghan, 2010), ch 103 at 62-67; *Jackson v State Farm Fire & Casualty Co*, 661 So 2d 232 (Ala 1995) (reaffirming the rule that "a purely subjective standard governs the determination of whether the insured expected or intended the injury" at 233); *Armstrong World Industries Inc v Aetna Casualty & Surety Co*, 45 Cal App 4th 1, 52 Cal Rptr 2d 690 (1996) (rejecting an "objective (should have known) standard" in favour of what the insured "actually knew or believed" at 719); *Vermont Mutual Insurance Co v Walukiewicz*, 290 Conn 582, 966 A 2d 672 at 681 (2009) (pure subjective standard applies in cases of self-defence, not the standards of reasonable foreseeability from tort and criminal law; insured's intent was not to cause injury but to defend himself); *Auto-Owners Insurance Co v Harrington*, 455 Mich 377, 565 NW 2d 839 (1997) (affirming lower court holding that the exclusion "requires a subjective inquiry into the intent or expectation of the insured" at 842); *Northern Security Insurance Company Inc v Durenleau*, 14 A 3d 257 (Vt 2010); *Farmers Mutual Insurance Co of Nebraska v Kent*, 265 Neb 655, 658 NW 2d 662 (Neb 2003).

42. See e.g. Fischer, *supra* note 2 at 139 (courts need to relate intent to actual harm intended by insured and limit exclusion to those losses actually contemplated by insured); George L Priest, "Insurability and Punitive Damages" (1989) 40:3 *Ala L Rev* 1009 at 1029 (actions should be considered intended if loss from action is uninsurable either because loss is not probabilistic or because it is highly susceptible to moral hazard); Peter Nash Swisher, "Insurance Causation Issues: The Legacy of *Bird v. St. Paul Fire & Marine Ins. Co.*" (2002) 2:2 *Nevada Law Journal* 351 (American courts' tendency to expand liability coverage for injury expected and intended is the result of recognition that "the classic tort doctrine of looking at foreseeable consequences of an insured's intentional acts is not appropriate in a liability insurance context since an insured must have had the specific intent to cause the specific type of injuries suffered" at 383-84); Jerry & Richmond, *supra* note 28 at 459-74 (noting that this is the majority view of US courts). *Contra* Stempel, "Insurance Contracts", *supra* note 1, ch 1 at 69-119 (preferring the hybrid approach because it best balances deterrence of antisocial insured behaviour and compensation of accident victims; a subjective perspective "insulates" an insured from the financial consequences of antisocial conduct) with Jeffrey W Stempel, "A Mixed Bag for Chicken Little: Analyzing Year 2000 Claims and Insurance Coverage" (1999) 48:1 *Emory LJ* 234 ("the critical fortuity issue that matters is whether the policyholder had the type of subjective, concrete knowledge of an actual loss that has already taken place, begun, or is absolutely imminent and unavoidable" at 231).

methodology and doctrinal development. Traditionally, however, Canadian courts have approached insurance coverage disputes from a more textualist and conservative vantage than their American counterparts, often forsaking jurisprudentially nuanced and commercially predictable results for the perceived benefits in adhering to a strict contractual approach.<sup>43</sup>

The hybrid perspective has the potential to over-deter insured behaviour and correspondingly reduce coverage without regard to fortuity by eliminating any consideration involving extent uncertainty. The whole point of extent uncertainty rests on the fact that, while the insured intended some harm, the insured did not intend such a calamitous degree of result from her conduct. How can an insured adjust her behaviour based on a standard she herself did not have in mind at the time? If an insured intended to punch a bar patron to give him a black eye, but that patron became paralyzed as a result of the punch, removing the insured's coverage for extent uncertainty may not result in the insured avoiding that particular loss-causing behaviour.

One may be tempted to argue that the insured "should have" had a reasonable behavioural standard in her mind at the time with respect to the extent of harm, and should not ever have intended even some injury to befall the victim. However, the full extent of the injury resulted from a miscalculation in the insured's intentional application of force. The insured may have been perfectly prepared to accept the consequences of being personally liable for the black eye, but not for the paralysis of the victim. There was no intent to commit to the full consequences of the act. The hybrid subjective-objective perspective therefore does not affect extent uncertainty at all vis-à-vis the insured before the loss. Fortuity under this hybrid perspective is therefore optimally deterred for only two of the three uncertainties that the insured can actually control through his own actions. Thus, the subjective perspective should be preferred as it allows insureds to predictably curb their behaviour based

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43. See e.g. Knutsen, "Confusion About Causation", *supra* note 3 at 967-68 (Canadian courts' approach to insurance contract interpretation falls somewhere in between Britain's strict contractual approach and the United States' consumer protectionist approach).

on their own subjective viewpoint, and rely on insurance for negligent behaviour.

## IV. Excluding Coverage for Criminal Conduct

There has been an entirely different jurisprudential history with respect to exclusions for losses resulting from criminal acts. Past decisions have oscillated between whether coverage was only excluded where the insured subjectively intended the loss arising from the criminal conduct<sup>44</sup> or was excluded by the mere commission of a criminal offence.<sup>45</sup> However, in 2007, the Ontario Court of Appeal in

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44. For cases finding coverage under a subjective perspective, see e.g. *Gosselin v State Farm Fire & Casualty Co* (1984), 46 OR (2d) 34, 8 DLR (4th) 318 (CA) (no “criminal” or “wilful” act present to exclude property insurance coverage when mother flicked a cigarette near flammable substances during wild fight with daughter); *Morrison v Co-operators General Insurance Co*, 2004 NBCA 62, 12 CCLI (4th) 171 (insurer had duty to defend insured who rammed victim with vehicle and then assaulted victims with baseball bat; driving could have been negligent and duty to defend not ousted by public policy principle); *Hartup v BCCA Insurance Corp*, 2002 BCSC 972, 40 CCLI (3d) 141 [*Hartup*] (coverage despite intentional/criminal act exclusion because criminal offence of careless storage of firearms did not cause damage; boy discharged pellet gun and injured victim’s eye); *Kullar v Co-Operators General Insurance Co*, 2001 BCCA 179, 86 BCLR (3d) 327 (insurer could not rely on insured’s guilty plea to manslaughter caused by fire or on police report alone to prove enough evidence to oust coverage under intentional/criminal act exclusion); *Gamblin v O’Donnell*, 2001 NBCA 109, 207 DLR (4th) 469 [*Gamblin*] (insured charged with careless use of firearm when he shot another hunter while deer hunting; criminal conviction for unintentional conduct does not remove coverage through application of intentional/criminal act exclusion); *Schatz*, *supra* note 36 (teen intended to start fire while vandalizing school but thought he had put it out; no intent to burn down the school and cause damage; intent to injure required in order to bar recovery based on criminal conduct).

45. For cases holding that the commission of a criminal offence itself is sufficient to deny coverage, see e.g. *Roman Catholic Episcopal Corp of the Diocese of Sault Ste Marie v Canadian Surety Co*, [2000] OJ no 3446 (QL) (Sup Ct J) (man set fire to shed adjacent to church and was convicted of recklessly or intentionally causing damage by fire; no coverage under intentional/criminal act exclusion as he committed a criminal act, even though he did not intend to set fire to the church); *Kolta v State Farm Fire & Casualty Co* (1981), 32 OR (2d) 515, 122 DLR (3d) 126 (HC) [*Kolta*] (fire started when man threatened people with shotgun; no property coverage for “wilful or criminal act” of husband; court

*Eichmanis*<sup>46</sup> held that the intentional/criminal act exclusion clause in liability insurance policies excludes coverage for any losses resulting from an insured's criminal conduct, regardless of the insured's subjective intent.<sup>47</sup> If a crime is committed, coverage vanishes. In *Eichmanis*, a fifteen-year-old boy was playing with a firearm that accidentally discharged and severely injured a thirteen-year-old boy. The fifteen-year-old was charged with and pleaded guilty to criminal negligence causing bodily harm. Even though that was not a specific intent crime, the Court denied insurance coverage because the act was criminal. This approach is severely dysfunctional because some criminal acts are fortuitous.

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imputes contravention of *Criminal Code* provision regarding unlawful use of firearm); *British Columbia Insurance Corp v Kraiger* (2002), 219 DLR (4th) 49, 41 CCLI (3d) 10 (BCCA) (intentional/criminal act exclusion applied to oust insurance coverage for insured who pled guilty to arson when he set forest on fire in order to call out firefighters to watch them; insured had thought fire was extinguished but fire damaged homes); *Buttar v Safeco Insurance Co of America* (1986), 30 DLR (4th) 762, 21 CCLI 135 (BCSC) (insured was drunk, lit a pile of clothes on fire in fireplace using gasoline, and was charged with wilfully setting fire to property; insured denied property coverage for "criminal and wilful act" because no requirement to prove intent to trigger exclusion clause).

46. *Eichmanis*, *supra* note 19. See also *Wong v Liberty Mutual Insurance Co*, 2009 ABQB 324, 479 AR 383 (day-care worker guilty of criminal negligence causing death of child; coverage ousted for "any criminal act or wilful negligence", regardless of worker's subjective intent). But see *Cipkar v RBC General Insurance Co* (2008), 91 OR (3d) 714, 62 CCLI (4th) 210 (Sup Ct J) [*Cipkar*] (spouse burned down home while suffering from mental disorder and died, so may not have been criminally responsible for crime and thus may have been incapable of being held responsible for a "criminal act"; summary judgment not granted for property insurer).

47. See also *Yates v Co-operators General Insurance Co* (2007), 85 OR (3d) 475, 280 DLR (4th) 186 (Sup Ct J) (guilty plea to arson by negligence ousts coverage for insured who attempted suicide with gas; criminal acts exclusion operative without regard to intent of insured).

### *A. Why Exclude Criminal Conduct from Liability Coverage?*

One must first ask why some insurers would specifically exclude criminal acts from liability insurance.<sup>48</sup> There may be several reasons, but the overriding question is whether any of them makes commercial sense. The interpretive approach needs to be consistent with the broad-spectrum liability coverage set out in these policies and needs to adhere to fortuity-based insurance principles.

It is possible that insurers use the criminal act exclusion clause to exclude two kinds of losses from coverage: losses that an insured intends to cause, and losses that occur when an insured intends to profit from his criminal conduct. In other words, the fortuity clause is an overt manifestation of both the fortuity principle and the public policy principle. Insurers may have attempted to incorporate the public policy principle into their insurance policies by somewhat clumsily inserting the word “criminal” after the word “intentional” in an effort to remove coverage for criminal non-fortuitous losses. There is some academic support for this story, and that is probably the most likely origin of the exclusion.<sup>49</sup>

Alternatively, though less plausibly, the clause could be thought of as a contractual response to provincial legislative provisions, which state that coverage is ousted only for losses where the insured acted criminally with intent.<sup>50</sup> If this were true, the fortuity clause in the insurance policy should include more than a simple exclusion for “criminal” acts. The statutory language refers to an insured’s intent to cause a loss. To “provide otherwise” within the meaning of the statute, one would expect an insurer to word the provision to say that all

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48. In Craig Brown & Melanie Randall, “Compensating the Harms of Sexual and Domestic Violence: Tort Law, Insurance and the Role of the State” (2004) 30:1 Queen’s LJ 311 at 346, the authors ponder whether there is a market for “criminal injuries insurance” as an add-on to homeowners liability coverage, simply because there are so many left without compensation as a result of operation of the “criminal act” exclusion. They conclude that the additional premium costs might discourage insureds from purchasing this type of coverage. Insurers have yet to experiment with this option.

49. See e.g. McNeely, *supra* note 23 at 41–43.

50. *Supra* note 16.

criminal acts are excluded from coverage, regardless of an insured's subjective intent, because exclusion clauses are traditionally read narrowly and *contra proferentem*. The clause is entirely general,<sup>51</sup> whereas the statute is specific.

In the homeowners "intentional or criminal act or failure to act" exclusion, how is one supposed to interpret the three components of that clause? If the word "intentional" is not supposed to be read as to modify "criminal act" (so that non-intentional criminal acts are excluded), then what does a reader do with "failure to act" at the end of the clause? Do both "intentional" and "criminal" modify "failure to act"? Read that way, the exclusion would oust coverage for all intentional acts, all non-intentional criminal acts, and all intentional, non-criminal or non-intentional, criminal failures to act.<sup>52</sup> Aside from the fact that no reasonable insured or insurer could likely figure out what is caught by

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51. This interpretation of the criminal/intentional act exclusion differs from that of Thomas Donnelly in Brown, "Insurance Law", *supra* note 1, ch 18 at 175-82. Donnelly argues that the "or" between "intentional" and "criminal" is to be read disjunctively, effectively creating two broad exclusion clauses in one and thereby bringing the effect squarely within the *Saindon*, *supra* note 32, result. His reasoning is to give effect to "criminal" as something different from "intentional", so as to not render "criminal" meaningless (that is, there must be some reason why the word is there). There are several alternative stories, as noted above, about how the word "criminal" found its way into the "intentional" act clause. But there is no evidence of the reasoning behind its precise phraseology. Sloppy drafting by insurers might be an equally plausible explanation for merely inserting "criminal" into the clause. Insurance policy language is, after all, not legislation, and it should be given a meaning that does not frustrate the very purpose of the policy. Nevertheless, this passage of Donnelly's commentary was relied upon by the Ontario Court of Appeal in *Eichmanis*, *supra* note 19 at para 27. It is notable that Brown, "Insurance Law", *supra* note 1, ch 8 at 31-32.1, 35-38, prefers the coverage-friendly subjective perspective to fortuity clauses taken in *Walkem*, *supra* note 3 and notes that the court in *Scalera*, *supra* note 1 specifically distinguished *Saindon*, *supra* note 32 and the Canadian cases relying on the objective approach. See also *Gamblin*, *supra* note 44 (the comments in the second volume of Brown's text were not "compatible" with Iacobucci J's conclusions in *Scalera*, *supra* note 1 that "intentional" and "criminal" modify "failure to act" at paras 52-53).

52. Of course, "failures to act" cannot stand on its own as an exclusionary category. There is nothing non-fortuitous about failures to act. They are negligent behaviour or non-behaviour, for which coverage cannot be ousted in such a general fashion.

that clause, the only category of criminal conduct in that list which is always non-fortuitous is that which is intentional. The other categories catch behaviour still within the realm of fortuity, such as criminally negligent behaviour. As such, the intentional/criminal act exclusion is likely not an answer to the provincial statutory provisions because its effect does not perceptibly match the same target as the legislation—only those losses intentionally brought about through criminal conduct.

An even less likely story is that the insertion of “criminal” into the intentional/criminal act exclusion could be seen as the insurer’s attempt to use criminal behaviour as a category to exclude from coverage a type of behaviour which might increase the insurer’s overall risk of loss. However, that reasoning would exclude potentially criminal yet clearly fortuitous behaviour stemming from miscalculation or negligence. The clause would also stop working as a behavioural deterrent in instances where an insured did not intend to act criminally, but where the behaviour has somehow attracted criminal sanctions. There is nothing an insured could do to alter her risky behaviour to maintain coverage if the insured did not intend her actions to be “criminal”. As such, reading “criminal” conduct as “more risky” conduct is not a sound insurance reason to exclude all criminal acts from coverage.

Could the decision by insurers to exclude criminal acts from liability insurance coverage be based on a concern about morality and not fortuity?<sup>53</sup> Are insurers trying to deter socially unwanted behaviour, such as crime, by excluding criminal acts? Few would think that liability insurers—for-profit, risk management companies—have been deputized with the moral task of stamping out crime, like Batman-esque social engineers.<sup>54</sup> Neither private insurance nor insurance law are built to

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53. See Réaume, *supra* note 38 at 81, which states that “[t]he exclusion of coverage for injury caused by ‘intentional or criminal’ acts carries an obvious moral valence; it suggests especially bad behaviour”.

54. For a rejection of this concept, see Tom Baker, *Insurance Law and Policy: Cases, Materials, and Problems* (New York: Aspen Publishers, 2003) at 505 [Baker, “Insurance Law and Policy”], referring to a pre-publication version of Jonathan Simon’s book, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007). Baker notes that because society’s idea of a crime has expanded beyond intentional wrongdoing, there is a

mete out the deterrent and punishment aspects of the criminal law. There are no doctrinal safeguards for the accused, and there is a different standard of proof. In addition, the accident victim's compensation would be jeopardized by being used as collateral to deter the "criminal" insured based on the insurer's view of what is wrongful behaviour.

The reason criminal acts are excluded from coverage cannot be because an insurer refuses to insure "bad" behaviour for "good" reasons. Negligence, inattention, sloppiness, and inadvertence are all "bad" behaviours that can and do cause injury and death, but they are all nonetheless insurable. Excluding a certain class of behaviour based on morality and not fortuity imports a host of conceptual problems that insurance law cannot resolve. Unfortunately, courts frequently attempt to meld morality and insurance, producing unpredictable jurisprudence.

#### *B. The Problem with the Eichmanis Approach*

If insurance coverage is ousted by the commission of a criminal act regardless of the insured's subjective intent to bring about the loss, as the Ontario Court of Appeal held in *Eichmanis*, then the fact that many crimes do not require subjective intent would remove coverage for events which are beyond the control of the insured. In the insurance context, can the insured be expected to adjust her behaviour to prevent future conduct that leads to accidents, even those found to be "criminal"?

The *Eichmanis* approach also creates coverage ambiguities when an insured is mentally incapacitated to the point where he cannot be held

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correspondingly increasing gap in insurable risky conduct. Excluding from coverage losses that arise from criminal conduct in effect deputizes insurers "to serve as private law enforcement agencies empowered to mete out the 'punishment' of refusing insurance benefits without having to comply with the procedural requirements and protections that govern public law enforcement". See also Simon, *ibid* at 198–200 noting that "one-strike insurance exclusions" like excluding losses related to criminal conduct have the effect of eroding the insurance safety net of the middle class who rely on homeowners policies and commercial liability policies for compensation; using crime as a dividing line for insurability often results in a ghettoizing effect on insureds by abandoning certain insureds who engage in certain socially condemned risky behaviours, from drug use to misdemeanours and beyond.

criminally responsible for his actions.<sup>55</sup> Is the insured to be denied coverage in that situation even if the courts will not impose criminal sanctions for those acts? Professor Craig Brown argues that criminal acts should not be excluded unless the fortuity principle would be “genuinely undermined”—otherwise, the needs of third party accident victims are inappropriately undermined.<sup>56</sup>

As well, the court in *Eichmanis* ignored the Supreme Court’s *Scalera* decision, which applied a subjective interpretive perspective to the intentional/criminal act exclusion.<sup>57</sup> Instead, the *Eichmanis* court isolated the term “criminal” in the clause, read it broadly, and took a different interpretive approach than the rest of the clause. How can a subjective approach be taken to the first part of a fortuity clause (the “intentional” part) and a very different approach (one that asks only whether a crime has been committed, regardless of intent) be taken to the second part (the “criminal” part)? Doing this turns standard insurance policy interpretation principles on their head, and makes it incomprehensible for insureds to understand what their policies require of them to maintain insurance coverage.<sup>58</sup>

Finally, this approach frustrates the purpose of a fortuity clause by loosely defining “criminal” in broad-spectrum liability policies such that

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55. *Cipkear*, *supra* note 46 (spouse burned down home while suffering from mental disorder and died, so may not have been criminally responsible for crime and thus may have been incapable of being held responsible for a “criminal act”; summary judgment not granted for property insurer).

56. Brown, “Accidental Loss”, *supra* note 1 at 541–42.

57. The facts in *Scalera*, *supra* note 1 involved a sexual assault on a school bus, an intentional act and certainly a criminal act. There is nothing in the decision to indicate that the subjective interpretive perspective is not to be applied to the whole clause. Although the Court focused its attention on whether or not sexual assault could ever be anything but intentional, there was likely no need to discuss whether or not sexual assault is criminal—such is patently obvious.

58. See e.g. *Derksen v 539938 Ontario Ltd*, 2001 SCC 72, [2001] 3 SCR 398 (coverage clauses to be interpreted broadly and exclusion clauses narrowly, as part of standard insurance policy interpretation principles); Erik S Knutsen, “Auto Insurance as Social Contract: Solving Automobile Insurance Coverage Disputes Through a Public Regulatory Framework” (2011) 48:3 *Alta L Rev* 715 at 723–25 [Knutsen, “Social Contract”] (describing the two-step contractual interpretive approach used by Canadian courts in construing insurance policies).

it excludes some negligent behaviour. The Court in *Eichmanis* held that “criminal act” means any criminal act in the *Criminal Code*,<sup>59</sup> or in the world, to match the scope of the broad coverage clause. However, that is an overly broad interpretation because it catches non-fortuitous criminal behaviour. In Canada, there are many acts for the consequences of which insureds would expect liability insurance coverage but which run afoul of a provision of the *Criminal Code*—for example, leaving an open excavation hole,<sup>60</sup> not watching a water skier closely enough,<sup>61</sup> failing to direct employees,<sup>62</sup> neglecting the existence of a hole in the ice on a lake<sup>63</sup>—or perhaps even being naked in public.<sup>64</sup> How could the complex provisions of a penal statute like the *Criminal Code* be an arbiter of what is fortuitous for the purposes of insurance coverage, particularly when those provisions do not come stapled to every liability insurance policy?<sup>65</sup> Can insurers ask courts to imbue a loss situation with an element of criminality to oust coverage after the fact, even if the insured is never charged with or convicted of a crime?<sup>66</sup> *Eichmanis* provides a

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59. RSC 1985, c C-46.

60. *Ibid*, s 263 (leaving open excavation).

61. *Ibid*, s 250 (failure to watch person towed).

62. *Ibid*, s 217.1 (failure to take reasonable care to direct workers).

63. *Ibid*, s 263 (knowing about a hole in the ice and not doing anything about it).

64. *Ibid*, s 174 (public nudity).

65. It would be even more unreasonable to expect an insured to adjust her behaviour while abroad if the criminal law of other countries applies too.

66. The insurer in *Raywalt*, *supra* note 32 did just that in a coverage action after the tort action had been decided. The court in the coverage decision construed the insured's actions in a fuel spill as criminal mischief and thus excluded coverage for criminal conduct, even though there was no charge or conviction. In *Gillespie v Donovan*, 2009 NBCA 6, 72 CCLI (4th) 21, an insurer tried to imbue an insured's conduct with criminality to oust coverage, in a case where the insured unintentionally shot and killed a house guest. The court held that the insurer had a duty to defend because the pleadings alleged negligent conduct only, and a criminal act could not be imputed to trigger the criminal act exclusion. This *ex post* imbuing of an insured's conduct with criminality for the purpose of denying insurance coverage in the absence of a charge or conviction is highly suspect because the conclusions can be disconnected from fortuity concerns that should be driving the insurance analysis. Also, the safeguards that criminal law provides for an accused are absent in insurance litigation. An insurance coverage claim is not a sensible doctrinal or procedural milieu to judge determinations of criminality, even for

hyper-literal answer: insurers are free to exclude any conduct through the wording of the insurance policy. Yet that answer is too simple in the context of publicly regulated liability insurance, which is now the backbone of Canada's tort law compensation scheme.

In short, the only solid, defensible reason for the exclusion of criminal conduct from liability coverage lies in the fact that it reinforces the fortuity principle and the public policy principle that no one should benefit from his or her own wrong. If an insured murders someone, the insured has complete control over the occurrence of that event and of the loss that arises from it. That is simply not true for crimes that are not intent-based. It follows that liability insurance coverage should only be excluded where the insured subjectively intended to cause a loss through the commission of a crime.<sup>67</sup> This would fit with the Supreme Court's holding in *Scalera* and with a proper subjective interpretation of the fortuity clause as a whole.

## V. Fortuity Clause Becomes Morality Clause

Why have Canadian courts produced such haphazard jurisprudence on the homeowners fortuity clause? The reason is that those clauses seem to prompt a shift in normative thinking: when courts address insurance coverage issues, fortuity clauses can morph into morality clauses,<sup>68</sup> with an emphasis moving from fortuity and moral hazard to

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coverage purposes. Insureds should not be "convicted" of "crimes" for the sole purpose of insurance coverage, separate and apart from the state-run criminal law system.

67. See especially *Devlin*, *supra* note 13 at para 35. The insured had been found guilty of drunk driving, but the court concluded that a clause in his policy excluding liability for violating the criminal law "with intent to bring about loss or damage" did not apply. The court held that *mens rea*, particularly with respect to criminal negligence, was different from intent in an insurance context, and that he did not intend the loss that ensued.

68. See e.g. Tom Baker, "Liability Insurance at the Tort-Crime Boundary" in David M Engel & Michael McCann, eds, *Fault Lines: Tort Law as Cultural Practice* (California: Stanford University Press, 2009) 66 at 69 [Baker, "Tort-Crime"] (insurers use consequentialist reasoning to distinguish among illegal acts according to their ideas about behavioural "incentives" when, in fact, those "incentives" should properly be moral hazard issues; morality appears to matter).

wrongdoing, deterrence and punishment.<sup>69</sup> When this happens, the interpretive focus moves from the perspective of the insured, to that of the insurer, then to that of other insureds in the same risk group, and ultimately, to that of society as a whole. Courts also invoke contract, tort and criminal law principles, giving the parties an incentive to tailor the litigation story to fit their competing interests.

Although the morality story about these insurance exclusion clauses may not overtly feature in court judgments, one can feel the normative pull within the judicial reasoning, often couched in the conventional language of contractual interpretation. When the fortuity story alone does not point to the insurer's desired result, the insurer has every incentive to invoke concerns about the morality of an insured's conduct. This normative shift can lead to a discussion on the general deterrent effects of the fortuity clause,<sup>70</sup> then to rhetoric about deterring the particular conduct in question, and finally to concern for the viability of insurance as a wealth protection mechanism for insureds.

Third party accident victims are seldom at the litigation table, and concerns for their compensation do not generally drive these cases. Instead, courts and insurers focus on holding the insured "accountable" for his behaviour, and for ensuring that his "wrongdoing" is "punished" by withholding insurance coverage. The insured is recast as what Tom

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69. See e.g. Iacobucci J in *Scalera*, *supra* note 1 ("this economic rationale takes on a public policy flavour where, as here, the acts for which the insured is seeking coverage are socially harmful. It may be undesirable to encourage people to injure others intentionally by indemnifying them from the civil consequences" at para 69); L'Heurex-Dubé J in *Scott v Wawanese Mutual Insurance Co*, [1989] 1 SCR 1445 [*Scott*] ("it may well be that insurance companies do not wish to pay for the delinquency of teenagers within the home" at para 51); Ritchie J in *Saindon*, *supra* note 32; *Hartup*, *supra* note 44 ("there are obviously good policy reasons for denying coverage to insureds who have committed criminal offences" at para 22).

70. See Clarke, "The Law of Insurance", *supra* note 32 ("reference to gravity and deterrence should not be taken entirely at face value. These factors are often associated with retribution and punishment; and there is some suggestion that they are really a proxy for punishment and retribution directed at wrongs which the judges and, they say, the people find particularly abhorrent" at 602). He disapproves of the English decision *Gray v Barr*, [1971] 2 QB 554 at 603, [1971] 2 All ER 949 (CA), where public policy concerns about firearm violence drove the denial of liability insurance coverage.

Baker calls the “moral monster”;<sup>71</sup> his failure to control his intentional or criminal conduct becomes a moral inability to refrain from wrongdoing.<sup>72</sup> In Baker’s words, the narrative becomes one about whether an insured “like that” who does “those things” should “deserve” insurance protection.<sup>73</sup> For example, Mr. Saindon’s reprehensible brandishing of his lawnmower led the court to hold that he legally intended the act and the injury, even though his intent was only to scare.<sup>74</sup> Such reasoning is bolstered by the view that an act of that sort should not be “rewarded” with an insurance payment for fear of encouraging wrongful behaviour. So not only does the fortuity story become one about morality and wealth protection for deserving insureds, it expands to include contract, tort and criminal law concerns. But it remains a mystery which concept of intent drives the analysis.

The morality story is also evident when courts consider the type of conduct that reasonable insureds would want to subsidize in their risk pool.<sup>75</sup> For example, would Mr. Saindon be the sort of person you would want in your risk pool, drawing payments from your premium dollars? This takes the focus of the conduct away from the insured, and even away from that of the reasonable person, and privileges the vision of innocent fellow insureds.<sup>76</sup> In this way, fortuity concerns can easily give way to imbedded morality concerns about the conduct in question. Those concerns very often drive whether or not a court finds the insured acted with sufficient intent to trigger the exclusion, particularly if a court is using the objective or hybrid perspectives to interpret fortuity clauses.

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71. Baker, “Tort-Crime”, *supra* note 68 at 77 (spotlight shifts from victims of crime who indisputably deserve compensation to instead the moral monster insured).

72. Insurers craft claims stories about denying coverage to the “immoral insured”, according to Tom Baker, “Constructing the Insurance Relationship: Sales Stories, Claim Stories, and Insurance Contract Damages” (1993) 72:6 Tex L Rev 1395 at 1412.

73. See *ibid* (insurers deny claims because they are not “worthy of payment”).

74. *Saindon*, *supra* note 32.

75. See Baker, “Tort-Crime”, *supra* note 68 at 75.

76. Priest, *supra* note 42 at 1032, surmises that the dominant population of insureds may want certain risks excluded from the risk pool, such as drag racing. However, there is no empirical information to support such assumptions. Instead, the wishes of insureds are often imputed through the insurer’s wishes as proxy.

This normative transformation, from a fortuity story to a morality story, results in conceptually problematic jurisprudence. First, mere general knowledge of risk does not always make an event non-fortuitous when it eventually occurs. A criminal act, in and of itself, is not necessarily a non-fortuitous act.<sup>77</sup> Second, the fortuity story can prompt courts to assume that people act rationally in choosing to intend certain risky behaviour. This notion ignores the fact that pranksters like Mr. Saindon actually thought it was a good idea as a scare tactic to thrust a whirling lawnmower in their neighbour's face. Furthermore, accidents do happen even in the wake of only slightly risky behaviour. To assume that all insureds must act rationally, or in legal terms "reasonably", assumes away the very need for insurance in the first place. While Mr. Saindon could control the height of the whirling lawnmower, he could not control his neighbour's protective reaction to thrust up his hands to protect himself. Not every uncertainty can be controlled by conscious, intentional conduct on the part of the insured.<sup>78</sup> Third, stressing that the intentional act exclusion is a fortuity clause that deters moral hazard does not account for instances of insurance coverage for insureds who harm mistaken targets through intentional or criminal conduct.<sup>79</sup> Finally, the fortuity story breaks down completely when "fortuitous" conduct is taken to mean only objectively unintentional or non-criminal conduct. As described above, insurance can discriminate between types of uncertainties, from factual to temporal to extent uncertainty, but as long as one of those uncertainties exist, an insurer can profit.

Since the fortuity story and the third party accident victim's compensation story are not as morally gripping as the deterrence and punishment story, courts and litigants trade off compensation and fortuity for the perceived opportunity to deter future insureds'

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77. Baker, "Tort-Crime", *supra* note 68.

78. George Priest notes that intentional act exclusion clauses are vague and do not give much guidance to insureds about where on the risk continuum their actions become uninsurable. See Priest, *supra* note 42 at 1028.

79. If an insured intends to injure target A but accidentally strikes victim B, there is generally insurance coverage for this loss, even under the objective and hybrid perspectives. See Fischer, *supra* note 2 at 134–38 (nonsensical result for unintended target cases; transfers test to a penal test because insured expected "some" injury).

behaviour. In instances where the fortuity clause pits deterrence and punishment concerns against fortuity and compensation concerns, only one set of concerns can be realized. Injured victims left uncompensated may have to look to social assistance and public welfare. This is unfortunate because the deterrence and punishment themes in morality stories about fortuity clauses are unrealistic. The more obvious the insured's intent to bring about the loss, the less likely the insured will be sued in tort by the accident victim because there could be a perception that there may be no pocket of insurance compensation from which to draw.<sup>80</sup> The punishment goal behind denying coverage is limited in effect only to those few insureds who have sufficient personal assets to satisfy a tort judgment and whose personal assets would thereby be exposed due to insurance coverage denial.<sup>81</sup> How can rhetoric about insurance as a means of protecting the wealth of the insured trump the compensation function of insurance when most insureds have little or no personal wealth to protect?<sup>82</sup> Insureds with no personal assets (particularly the criminal insured) will not feel a financial sting if coverage is removed. There can also be additional perverse punishment effects on innocent co-insureds when insurance coverage is removed because of intentional or

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80. See Brown, "Insurance Law", *supra* note 1 ("put another way, the question is whether liability insurance is primarily for the protection of the insured or for the compensation of injury or damage victims. Often a wrongdoer has insufficient funds to compensate the victim personally. Without liability insurance, she or he is not worth suing. If the insurer is excused when the insured (in effect the uninsured) is guilty of a crime, the victim may not bother to sue. If so, neither public policy goal is served. It follows that the conflict should be resolved in favour of compensation" ch 8 at 36).

81. Fischer, *supra* note 2 at 111–12 (a solvent insured cannot "benefit" from insurance claim because money goes to accident victims).

82. See Tom Baker, "Blood Money, New Money, and the Moral Economy of Tort Law in Action" (2001) 35:2 Law & Soc'y Rev 275 [Baker, "Blood Money"] (lawyers typically do not initiate litigation when there is no insurance coverage for a loss; "blood money"—personal assets of tortfeasors—is not usually a sensible target in lawsuits); Tom Baker, "Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action" (2005) 12:1 Conn Ins LJ 1 [Baker, "Tort Regulation"] (liability insurance limits act as de facto caps on tort damages); Stephen G Gilles, "The Judgment-Proof Society" (2006) 63:2 Wash & Lee L Rev 603.

criminal conduct by another co-insured.<sup>83</sup> This punishes the co-insureds for something they did not do by denying coverage for their own negligent behaviour (that is, negligent supervision) if the loss itself was caused by the co-insured acting intentionally or criminally.<sup>84</sup> Finally,

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83. If one insured causes a loss as a result of intentional or criminal conduct then, if insurance coverage is not several but joint, all other co-insureds, however innocent of such conduct they may be, will also lose coverage for that loss. See e.g. *Godonoaga v Khatambakhsb* (2000), 49 OR (3d) 22, 188 DLR (4th) 706 (CA) (parents of children who assaulted other children after school were deemed separate insureds by court for purposes of insurance coverage, so parents' coverage for negligent supervision was not lost by virtue of the fact that the children had committed intentional assaults); *Snaak v Dominion of Canada General Insurance Co* (2002), 61 OR (3d) 230, 40 CCLI (3d) 12 (CA) (intentional/criminal act exclusion ambiguous as to whether insurer had duty to defend parents sued for negligent supervision of insured son who committed intentional assault in schoolyard fight; insurer held to have duty to defend); *Riordan v Lombard Insurance Co*, 2003 BCCA 267, 13 BCLR (4th) 335 (no insurance coverage for joint innocent insureds when foster child set fire to home).

84. See e.g. *GP v Children's Aid Society of Dufferin* (2000), 26 CCLI (3d) 76 (available on WL Can) (Ont Sup Ct J) (wife's husband sexually assaulted minor and wife was sued for failing to protect minor; while wife was considered a separate insured from husband, intentional/criminal act exclusion ousted coverage because wife "failed to act"). This is a sadly common result in the property insurance context. See e.g. *Scott*, *supra* note 69 (no property coverage for parent homeowners when 15-year-old insured set fire to family home); *Torchia v Royal & SunAlliance Insurance Company of Canada* (2004), 71 OR (3d) 511, 10 CCLI (4th) 16 (CA) (husband convicted of arson and burned down house; property coverage excluded for loss or damage "resulting from the intentional or criminal acts" of insured); *Kolta*, *supra* note 45 (fire started when husband threatened people with shotgun; no property coverage for "wilful or criminal act" of husband; court imputed contravention of *Criminal Code* provision regarding unlawful use of firearm); *Gecho v BCCA Insurance Corp* (1997), 35 BCLR (3d) 82, 43 CCLI (2d) 157 (CA) (husband set fire to home; innocent co-insured wife denied coverage, even though her relationship with husband was only transient); *Walsh v Canadian General Insurance Co* (1989), 60 DLR (4th) 358, 38 CCLI 189 (Nfld CA) (husband burned down matrimonial home and was charged with arson; no property coverage for wife as husband committed "wilful and criminal act"); Hazel Glenn Beh, "Tort Liability for Intentional Acts of Family Members: Will Your Insurer Stand By You?" (2000) 68:1 Tenn L Rev 1 at 3 (from insured's standpoint, loss arising out of intentional misconduct of child or spouse is fortuitous); Fischer, *supra* note 2 at 150 (allowing innocent insureds indemnity lessens deterrence value of exclusion but freely imputing intent denies benefit of contract they purchased); Peter Nash Swisher, "Judicial Interpretations of Insurance Contract Disputes: Toward a

does removing insurance coverage based on intentionality deter moral hazard concerns at all?<sup>85</sup> If the threat of civil liability is not a deterrent to intentional or criminal conduct, it is unlikely that removing coverage for legal liability will deter unwanted risky conduct.<sup>86</sup> Can an insured even foresee such a scenario *ex ante* and adjust her behaviour accordingly?<sup>87</sup> Most insureds do not consider loss of insurance coverage while acting in a manner that could be deemed to be intentional or criminal. When this occurs, the deterrent effect disappears, especially if courts use an objective or hybrid perspective to infer intent for risky or wrongful behaviour.

If deterrence and punishment are valid concerns for insurers and the insurance system, there are more commercially and jurisprudentially efficient ways to achieve this goal. Insurers could contractually subrogate against their own insureds for losses arising from intentional

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Realistic Middle Ground Approach” (1996) 57:2 Ohio St LJ 543 at 632–33 (middle-ground courts find contracts severable to compensate innocent co-insureds).

85. See Malcolm Clarke, “Insurance: The Proximate Cause in English Law” (1981) 40:2 Cambridge LJ 284 at 302 [Clarke, “Proximate Cause”] (noting that the deterrent effect of insurance coverage denial will neither be great nor frequent); Beh, *supra* note 84 at 37 (insurance only indirectly rewards the intentional wrongdoer but ignores victim compensation concerns); Fischer, *supra* note 2 at 145 (if the goal of the exclusion is punishment, the insured must deserve punishment and be able to appreciate the reason behind coverage loss; otherwise retributivist and educational functions of punishment are divorced from meting it out).

86. Billingsley, *supra* note 10 at 171, n 142 notes that “from a public policy perspective, such an exclusion clause [for criminal acts] probably would not have deterred the insured’s criminal act any more than the existence of the criminal forfeiture [public policy] principle”. See also Brown, “Accidental Loss”, *supra* note 1 at 528 (deterrence best left to devices other than tort law such as disciplinary proceedings). See Clarke, “Proximate Cause”, *supra* note 85 at 302. (If the prospect of a life sentence in prison is not a deterrent, how can a fear of non-payment by insurers for civil liability to a victim of crime deter wrongdoing?).”

87. See e.g. Stempel, “Insurance Contracts”, *supra* note 1 (“[i]nsurers should not be able to invoke 20-20 hindsight to second-guess policyholder conduct to defeat coverage unless the coverage dispute falls clearly outside the text and scope of the insuring agreement or clearly violates the fortuity principle” ch 1 at 120).

or criminal conduct (in either the full amount or in degrees).<sup>88</sup> However, this might leave insurers in no better position because most insureds are not solvent enough to satisfy a judgment. Alternatively, a tortfeasor “co-pay” fee could be imposed on the loss-causing insured, to ensure that he may contribute something to the victim’s reparations. Society could also enact uninsurable penalties for certain antisocial behaviour.<sup>89</sup> These options may be a better deterrent than an insurance premium increase or a denial of coverage. Regardless, the question that remains is whether denying coverage results in any deterrent effect at all. This is highly problematic because the trade-off for this vague to non-existent deterrent effect is the loss of compensation for an innocent accident victim.

Injecting morality in place of fortuity in these cases creates strange incentives to behave inefficiently in insurance coverage litigation. Insurers would look for facts indicating the anti-social nature of the insured’s conduct to prompt courts to consider whether the insured deserves insurance coverage. Such factual crafting (or over-pleading)<sup>90</sup> can take place at the pleading stage, where insurers spin the story about the insured’s wrongdoing.<sup>91</sup> Plaintiffs may be equally incentivized to under-

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88. Baker, “Blood Money”, *supra* note 82 (discussing the confusing morality play in litigation about payment of personal money from wrongdoers to injured accident victims); Baker, “Insurance Law and Policy”, *supra* note 54 at 488; Baker, “Tort-Crime”, *supra* note 68; Fischer, *supra* note 2 at 111; Russell B Wuehler, “Rethinking Insurance’s Public Policy Exclusion: California’s Befuddled Attempt to Apply an Undefined Rule and a Call for Reform” (2001) 49:2 UCLA L Rev 651 at 680 (insurers should be able to subrogate against insureds).

89. See e.g. Catherine M Sharkey, “Revisiting the Noninsurable Costs of Accidents” (2005) 64:1–2 Md L Rev 409 at 417–18.

90. This was the precise concern of Iacobucci J in *Scalera*, *supra* note 1. As a result, the Supreme Court held that, in deciding at the pleadings stage whether an insurer has a duty to defend, courts are to look past the legal labels of the claim and instead to its true nature. See also *Unrau v Canadian Northern Shield Insurance Co*, 2004 BCCA 585, 246 DLR (4th) 412 (no coverage for insureds who organized and incited a mob to perform an assault, even though the claim used the words “negligent” and “careless”; the acts were intentional and likely criminal). See also Ellen S Pryor, “The Stories We Tell: Intentional Harms and the Quest for Insurance Funding” (1997) 75:7 Tex L Rev 1721; Beh, *supra* note 84 at 23 (plaintiff pleads to catch insurance coverage).

91. Baker, “Tort-Crime”, *supra* note 68 at 66.

plead their cases, by characterizing the insured's loss-causing actions as unintentional and certainly not criminal.

Finally, a morality-driven analysis of a fortuity clause completely ignores standard, pro-coverage insurance policy interpretation principles. If a fortuity clause is ambiguous as to which interpretive perspective is to be employed, it should be interpreted as imposing a subjective perspective in accordance with the broad, comprehensive coverage of modern liability insurance policies. Treating the fortuity clause as a morality clause misconceives the basic objective of insurance law.

## VI. The Policy in the Policies: The Role of Insurance in Society

Consistency in insurance litigation will not be attained unless courts and litigants account for liability insurance's role in the broader system of accident compensation. Most liability insurance disputes in Canada are framed solely as contractual disputes, despite the fact that insurance litigation fundamentally affects a variety of people beyond the insurer and insured. Liability insurance serves as the financial backbone of the Canadian accident compensation system.<sup>92</sup> It is not merely a wealth protection mechanism, but also an important source of financial support for many injured third parties who may have few or no other sources of aid.

In most standard accident scenarios, the dual purposes of insurance—wealth protection and compensation—do not conflict.<sup>93</sup> However, a conflict does arise where a loss is excluded due to an insured's intentional or criminal conduct, and where the exclusion clause does not

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92. See Baker, "Tort Regulation", *supra* note 82 (primacy of private insurance system within tort system cannot be ignored).

93. Brown, "Accidental Loss", *supra* note 1 at 524–25. See also Beh, *supra* note 84 (broad coverage for insured and no coverage for intentional acts leads to "vastly divergent judicial responses" at 23).

predictably stipulate the interpretive perspective.<sup>94</sup> At least in cases where the insurance policy in question does not offer clear interpretive guidelines, courts are forced to choose between the dueling purposes of liability insurance: to deny wealth protection for the at-fault insured (and simultaneously protect the wealth of other insureds) by broadly interpreting the exclusion and thereby denying coverage, or to compensate the accident victim by narrowly construing the exclusion and thereby providing coverage. Herein lies the source of unpredictability in insurance coverage case law.<sup>95</sup>

Can the insurance system serve a third purpose—that of a social or moral deterrent? This purpose would stretch insurance law beyond its public policy and fortuity principles. Insurers are not the moral arbiters for the public. Insurance law does not have the fault-based doctrine of tort law or the punishment and retributivist purposes of criminal law. To imbue insurance law with a moral purpose would hand insurers all the benefits but no responsibilities of a government. This hardly makes commercial or moral sense.

Courts must consider the broader social purpose of liability insurance when interpreting fortuity clauses. A key function of liability insurance is to buttress the fault-based accident compensation system.<sup>96</sup>

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94. As noted by Fischer, *supra* note 2 at 96 (ex ante, goals of deterrence and compensation do not conflict, but ex post they do) and John Dwight Ingram, “The ‘Expected or Intended’ Exclusion Clause in Liability Insurance Policies: What Should it Exclude?” (1992) 13:3 Whittier L Rev 713 at 719–20 (noting that a narrow interpretation of the clause serves public interest in compensating accident victims but a broader interpretation furthers public interest in punishment and deterrence).

95. For example, in *Scott*, *supra* note 69, a property insurance case excluding coverage for “loss or damage caused by a criminal or wilful act” of the insured, the five-judge majority of the Supreme Court of Canada held that the exclusion clause was “perfectly clear and unambiguous” in ousting coverage for the entire family who lost their home due to a fire set by their fifteen-year-old son. The three-judge dissent, however, held that the clause was “far from clear and unambiguous” and would have found coverage for the loss. It is questionable that any insurance policy language can ever be “perfectly clear and unambiguous” for all time, in all circumstances. Language in insurance policies is always contextual, depending upon the factual matrix of the loss.

96. Craig Brown makes a similar argument about the public nature of insurance law in Brown, “Accidental Loss”, *supra* note 1.

Additionally, various forms of insurance have become almost mandatory to enable businesses to operate in commercial reality.<sup>97</sup> Public infrastructure has also benefitted from the widespread availability of insurance as most accident costs are borne by the private liability insurance marketplace and not the public purse.<sup>98</sup> Liability insurance is thus an important public good.

Insurance policies are delivered to the public through a private, risk-sharing mechanism that has the appearance of a contract. However, they are contracts of adhesion in that the insurer has overwhelming bargaining power. The bargain theory of insurance as a contract is a fiction; all insurers use nearly the same policy documents.<sup>99</sup> As Jeffrey Stempel has noted, insurance policies are social instruments in a private sphere, and they resemble statutes in their form and effect.<sup>100</sup> They must be interpreted in a way which pays heed to that social role through the use of interpretive methodologies similar to those used for public statutes.<sup>101</sup>

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97. Financial institutions will not offer a mortgage to a borrower without requiring that the borrower have homeowners insurance, a portion of which is liability insurance. Professional regulatory bodies, such as those for physicians and lawyers, mandate the carriage of professional liability insurance to protect both the public and the professional. See e.g. *ibid.*

98. See e.g. Knutsen, “Social Contract”, *supra* note 58 (in the automobile insurance context, liability insurance is very much a public good—a “social contract” at 716).

99. *Ibid* at 723–25 (detailing the contractual model of insurance contract interpretation in Canada).

100. Jeffrey W Stempel, “The Insurance Policy as Statute” (2010) 41:1 McGeorge L Rev 203 at 205; Jeffrey W Stempel, “The Insurance Policy as Social Instrument and Social Institution” (2010) 51:4 Wm & Mary L Rev 1489.

101. See e.g. Knutsen, “Social Contract”, *supra* note 58 (automobile insurance contracts are public contracts enacted for a public purpose and that purpose should drive the interpretive exercise).

## VII. A Solution: Macro-Interpretation and Micro-Interpretation

The solution to achieving a reliable and consistent interpretation of the intentional act and intentional/criminal act exclusions is always to remember that the clauses are fortuity clauses, not morality clauses. To that end, courts should use an interpretive process with two steps—a macro-interpretive step and a micro-interpretive step. The macro-interpretive step asks what purpose the liability insurance in question serves, and what the fortuity clause is trying to do as part of the larger insurance system. If the insurance policy provides broad-based liability protection for an insured's actions "anywhere in the world", as standard homeowners insurance does, courts need to interpret that policy with its broad compensatory purpose in mind. If the particular exclusion clause is designed to deter moral hazard and maintain the requirement of fortuity—which most of those clauses are—then courts must ensure that their decisions achieve that goal.

The second step of the process would be a micro-interpretation, which applies standard pro-coverage insurance policy principles of interpretation that give effect to the purpose of the fortuity clause. Exclusions should be interpreted narrowly, and coverage clauses broadly. The policy should be read *contra proferentem* and the insured's reasonable expectations of coverage considered. If courts follow this two-step analytic process, they will put in place the legal rules to maintain the fortuity story and avoid moralistic distractions.

The fortuity clause in a standard broad-based liability policy directed at excluding intentional or criminal conduct would operate as follows. If liability insurance is to insure fortuitous losses only, then the clause excludes only those losses which are non-fortuitous from the perspective of the insured. The clause is written to target these moral hazard concerns of the insurer, not to fuel an insurer's moral crusade. To do otherwise is to move beyond the purpose of the exclusion clause and over-deter conduct at the expense of removing compensation for a third party accident victim. The key to interpreting this clause is to

predictably tie the analysis to fortuity principles and not morality issues.<sup>102</sup>

Because an actual behavioural deterrent effect of the clause is questionable under some interpretive perspectives, the interpretation of the clause needs to be restrictive enough to exclude from coverage only those losses for which the insured could avoid. This is a more sensible trade-off with the public compensatory purpose of liability insurance.

Courts should have to evaluate the insured's intent to do the actual harm that resulted from his conduct, and should limit the effect of the exclusion for intentional or criminal conduct to losses subjectively contemplated by the insured. This approach would ensure that courts withhold coverage only for behaviour that an insured could certainly have controlled—non-fortuitous intentional conduct, crimes with an obvious subjective intent element, and acts that were clearly motivated by the insured's desire to profit personally from her conduct through insurance.

This two-step approach would help to ensure that outcomes are predictable and consistent with pro-coverage principles for the contractual interpretation of insurance policies.<sup>103</sup> It would prevent the fortuity story from inappropriately shifting to a story about the morality of the insured's conduct. It would thereby ensure that insurance pays the prankster but not the arsonist, and the risky fool but not the premeditated murderer. It would stop the inappropriate borrowing of tort law concepts for assessing fault and responsibility. Most important of all, it would force courts and litigants to put the goals of insurance squarely on the table. Those goals would drive the analysis of fortuity clauses, and would lead the courts to reliable and consistent results.

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102. See Priest, *supra* note 42 at 1029 (tie insurance coverage concerns to fortuity and moral hazard principles).

103. Jeffrey Stempel argues that the fortuity concept should not be “so broadly interpreted or rigorously incorporated into the policy” as to create what he calls a “phantom exclusion” from coverage. In his view, insurers should not be able to invoke fortuity as a defence unless “the nature of the loss to the policyholder or the claim against the policyholder clearly falls within the zone of uninsurable non-fortuitous conduct.” See Stempel, “Insurance Contracts”, *supra* note 1, ch 1 at 119–20.

