"ACCIDENTAL LOSS" AND LIABILITY INSURANCE

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I INTRODUCTION

A foundation of liability insurance, like all indemnity insurance, is the fortuity principle. In one of its manifestations, this principle requires that indemnity under a liability insurance policy is generally payable only if the insured has caused the loss "by accident". This, and similar terms have been the subject of much attention by the courts in several jurisdictions. While no single definition of "accident" in this context has emerged, as a general rule insurers have been relieved of liability where the insured has brought about the loss intentionally or recklessly. Negligence on the part of the insured is covered but the line between negligence and recklessness is not a clear one. The result is that plaintiffs not infrequently find themselves with a good cause of action against a tortfeasor but with no real remedy because the liability insurer is not bound to provide an indemnity.

In many instances, this is an inappropriate as well as unfortunate result. In my view a significant reason for this unsatisfactory state of affairs is the adherence by the courts to an outdated scheme of classification of law. Classification is a necessary feature of any system of law. The mass of primary source material is organised into categories, such as tort, contract and so forth, to enable it more easily to be taught, analysed, administered and practised. While we are not so locked into this scheme that we cannot see areas of overlap and adjust our thinking accordingly,[1] occasionally categorisation is a hindrance to a more rational development of rules especially in the context of a changing world in which they are supposed to operate.

Because insurance is most often effected by a contract,[2] insurance law s traditionally regarded as a branch of commercial law. In that field, the principles are largely concerned with the rights and obligations of the parties to commercial transactions. The fundamental concepts of indemnity, utmost good faith as well as fortuity, distinguish insurance as a subcategory, but it nevertheless seems to fit into the general framework of commerce, here being a transaction between the insured and the insurance company. But, as will emerge, liability insurance requires a wider perspective and, n my view, the failure to see it in a broader context has resulted in at best stunting of growth in what I consider to be the appropriate direction, r at the worst, a total misdirection in the development of the law.

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1 Recent developments in academic writing and case-law concerning the relationship between tort and contract are a good example, even if many of the difficulties remain unresolved. See for example French, "The Contract/Tort Dilemma" (1982) 5 Otago LR 236.

2 Even if the contract is in some sense compulsory and its terms are imposed as, for example, automobile liability insurance in Ontario, see Brown and Menezes, *Insurance Law in Canada* (1982) ch 8.

To deny recovery under an insurance policy on the grounds of the insured's conduct in intentionally or recklessly bringing about the loss, makes sense in the context of the relationship between the insurer and the insured — the parties to the contract. The insured's conduct has a prejudicial effect with respect to the rights of the insurer. In other words, the approach can be justified in terms of commercial law precepts. But where a liability insurance policy is concerned, this approach ignores the fact that another party, the victim of the insured's tortious conduct, is involved.

The view I wish to advance in this paper is that the rules about liability insurance, in particular those pertaining to the question of fortuity, should be regarded as part of tort law[3] at least as much as they should be considered part of commercial law. This in turn means that those rules of fortuity constitute part of what we call the 'system' of compensation[4] along with any specific compensation schemes which have been established in various jurisdictions.[5]

Of course, providing compensation to accident victims through the clumsy mechanism of third party insurance means that the 'system' is grossly imperfect. I do not advocate that matters concerning the relationship between the insurer and the insured be ignored. Clearly they cannot be, otherwise the institution of liability insurance would cease to exist because, if it was offered at all under conditions highly prejudicial to the insurer, it would be prohibitively expensive. Therefore, some victims have to go uncompensated just as they would where the tortfeasor has no insurance at all. What I do argue is that the role of liability insurance in the overall compensation scheme has to be recognised and, in relation to questions about fortuity, this means a shifting in the balance of interests between the insurer, on the one hand, and the third party, on the other. At present, in my view, that balance is weighted too heavily in favour of the insurer.

In the next section I discuss some aspects of the development of liability insurance, particularly legislative changes that have occurred with respect to it, which demonstrate an increasing concern for the position of third parties. This concern supports my contention that liability insurance is properly viewed as part of tort law, particularly in its role as a provider of compensation for certain kinds of loss. Following that, I examine some of the leading Commonwealth authorities dealing with the question of 'accident' (or 'fortuity') and argue for a clearer and generally more liberal approach to allowing recovery, at least by the third party.[6] This approach

3 See also Gardner, "Insurance Against Tort Liability" (1950) 15 Law & Contemp Problems 455.

4 I acknowledge that tort law is not always considered to be primarily designed as a compensation mechanism; see for example Posner, "A Theory of Negligence" (1972) 1 J Legal Stud 29. I deal with that later in the paper.

5 In New Zealand the Accident Compensation Act 1972 has undoubtedly taken some of the sting out of the concerns on which this essay is based but, to the extent my arguments are valid, they apply at least in some degree to property loss (to which the Act does not apply) as well as to personal injury and death.

6 It may be possible to allow the third party to recover in some cases while giving the insurer the right to claim reimbursement from the insured.

s more readily achieved if the modern concept of liability insurance incorporating the goal of compensating tort victims), which I argue for, s adopted and the idea that such insurance is primarily a commercial ransaction between two parties is given less weight. I then examine some vider policy issues involved. These are the role of deterrence and considera- ions relating to criminal conduct committed by the insured.

I Liability Insurance and the Compensation System

More than thirty years ago Professor Gardner of Harvard, in discuss- ng certain aspects of law school curriculum, wrote[7]

> The elements of liability insurance law, including the law of workmen's compensation, should be included in any course which attempts to deal with the law of negligent torts. A very large fraction of all the tort judgments rendered are now paid by insurance companies, and in the absence of liability insurance would probably not be paid at all. Both the plaintiffs' and the defendants' counsel are, of course, well aware of this, and try to settle their cases with that in mind. It results that tort law and liability insurance law constitute in practice a single field.

The courts, as much as the law schools, have been slow to acknowledge the kinship of the two subjects,[8] but this is perhaps because the relationship took some time to develop. When liability policies first appeared they were attacked on the ground that they purported to relieve the insured from the consequences of his own wrongdoing.[9] In the ongoing debate about the aims of tort law, deterrence and punishment have long been prominent[10] and, in that light, the basis of this attack on liability insurance is obvious. But, more recently, the function of compensation in tort law has been given greater prominence.[11] This is evidenced by a widening in the reach of tort liability to embrace, for example, more kinds of economic loss,[12] and the adoption of more sophisticated and wide-ranging formulae for measuring damages.[13] Along with this, views about liability insurance have developed to the point where it can be said unequivocally that "there is no rule of public policy which prevents a man from insuring against the consequences of his own negligence".[14]

In its infancy it appears that liability insurance was used almost exclusively to protect members of the business community, especially smaller firms engaged in manufacturing and building.[15] In that context it is natural to regard insurance as a purely business transaction and for rules to develop as part of the general body of commercial law with the

7 Supra n 3 at 414.

8 The survival of the rule that the existence of any liability insurance held by the defendant in tort action cannot be disclosed at trial is perhaps the most obvious example of this.

9 Gardner, supra n 3 at 462.

0 See for example Glanville Williams, "The Aims of the Law of Tort" (1951) 4 Current Legal Prob 137. See also Posner, "A Theory of Negligence" (1972) 1 J Leg Stud 29.

For an account of this trend see Henderson, "Crisis in Accident Loss Reparations Systems: Where We Are and How We Got There" [1976] Ariz State LJ 40.

2 See Smillie, "Negligence and Economic Loss" (1982) 32 U of T LJ 231.

3 Good examples are provided by the well-known 'trilogy' of cases in the Supreme Court of Canada: *Andrews* v *Grand & Toy* (1978) 83 DLR (3d) 452; *Arnold* v *Teno* (1978) 83 DLR (3d) 609; and *Thornton* v *Board of School Trustees* (1978) 83 DLR (3d) 480.

MacGillivray and Parkington on Insurance Law (6th ed 1975) 233.

Gardner, supra n 3 at 462.

emphasis on the relationship of the parties to the transaction. But in th twentieth century, particularly with the advent of motor transport and lat an increase in various kinds of professional liability, liability insuranc became more widely used by individuals. Many of these people, if the incurred tort liability, would be judgment-proof without their insuranc It therefore became apparent that, for a tort remedy to have any teeth insurance was essential. In these circumstances, if there was no insuranc none of the so-called goals of tort law would be given effect in any realisti sense. The plaintiff would receive no compensation and, because he woul probably not bother to commence proceedings where no recovery was likel the defendant would probably escape any significant penalty and no (c only slight) deterrent effect could be achieved.

The problem of automobile accidents with their ever-increasing effec in terms of social cost highlighted this problem. Legislatures in many juri dictions came to regard liability insurance as a prerequisite for the oper tion of motor vehicles as not only desirable but essential. The institutio was embraced. Many jurisdictions adopted compulsory automobile liabilit schemes or encouraged its use by the implementation of financial respor sibility laws or unsatisfied judgment funds.[16] The clear, prevailing polic in all this was to ensure that money was available for compensating at lea those victims of motor accidents who had been injured by the torts c others. Any deterrence in the system was left in the hands of insurers an their rating practices with accident-causing drivers either forfeiting nc claims bonuses or incurring penalties.[17]

The use of liability insurance as an instrument of government polic in respect of motor accidents occurred in many parts of the world an was virtually universal throughout common law jurisdictions.[18] A numbe of these jurisdictions went even further and gave injured third parties direc access to the insurance of the tortfeasor. This took varying forms[19] bu a description of one example will serve as an illustration. In Ontario, section 226 of the Insurance Act provides that where a judgment has bee obtained in a province or territory of Canada against the insured, the pe

16 A typical example is that which operated in Ontario until 1979. To register a motor vehic (each year) the owner had to show proof of insurance or pay a fee of $60. This fee wa used to help support an unsatisfied judgment fund which was available to people injure in automobile accidents who had a tort right against a motorist but no effective remed because there was no insurance. When a person who had opted to pay the fee rather tha buy insurance was responsible for an accident requiring payment from the fund, th person's driving licence was suspended until he had reimbursed the fund or made sati factory arrangements for doing so. In 1980 the Ontario Government replaced that schem with one of compulsory insurance.

17 The deterrent effect of such practices is marginal at best. See Brown, "Deterrence a Compensation Schemes" (1978-79) 17 UWOLR 111.

18 In New Zealand, prior to the totally different approach adopted in the Accident Co pensation Act, third party insurance was compulsory under the Transport Act 1962. regards Australia see Sutton, *Insurance Law in Australia and New Zealand* (1980) ch for the U.K. see *MacGillivray and Parkington on Insurance Law* (6th ed 1975) ch and for the U.S. see Henderson, supra n 11.

19 See for example Keeton, *Insurance Law — Basic Text* (1971) 291; MacGillivray and Pa ington, idem, 966; Sutton, idem, 622. For the New Zealand position, see supra n 31 a accompanying text.

20 The other common-law provinces of Canada have similar provisions. See Brown a Menezes, *Insurance Law in Canada* (1982) 403.

son in whose favour the judgment is made may ". . . have the insurance money payable under the contract [of insurance] applied in or towards satisfaction of his judgment . . . ." It is not necessary for the plaintiff to re-establish the insured's liability to him. The judgment itself is sufficient evidence of that.[21] Even more importantly perhaps, the insurer may not resist a claim made under the section by relying on defences it may have against the insured. If, for example, the insured has been in breach of a policy provision, if he has brought about the loss by contravening a criminal or quasi-criminal statute, or if he has been guilty of a material misrepresentation in obtaining the policy, that will not prejudice the plaintiff's claim up to specified limits of cover and within a basic specified risk.[22] Where the insurer has been required to make payment to a third party under the section and it is clear that, apart from the section, it would have been entitled to deny the insured protection, it may claim reimbursement from the insured.

This last provision particularly, makes it clear that the aim of the section is to protect the third party and that the rights and obligations arising between the parties to the contract are secondary concerns only. In other words the tort considerations openly take precedence over the commercial considerations in the utilisation of liability insurance.

Another way in which automobile liability insurance has been given a scope that is wider than would otherwise be the case in order to advance the interests of third parties, is in respect of cover afforded drivers other than the named insured. At one time there were serious obstacles to a plaintiff trying to reach the insurance money if the accident occurred while the vehicle was being driven by someone other than the person named in the policy. In *Vandepitte* v *Preferred Accident Insurance Co*,[23] an appeal from Canada to the Privy Council, the insured's daughter was driving with the consent of the insured. Despite the fact that the policy contained a clause to the effect that

> The insurer agrees to indemnify the insured and, in the same manner and to the same extent as if named herein as the insured, every other person who with the insured's consent personally drives the automobile . . .

it was held that there was no cover, and that the third party must go uncompensated. The driver was not entitled to sue on the contract because there was no privity between her and the insurer. Nor were the circumstances such that the named insured could be considered a trustee for her in respect of the benefits under the policy. Because the third party's tort right was against a person who, on this interpretation, was not covered by insurance, the third party had no basis on which to launch a direct action against the insurer. As a direct result of this case, various Canadian provincial legislatures intervened to ensure that, as far as liability insurance was concerned, there was cover where a person driving with the consent

Global Gen Ins Co v *Finlay* [1961] SCR 539; [1961] ILR1036; 28 DLR (2d) 654. For details see Brown and Menezes, supra n 20 at 405-6.

[1933] AC 70; [1932] 3 WWR 573; [1933] 1 DLR 289 (PC).

of the insured was responsible for an accident.[24] Broadly similar rules apply in Britain,[25] Australia[26] and, apparently, New Zealand.[27] Similarly, legislation has been enacted in some jurisdictions to ensure survival of third party protection after the death of the named insured.[28]

Legislative expression of a concern for the position of victims of torts in the disposition of liability insurance proceeds is not confined to automobile insurance. There are, for instance, other examples of compulsory liability insurance with its implicit preoccupation with compensating third parties. Liability insurance is not uncommonly a prerequisite for conducting the practice of a profession. This is true, for example, of the practice of law in England, Ontario, British Columbia and Queensland. The rationale is that those who suffer financially at the hands of a negligent solicitor should not go uncompensated for that loss.[29] Deterrent measures are, by and large, left to devices other than tort law such as internal disciplinary proceedings.[30]

Further evidence of legislative concern for third parties outside of automobile cases may be found in the fact that the direct right of action by third parties against liability insurers (where they have obtained a judgment against an insured but are unable to recover from him) is, in some jurisdictions, not restricted to motor vehicle liability policies. In New

24 See for example, s 209(1) of the Ontario Insurance Act which provides:

> Every contract . . . insures the person named therein and every person who with his consent personally drives an automobile owned by the [named] insured . . . against liability imposed by law upon the [named] insured . . . or that other person for loss or damage . . .

and s 213 provides:

> Any person insured by but not named in a contract to which section 209 applies may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

25 Road Traffic Act 1972, s 148(4). See *MacGillivray and Parkington,* supra n 19 at 96 and 975.

26 See. eg Motor Vehicles (Third Party Insurance) Act 1942 (NSW), s 10(7). See Sutton, supra n 18 at 602.

27 See formerly ss 79(2) and (3), Transport Act 1962, now repealed by s 22(1) of the Transport Amendment Act 1972. The compulsory insurance applied only to cover for liability to pay damages for personal injury or death. The Accident Compensation Act, which abolished rights of action in cases of death or injury by accident therefore made the entire scheme of compulsory insurance redundant. With respect to liability arising for property damage, a policy purporting to indemnify a person driving the insured vehicle with the consent of the insured would be enforceable by the permittee under the Contracts (Privity) Act 1982, s 4. Prior to that Act, the courts in New Zealand seemed prepared to give effect to the express terms of policies despite the misgivings about privity that influenced the Privy Council in *Vandepitte.* See eg *Linekar* v *Hartford Fire Ins Co* [1936] NZLR 7[illegible] In any case the Privy Council seems now to have taken a different view on the question of privity. See *NZ Shipping Co* v *Satterthwaite & Co* [1975] AC 154.

28 For example, Motor Vehicles (Third Party Insurance) Act 1942 (NSW), s 10(8); and Ontario Insurance Act, s 209(3).

29 A more cynical view might be that the prime reason for compulsory insurance in this context is to protect the public image of the profession. But this has still to do with compensating third parties.

30 In Ontario, the lawyers' insurance scheme provides for some adjustments in premium rating to take account of individual claims experience but the amount involved is so minor relative to the overall cost of the insurance that it can hardly be regarded seriously as a deterrent measure.

ealand, section 9 of the Law Reform Act 1936 provides that, when a per-
on insured by any liability policy becomes liable to pay damages or com-
ensation, the amount of such liability shall be a charge (having priority
ver other charges) on all insurance money payable in respect of that
iability. A charge of this kind is enforceable up to the limits of the policy

> . . . by way of action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured; and in respect of any such action and of the judgment given therein the parties shall, to the extent of the charge, have the same powers, as if the action were against the insured.

Such an action may be brought whether or not judgment has already been recovered against the insured.[31] Each of the common-law provinces of Canada have a section in their Insurance Acts giving this right of direct action, in addition to the provisions referred to above concerning automobile insurance. However, unlike those automobile provisions, the third party's claim is subject to any defences the insurer has against the insured.[32] In contrast, under the Queensland solicitor's compulsory insurance scheme, the third party's position is not prejudiced by defaults by the insured against the insurer.[33]

The discussion so far demonstrates a recognition by legislatures in numerous jurisdictions that liability insurance, in a number of specific contexts, is inherently related to the compensation-producing function of tort law and that the rules applying to it have been fashioned accordingly. It is arguable that observations about public policy based on a body of law specifically enacted to apply to a particular problem area do not have validity in a wider context.[34] However, my contention is that they do; that there is a strong public policy argument that the concern for the plight of third parties with enforceable tort rights, manifested by legislation for particular situations, be given expression by the courts in the disposition of all cases involving claims for indemnity under liability insurance policies, including those not directly covered by legislation of the kind discussed above. This is not to suggest that the courts should afford rights to third parties that fly in the face of express terms in insurance contracts, grant rights of action not sanctioned by statute, or blithely ignore valid defences available to insurers where there is no statutory authority to do so. Rather, I urge that a general concern for third parties, given express shape for particular situations by the legislation,[35] be taken into account generally in interpreting policies and determining the scope of cover afforded by them.

See ss 4 et seq for these and related provisions. It would appear that, in invoking these provisions, the third party would have to re-establish the liability of the insured. In addition, any defences available to the insurer against the insured would defeat the third party's claim. See generally, Brown and Menezes, supra n 20 at 398 et seq. The scope of this provision appears recently to have been restricted by a High Court decision which held that it did not cover liability brought about by breach of contract or neglect of a solicitor in performance of his duty towards a client. *Perry* v *General Security Ins Co of Canada* unreported, Ontario Supreme Court, 11 July 1983.

See Sutton, supra n 18 at 307.

See eg Keeton, supra n 19 at 292.

Another example, in a different context, of legislation giving protection to a third party is section 11 of the Insurance Law Reform Act 1983. That provision gives the purchaser of land the benefit of the vendor's insurance for the period between the signing of the contract and the date of settlement or possession, to the extent that the purchaser's own insurance, if any, does not cover the loss.

As suggested earlier, such an approach should in particular be adopte in connection with the question of fortuity as it relates to liability insuranc

III FORTUITY AND LIABILITY INSURANCE

One of the fundamental concepts of insurance is that of fortuity. Ther are two aspects to this. One is that insurance money is not payable fo loss that is virtually certain to occur. For example, recovery cannot be had under insurance on property for normal wear and tear, only for 'accidental' loss or damage. The other aspect is that loss intentionally brought about by the insured is also excluded from the coverage. These principles are basic to insurance which, based on the law of large numbers, aims to provide for the losses of the few out of the premiums of the many. Out of a large number of insured risks only relatively few can be expected to materialise. If certainties and intentionally incurred losses were to be 'insured' the premiums required to cover them would for each insured have to equal the total amount of his anticipated loss. Of course this would not be 'insurance' in the accepted sense at all.[36] It is common for policies to specify that there is cover only for 'accidental' loss or losses not brought about 'intentionally' or some other phrase of similar meaning. However, this is not necessary as the fortuity principle is so fundamental it is regarded a an implied term of every contract of insurance.[37]

For the purposes of this paper, the second aspect of fortuity, intentionally caused losses, is the more relevant one. The issues involved are most clearly apparent with respect to non-liability policies so I shall discuss them befor dealing with the trickier problem relating to liability insurance.

1 *Accidents and Non-Liability Policies*

Where, as is usually the case, the word 'accident' or some similar or appears in the policy, the argument centres, naturally enough, upon th meaning of it. The courts have repeatedly stated that there is no 'compr hensive' legal meaning of the term and in each case it is necessary to loc to the particular wording of the policy and the circumstances of the case. However, one recurring theme is that an accident, for insurance law pu poses, involves an unlooked for mishap or an untoward event which is n looked for or designed.[39] This is perhaps a necessary starting point b the cases demonstrate its limitations. In *Colonial Mutual Life Assuran Society* v *Long*,[40] for example, the New Zealand Court of Appeal consider

36 In one sense this only applies strictly to indemnity insurance. Non-indemnity insuran such as life insurance, often promises to pay out on the occurrence of a certain eve i.e. the death of the life insured. Here the law of large numbers works on the basis individual uncertainty of life expectancy. In any event the amount payable is genera not calculable according to a measure of loss, but to a sum agreed in advance. Endo ment policies, with amounts payable on the insured's attaining a specified age, are fund by premiums which, taking into account their earning power over time, do match amount of the eventual pay-out. These types of insurance are outside the scope of present article.

37 A related but separate question relates to the public policy concerns involved in los brought about as a result of the criminal activity of the insured. This is discussed i subsequent section of this paper.

38 *Stats* v *Mutual of Omaha Ins Co* (1976) 73 DLR (3d) 324 at 328 (SCC); *Mills* v *Sm* [1964] 1 QB 30 at 35; *Colonial Mutual Life Ass Co* v *Long* [1931] NZLR 528 (CA

39 *Fenton* v *Thorley & Co* [1903] AC 443.

40 Supra n 38.

ase where the insured had strained his shoulder when throwing a tennis ll. His insurance was against accidental injury. Common sense might ggest that the man did not look for, foresee or expect the injury. Indeed e court itself stated:[41]

> Where the voluntary act which precedes the injury is not such as, in the ordinary course, to produce the result which follows, there is foundation for the inference that, in addition to the voluntary act, something unforeseen, involuntary or unexpected occurred which caused the unexpected result.

lowever, the court was persuaded by medical evidence to the effect that a strained shoulder was a not uncommon result of the act of throwing a ight tennis ball with some force, and that the injury could not be regarded as arising other than in the "ordinary course". The insured produced no evidence that there had been any 'unforeseen, involuntary or unexpected' intervention and the court was unwilling to draw any inference that such intervention had occurred. This reasoning is surely flawed. The fact that medical experts would not be surprised that such an injury would result from the act that was done does not mean that it follows in the ordinary course. By way of example, the court stated that it would regard as an accident a person's stumbling while walking since such an incident would clearly be unforeseen. But the distinction seems too technical. In neither case could it be said that the fortuity principle would be undermined by allowing recovery. In the case itself it was accepted that the insured was experienced at games and had not suffered such an injury before. It was not suggested that the injury was deliberately incurred, but neither could it be said that the insured was courting a risk.[42] The court only concerned itself with the narrow issue of the definition of 'accident', leading it to make a fine distinction and, in my view, a bad decision.

As we shall see, later cases in other jurisdictions probably mean that he *Long* case would be decided differently today.[43] But the decision does

1 Ibid at 540.

2 Cf *Candler* v *London & Lancashire Guarantee & Acc Co of Canada* [1963] 2 OR 547; 40 DLR (2d) 408; [1963] ILR 1-110 (HC), where the insured attempted to demonstrate his nerve by balancing on a window ledge of the 13th floor. He fell off and was killed. The court held that he was aware of the risk and had deliberately courted it. His death was therefore not accidental. See also *Jones* v *Prudential Ins Co* (1972) 24 DLR (3d) 683. It is probable also that a person injured in similar circumstances today would be able to claim successfully under the Accident Compensation Act 1982. There are two relevant provisions under that Act. First, the claimant must suffer "personal injury by accident", within the meaning of s 2. Second, under s 90, no compensation is payable in respect of personal injury "that a person wilfully inflicts on himself or, with intent to injure himself, causes to be inflicted on himself . . .".
"Personal injury by accident" was recently the subject of interpretation in *Wallbutton* v *ACC* (1980) 5 ACC Report 56 (High Court). The claimant had injured her back while engaged in the intentional act of bending over to pick up milk bottles. Relying on English cases dealing with Workers' Compensation legislation, the court held that for the purposes of the Act, an accident included ". . . an event which, although intended by the person who caused it to occur, resulted in a misfortune to him which he did not intend". The appellant's claim was therefore allowed.
S 90 (nor its predecessors) seems not to have been the subject of any interpretation that has been published. However, its wording seems clearly to require that the injury itself must have been intended before the exclusion applies. Interestingly, suggestions mooted a few years ago that persons injured in the course of highly dangerous recreational activities should not be covered by the scheme have not been implemented.

illustrate one important aspect of these cases which is relevant to our la consideration of liability insurance, and that is the distinction the cou sometimes draw between the act done and the result that follows. If t act itself is intended, as opposed to the result, that can often deprive t entire incident, including the result, of the qualification 'accidental'. I essence that is what happened in *Long*.

A more recent case that appears to represent a different approach is *Stat* v *Mutual of Omaha Insurance Co.*[44] A woman was killed when the ca she was driving while intoxicated collided with a stationary object. N doubt sufficient statistical evidence exists to show that injury and death is a not unexpected result of driving while drunk. In fact the Supreme Court of Canada appears to have accepted that the result was reasonably foreseeable from the insured's viewpoint especially given her voluntary act of drinking to excess before driving. However, it was stated that this state of mind must be distinguished from intent for the purposes of establishing whether something was an accident within the meaning of an insurance policy. Similar facts in an English case[45] led the court there to a similar conclusion and to consider that the risk of injury was neither deliberately run nor actually appreciated. The application of such a subjective test would surely have produced a different result in the *Long* case. Indeed the law seems now to have progressed to the stage where it can be summarised as follows, at least for non-liability insurance:[46]

> Whether a mishap is an accident or not depends on the intention of the actor. If the act is intended to produce a mishap, it will not be an accident. But if the mishap is not intended in this sense, the fact that the occurrence is due to the negligence of the actor does not prevent it from being an accident. It does not matter whether the degree of negligence is great or small. Where the mishap is not intended but the actor understands the risk of its occurring and deliberately courts it or 'looks for' it, that is, there is a deliberate acceptance of an appreciated risk, an awareness of the specific danger of a deliberate action, the occurrence is not an accident. It is otherwise if the risk which is taken is neither deliberately run nor appreciated.

This may seem to be a difficult test to apply in practice, as subjectiv tests often are. However, this problem has been somewhat alleviated, a least in the drinking driver cases, by what amounts to a presumption t the effect that the insured has not thought about or appreciated the risk involved in his actions in the absence of evidence to the contrary.[47] Thi is in line with general insurance law principles which place on the insure the burden of proving fact which might activate an exclusion clause c

44 14 OR (2d) 233; 73 DLR (3d) 324; [1976] ILR 1-816 (Ontario CA), affirmed [1978] 2 SC 1153; 87 DLR (3d) 169; [1978] ILR 1-1014.

45 *Marcel Beller Ltd* v *Hayden* [1978] 2 WLR 845; [1978] QB 694.

46 Sutton, supra n 18 at 393. See also the recent Ontario case, *Gosselin* v *State Farm I Co* (1983) 41 OR (2d) 641 where the insured, while drunk, had negligently set a hou on fire and left it to burn. The court held the fire not to have been "wilful".

47 See eg *Marcell Beller Ltd,* supra n 45. Note that in *Long,* the presumption worked other way. The claim failed because the insured was unable to produce evidence sugge ing the fortuity of his injury.

ɔund some other defence to a claim. Here, once the insured has estab-
shed a loss which comes broadly within the cover provided by the policy,
t is not inappropriate that the insurer establish the lack of fortuity.[48]

In general the test is a satisfactory one in the context of non-liability
nsurance. There are only two parties involved, the insurer and the insured,
ınd a reasonable balance is struck between their respective interests.
)eliberate courting of the risk, like an intentionally caused loss, detracts
ɜeriously from the fortuity of the event. The odds, calculated at the birth
ɔf the contract and based on the randomness of loss-causing occurrences,
ıre distorted by the conduct of the insured to the prejudice of the insurer.

ʔ *Liability Policies*

It is commonly considered that this basic approach is of equal applica-
ion to both non-liability and liability insurance. In fact many of the cases
dealing with either type draw freely on precedents involving the other type.[49]
But, as I have indicated above, there are additional considerations that
should come into play in examining the question of fortuity in connection
with liability insurance.

Readers may be puzzled by the suggestion that an identical phrase might
be subject to different interpretations. For example, in an act of extreme
recklessness, an insured motorist may cause damage both to his own car
ınd to that of another person. Why, it may be asked, should it be arguable
hat the motorist be denied recovery for the loss to his own property on
he grounds of his conduct yet the insurer still be liable for the damage
nflicted on the third party? The answer lies in the fact that there are two
ɜeparate promises involved even if the motor vehicle policy is regarded as
ı single contract. One promise is to pay the insured an indemnity for
lamage to his vehicle if certain conditions are satisfied. The other is ex-
ɔressed in terms of an undertaking to pay damages for liability imposed
ɔy law upon the insured. In my view, the concept of "accident" may
ppropriately be viewed differently with respect to each promise and the
ʌord "accident" should be given different interpretations accordingly.
ʌgain, some examples assist in elaborating this point.

In *Crisp* v *Delta Tile and Terrazzo Co*[50] the insured's workers negligently
ıiled to guard against the escape of dust from their work area which
ɜsulted in damage caused to the rest of the plaintiff's house. The insurer
ʌas joined and the issue was whether it was required to indemnify the
ınsured under a liability policy which provided for payment of loss 'caused
ɣ accident'. The Ontario Court of Appeal held that the loss had not been
ɔ caused because the workers[51]

8 I understand that the basic debate here is, strictly speaking, about the scope of the risk as opposed to defences to the claim. However, the line between these two aspects of cover has never been a clearly defined one; see Baer, "The Distinction Between Breach of Condition and Restrictive Definition of Risk: A Reply to Professor Rendall" (1977-78) 2 Can Bus LJ 485. In any event, I regard the approach under discussion regarding onus of proof to be appropriate on its own terms.

See eg *Stats,* supra n 44.

[1961] OWN 278; [1961] ILR 1046 (CA). See also *Marshall Wells of Canada* v *Winnipeg Supply of Fuel Co* (1964) 49 WWR 664 (Man CA).

[1961] OWN at 279 per Aylesworth JA.

> . . . had actual knowledge of what would happen if the precautions, which they faile to take, were not taken. There was, in this sense, a deliberate courting of the risk wit knowledge of the risk, there was an element of reckless conduct in the sense they coul not have cared whether or not the dust damage would ensue when they proceede with work in the way they did with the knowledge they had.

Although the court found some 'actual knowledge' on the part of th workers, there was also an objective element involved. The approach is sometimes described by the term 'constructive intent'. A hypothetical dispassionate reasonable observer is called upon to determine whether or not, given the voluntary actions of the insured, the resultant loss is, in retrospect, expected or designed. If an affirmative finding is obtained it is imputed to the insured who could therefore be said to have intended the results.[52] A broadly similar approach was adopted in the Australian case *Robinson* v *Evans Bros Pty Ltd.*[53] A market gardener brought an action against the insured company for damage to his crops caused by noxious fumes emitted from the insured's brick making factory. The insurer was joined, the insured claiming that this loss came within the term "accidental damages arising out of an accident" which appeared in the policy describing the risk covered. Starke J stated that[54]

> The test is whether an ordinary, reasonable sensible man, in the position of [the insured], would or would not have expected the occurrence . . . . The test is I think objective and not subjective: whether an ordinary, reasonable man with the knowledge, information and experience of [the insured] reasonably would have expected the event that did happen, namely the damage to the sprouts.

A different way of analysing cases of this type, but which generally produces the same result, is to characterise as the 'proximate' or 'dominant' cause of the injury that particular aspect of the incident which was actually intended. Thus, in *Robinson,* it could be said that the damage to the crop was 'caused' by the intentional actions of the managers of the factory in conducting their operation generally, and in failing to install a sufficiently high smokestack in particular. Therefore, since the cause of the damage was intentional, that damage could not be said to have arisen accidentally for the purposes of the liability insurance policy. This was the basis of Lord Denning's judgment in *Gray* v *Barr,*[55] the facts of which were that the insured took a loaded gun into Gray's house intending to threaten him. The gun accidentally discharged, killing Gray. The dominant cause of the death was held to be the deliberate act of the insured in entering the house with a loaded gun. Everything else flowed from this and there was no new intervening cause.

Gray was followed by a majority of the Supreme Court of Canada in *Co-operative Fire & Casualty Co* v *Saindon.*[56] The insured there intentionally threatened his neighbour in the course of an argument by lifting a power lawnmower and directing it towards the plaintiff's face. The plaintiff's hands and arms were severely injured although this result w

52 See Brown and Menezes, supra n 20 at 201.
53 [1969] VR 885.
54 At 896-7. Cf the judgment of Phillimore LJ in *Gray* v *Barr* [1971] 2 QB 554 at 586-7 (C
55 Ibid at 567, citing *Leyland Shipping Co* v *Norwich Union Fire Ins Soc* [1918] AC 3
56 [1976] 1 SCR 735; 56 DLR (3d) 556; 10 NBR (2d) 329; [1975] ILR 1-669.

t intended by the insured. An exemption in the policy for damage "caused tentionally by or at the direction of the insured" was held to apply and ere was no recovery under the policy. The act of lifting the lawnmower o near to the plaintiff's face was categorised as the 'proximate' cause of e injury, and thus the exclusion applied and the insurer escaped payment.

Whatever the specific approach used, the courts are concerned with the egree of intention or recklessness involved in the insured's conduct in ringing about the loss. This seems reasonable as far as it goes but, in my iew, it sometimes ignores important considerations. In *Robinson* v *Evans 'ros Pty Ltd,* referred to above, the judgment of Starke J included the ollowing passage which I think goes to the heart of the matter even if ıe did, in my view, resolve wrongly the question he posed:[57]

> It is true that the damage was unintended, but in these circumstances can it be said that it was unexpected? I find it impossible to say so. The defendant knew of the risk and deliberately chose to take it. In so doing, in my judgment, it acted negligently, but that is beside the point. What is to the point is that the defendant knew that if it continued operations with a low stack, there was a risk of damage to foliage. With that knowledge, it decided to gamble on its own opinion being right. He took, if you like, a calculated risk. The gamble failed to pay off. In these circumstances, I find it impossible to say that the damage to the sprouts was an unexpected event. It was not hoped for, rather than not expected.

With respect, the fact that the insured's conduct is characterised as ıegligence is not beside the point. In terms of the brick maker's liability o the plaintiff, the negligence *was* the taking of the calculated risk, and egligence in whatever form is the proper subject matter of liability in- urance. If an insured's negligence disqualified him from obtaining an ıdemnity under a liability policy, virtually all liability insurance would e rendered worthless from the insured's (and third party's) point of view. rotection against liability for negligence is the main purpose of most ability policies. As MacFarlane J said in *Straits Towing Ltd* v *Washing- ɔn Iron Works*[58]

> . . . if there was no liability under an accident policy for damage flowing from a reasonably foreseeable event then there would be no indemnity for liability arising from the negligence of the insured. The object of the insurance would thereby be frustrated because, in essence, the result of negligence of the insured is the risk insured against.

It is only when the conduct goes beyond negligence to such an extent at the fortuity principle is undermined, that cover is appropriately pre- ıded. The clearest example is where the event that happens is actually e intended result of the insured's conduct. It is also true that "reckless" haviour goes beyond the risk reasonably covered by a liability policy.[59] t the difficulty lies in identifying recklessness. In general it requires that e insured could be taken to have "expected" the result but this involves ɔre than that result was merely "foreseeable" (the negligence standard).

Supra n 53 at 897.

(1970) 74 WWR 228, 231, affirmed 38 DLR (3d) 265; [1973] 5 WWR 212. Cited with approval in *Prince George White Truck Sales* v *Can Indemnity Co* [1973] 6 WWR 365 at 369; 40 DLR (3d) 616 at 619.

See the various cases discussed supra and dicta in *Prince George White Truck Sales,* ibid.

However, this distinction seems to me to be largely illusory, at least in far as calculated risks are concerned. In *Robinson* for example, the jud appears to have thought that the damage to the crops was more tha foreseeable.[60] But neither could it be said that the damage was "expected In taking the calculated risk the brick maker must have thought there wa some possibility that there would be no harm caused. The real issue whether the conduct should be properly viewed as being closer to (a) clearl intentional conduct or (b) merely negligent conduct in terms of the threa posed to the financial integrity of the institution of insurance. In my viev a calculated risk is properly classifiable as negligence rather than intentiona conduct. Certainly, the insured's conduct in *Robinson* was surely not s "reckless" that it would have qualified as an intentional tort – even o a theory of constructive intent which requires that the result was "certai or substantially certain" to follow.

The view that calculated risks should be treated differently from in tentional infliction of harm is supported by another Canadian Suprem Court case, *Canadian Indemnity Co* v *Walkem Machinery Ltd.*[61] Th insured had been found negligent in respect of some repairs it had carrie out on a crane.[62] Significantly, for present purposes, it was found tha "Walkem *knew* of the dangerous condition of the crane, but neverthele pawned off on an unsuspecting customer an inadequately and negligentl repaired piece of equipment" [emphasis added].[63] Pigeon J referred to a earlier Canadian case [64] in which the majority decision had drawn a express distinction between an accident and a calculated risk. He stated:[

> With respect this is a wholly erroneous view of the meaning of "accident" in a compr hensive business liability insurance policy. On that basis, the insured would be denie recovery if the occurrence is the result of a calculated risk or of a dangerous oper tion. Such a construction of the word "accident" is contrary to the very principle insurance which is to protect against mishaps, dangers and risks.

and further[66]

> . . . I wish to add that, in construing the word "accident" in this policy, one shou bear in mind that negligence is by far the most frequent source of exceptional liabili which a businessman has to contend with. Therefore, a policy which would not co liability due to negligence could not properly be called "comprehensive". B foreseeability is an essential element of such liability. If calculated risks and dangero operations are excluded, what is left but some exceptional causes of liability?

The judgment of Pigeon J was adopted unanimously by the court exce for a qualification added by one judge excluding calculated risks. The ca might have been thought to be the final and most authoritative word

60 See Sutton, supra n 18 at 391.
61 [1976] 1 SCR 309; [1975] 5 WWR 510; 53 DLR (3d) 1; [1975] ILR 1-654 (at trial, *nom Straits Towing,* supra n 58).
62 *Rivtow Marine Ltd* v *Washington Iron Works* 40 DLR (3d) 530; [1974] SCR 1189; [19 6 WWR 692.
63 53 DLR (3d) 3.
64 *Marshall Wells of Canada Ltd,* supra n 50.
65 53 DLR (3d) 6.
66 Ibid 7.

e subject in Canada except that *Co-operative Fire & Casualty Co* v *iindon,* referred to above (involving the injury inflicted by the lawnmower) as subsequently decided in the Supreme Court of Canada and held against e insured. *Walkem* was not referred to in the majority judgment. Laskin JC, writing for the minority, did, however, follow *Walkem.* He said:[67]

> . . . so far as this court is concerned, [that] an act or omission which involves a calculated risk or amounts to a dangerous operation from which injury or damage results cannot be said to be done or omitted with intent to cause the injury or damages in the absence of a specific finding that there was such intent.

cause the policy in *Saindon* did not include the word "accident", the ajority decision can perhaps be considered dicta as far as the definition "accident" is concerned, especially as the court seemed to be chiefly rsuaded by arguments about the public policy relating to claims for covery arising out of criminal activity.[68] However, a definitive statement the Canadian law on the subject is not necessary here. It is enough to t out the opposing views. What I wish to suggest is that the position ken in *Walkem* and by Laskin CJC in *Saindon* is the appropriate one ven the commercial and social setting in which liability insurance operates. ie insured should be able to rely upon cover in taking a calculated risk.

But I would take even further the notion that the commercial and social tting of liability insurance is an important factor in the interpretation liability policies. Not only should this involve ensuring that businessmen id other potential tortfeasors are protected against the risks normally ising in the course of their particular activities, but it should also take count of the third parties who suffer when these risks are realised. In ird cases not involving actual intent by the insured to cause damage and ot necessitating violence to the wording of the policy, the fact that the surance is likely to be the only source of compensation for the victim ould be considered in favouring a wider definition of "accident".

Although I have argued for a greater recognition of the kinship of liability surance law and tort law and that account be openly taken of this re- ionship in the interpretation of liability insurance policies, the fact that e availability of an indemnity is, at root, based on a contract cannot ignored. The approach I have advocated is, I think, consistent with usual licy terms which describe the primary risk by referring to "accident" or cidental loss", and also with those that set out an exclusion, such as cept for intentionally caused loss" and the like. But, except where the ms of policies are mandated by legislation or some administrative pro- s,[69] an insurer may insert wording which is narrower than this. For mple, a policy may expressly exclude loss arising from the insured's ure to take some particular precaution, such as installing a specified ce of safety equipment, regardless of his intention to cause loss. Such express provision would be controlling and recovery would be denied pite the public policy considerations I have referred to.

But surely this fact supports the general argument I have made. The foun-

1976) 56 DLR (3d) 559.

See Brown and Menezes, supra n 20 at 203.

For example, Automobile Insurance policies in most Canadian provinces.

dation of insurance is the ability of insurers to predict the frequency which risk-taking will result in disaster. If an underwriter cannot do thi he should be in another business. Therefore, if an insurer regards a pa ticular type of activity, or particular category of calculated risk, as undc mining the fortuity principle, it can exclude that activity expressly. Failu to make such express provision suggests that the consequences of ris taking, short of intentionally causing loss, are properly regarded fortuitous.

IV Other Relevant Policy Considerations

1 *The Problem of Deterrence*

So far I have emphasised the role of liability insurance in enhancing th compensation role of torts, particularly negligence. But the idea th negligence law serves a deterrent function, indeed that this is its prima role, still finds favour among some theorists.[70] If negligence law does ha this effect, it is necessary to consider what impact a more liberal inte pretation of liability insurance policies would have on it. Of course, th very existence of liability insurance policies blunts considerably the dete rent effect of torts because its very purpose is to relieve the tortfeasor the consequences of a damage award against him.[71] If a tortfeasor shielded not only for mere careless acts but also for activities that mig be described as "reckless", the deterrent function is reduced even furth The incentive to refrain from indulging in such conduct is removed.

For a response to this seemingly forceful objection, we can turn to th economic analysis of law.[72] One of the contributions of that field, as applies to the law of negligence, is the insight that absolute deterrence not an appropriate goal. To eliminate entirely the incidence of occurrenc which give rise to tort actions, it would be necessary to eliminate potentially tortious activities and conduct. This would mean that ma socially beneficial activities would cease to be carried on. There would no motor accidents if people stopped driving cars. Mr Robinson's sprou would have escaped damage if his community was prepared to do withc bricks. The trick is to find the level of activity which produces no mc than a tolerable level of harm.

The prevailing economic theory of negligence law is that the traditio principles themselves produce this optimal level of activity and l avoidance. The standard of the ordinarily prudent, or reasonable, pers is said to approximate a rational cost-benefit analysis by striking a bala between the cost of preventing loss and the magnitude and likelihood that loss. Professor Posner, the leading exponent of the theory, described it as follows:[73]

70 See Posner, "A Theory of Negligence" supra n 4. But see also, for a criticism of this Veljanovski, "Economic Myths About Common Law Realities – Economic Effici and the Law of Torts" (1979) Centre for Socio-Legal Studies, Working Paper No.

71 See Brown, "Deterrence and Accident Compensation Schemes" supra n 17.

72 I am mindful of Veljanovski's caution about unschooled and amateurish delving economic analysis. See Veljanovski, "Cost Benefit and Law Reform in Australia" (1 132 New LJ 893. However, as will appear, my brief digression here is more for illustr than detailed analysis.

73 Supra n 4 at 32.

> Discounting (multiplying) the cost of an accident, if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident. The cost of prevention . . . may be the cost of installing safety equipment or otherwise making the activity safer, or the benefit foregone by curtailing or eliminating the activity. If this cost . . . exceeds the benefit in accident avoidance to be gained by incurring this cost, society would be better off, in economic terms, to forgo accident prevention . . . . If, on the other hand, the benefits in accident avoidance exceed the costs of prevention, society is better off if those costs are incurred and the accident averted, and so in this case the enterprise is made liable, in the expectation that self interest will lead it to adopt precautions in order to avoid a greater cost in tort judgments.

This means that if a person takes a "calculated risk", in the sense discussed above, but gets the calculation wrong by underestimating the magnitude or likelihood of loss, then tort law will hold him or her liable. The managers of the brick factory, in the *Robinson* case, underestimated the likelihood of damage to their neighbour's crops and thereby were judged to be acting below the standard of the reasonable person.

But as a matter of practicalities, calculations such as this are not often easy to make with precision. A determination may be made and risk taken in all innocence in the sense that benefits will be predicted to accrue without loss to any person even though the dangers are considered. The effect of the *Walkem* approach to the interpretation of liability insurance policies is that people will not be deterred from taking chances designed to produce benefits (both to the actor and also, perhaps indirectly, to society in general) but which may go wrong and cause loss. In other words they can take the chance of being wrong in calculating the risk. Insurance enables the risk to be spread. At the purely theoretical level, economic analysis of negligence law does not take liability insurance into account but its existence in a sense bolsters the theory by allowing the necessarily imprecise calculations about likelihood of harm to be made and acted on without an excessive caution which would stifle socially beneficial enterprise.

However, if the likelihood of harm is so great that it can be said, objectively, to have been intended, then the claim that the calculation of the risk is too imprecise (and therefore deserving of insurance protection) cannot be made. Deterrence can operate in this area and the unavailability of insurance strengthens its effect. This is consistent with the distinction, approved in *Walkem,* between intentional conduct and the taking of calculated risks.[74]

Criminal Conduct of the Insured

Another matter having a bearing on the question of fortuity which has ramifications in terms of both the compensation and deterrence functions of tort law, is that concerning the criminal conduct of the insured. There is much authority in the cases for the proposition that a person should not recover an indemnity for loss brought about by his criminal conduct.

[74] Ironically, perhaps, the *Walkem* case could be said to have been wrongly decided on its facts. The liability incurred by the insured arose out of its deliberate withholding of information about the state of the crane. This could be considered to be more than a calculated risk. The point is debatable, however, and in any event, the principles of law expounded remain valid.

Gray v *Barr*[75] is an example. There, the insured's action in entering th house with a loaded gun and threatening the victim amounted to a unlawful assault with violence and this was held to preclude cover. Thi reflects a certain repugnance at the idea that people should be protecte against the consequences of their crimes. But this confuses the area o punishment with that of deterrence. It is one thing to deny indemnity fo a fine or other punishment,[76] quite another to suggest that the forfeitur of the benefits of an insurance policy will succeed where criminal sanc tions and societal disapproval have failed.[77] It also ignores the fact that in liability insurance cases, it is the victim who is penalised for the insured' anti-social behaviour when there is a denial of cover.

This dilemma is most pronounced in automobile accident cases. In thi situation, English cases have established that insurance against third part liability when an offence is committed is not contrary to public policy.[7 A Canadian case took the opposite view. In *O'Hearn* v *Yorkshire Insurance Co*[79] the insured struck and killed a man when driving while intoxicated The court stated:[80]

> In the case at bar, the appellant's negligence, apart from it resulting in the death of the injured man, was a crime; and, according to the cases to which I have referred, the appellant cannot maintain an action to indemnify him against the injury caused by that act.

Particular approval was given to the following words of Fry LJ in *Cleaver* v *Mutual Reserve Fund Life Assn*:[81]

> No system of jurisprudence can with reason include amongst rights which it enforces rights directly resulting to the person asserting them from the crime of that person If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour.

The unfortunate consequences of this approach were recognised and gave rise to legislative intervention in Canada. The relevant provision, which now appears in the insurance statutes of all common law provinces, states:[8

> Unless the contract otherwise provides, a violation of any criminal or other law i force in the province or elsewhere does not, ipso facto, render unenforceable a clai for indemnity under a contract for insurance except where the contravention committed by the insured, with intent to bring about loss or damage.

75 Supra n 54.

76 *Leslie* v *Reliable Advertising Agency* [1915] 1 KB 652 at 659; *Askey* v *Golden Wine C* (1948) 64 TLR 379. In this vein, punitive damages are not normally recoverable eith See Keeston, supra n 19 at 287.

77 See *Hardy* v *Motor Insurers' Bureau* [1964] 2 QB 745; [1964] 2 All ER 742 at 750 (C per Diplock LJ.

78 *Tinline* v *White Cross Ins Assn* [1921] 3 KB 327. See also *James* v *Brit Gen Ins Co* [192 2 KB 311.

79 (1921) 67 DLR 735.

80 Ibid at 738.

81 [1892] 1 QB 147 at 156.

82 For example, Ontario Insurance Act, RSO, 1980, c 218, s 95. The *Saindon* case, sup n 56 is an example of judicial construction of the section. There the Supreme Court Canada held that the section did not apply because the intentional act of the insu in brandishing the lawn mower in a dangerous way was sufficient to bring the case wit the exception regarding intentional loss.

This section applies to liability insurance generally. Another section, applying to automobile liability insurance, reinforces the principle so far as third parties are concerned. As discussed above,[83] Canadian legislation gives a third party claimant direct rights of action against a liability insurer once a judgment against the insured is obtained. This direct right of action is expressly not prejudiced by[84]

> (c) any contravention of the *Criminal Code* (Canada) or a statute of any province or territory of Canada or of any state or the District of Columbia of the United States of America by the owner or driver of the automobile.

However, if, in the absence of this section, the insurer would have been relieved of liability entirely, it can claim reimbursement from the insured.

This kind of legislation does not appear to have been necessary in other jurisdictions.[85] The English position, as enunciated in *Tinline*[86] and *James*,[87] has been followed in Australia. In *Fire and All Risks Insurance Co* v *Powell*[88] it was accepted that insurance should provide an indemnity in respect of liability for loss caused by the insured's driving unless that loss is intentionally caused, even if there has been the commission of a crime. In discussing the circumstances in which public policy would operate against allowing recovery, the court said:[89]

> It may be that each case is to be decided on its own particular facts. The gravity of the illegal or criminal act in question, the possible tendency to encourage the doing of such acts if civil claims are entertained in respect of them, the necessity for the courts to uphold a deterrence to the doing of such acts, all spring to mind as relevant considerations. The cases seem to support the view that they are all relevant.

The court in *Powell* paid heed to other aspects of public policy and referred to the social benefit in having the obligations imposed by contracts carried out wherever possible. The court felt this was particularly so where the rights of third parties are affected.[90] This is reminiscent of the reasoning of Greer LJ in *Hazeldine* v *Hosken*[91] who, in distinguishing the *Tinline* and *James* cases, explained them on the ground that the act to be indemnified in those cases was one against which the law intended that people should insure. It has been rightly suggested by one commentator that this meant that "the public policy of protecting innocent third parties should prevail over the public policy of refusing to indemnify a person for the consequences of his unlawful act"[92] and that reaches the essence of the

83 See notes 20-22 and the relevant text, supra.
84 Ontario Insurance Act, s 226(4)(c).
85 The courts have given third parties similar protection under Australian (see Sutton, supra n 18 at 485) and English (see MacGillivray and Parkington, supra n 18 at 244) legislation providing direct rights of action.
86 Supra n 78.
87 Ibid.
88 [1966] VR 513 (Full Court of Victoria).
89 Ibid at 521-22 per O'Bryan and Pope JJ.
90 Ibid. See particularly, the judgment of Smith J. Cf *Hardy* v *Motor Insurers' Bureau,* supra n 77.
91 [1933] 1 KB 822 at 838.
92 Sutton, supra n 18 at 482.

theme of this paper. The courts, and some legislatures, have recognised that protecting the interests of third parties is an important aspect of public policy and should be given prominence in dealing with cases concerning the obligations of insurers under liability policies where the insured's conduct may have breached the criminal law. My view is that this same concern is properly expressed, not only in addressing objections based on the criminal activity of the insured, but also in respect of the question of fortuity. This public policy consideration supports the view that recovery should be denied the third party only where the fortuity principle is genuinely undermined; that is, where the loss itself is actually intended by the insured.

V CONCLUSION

In practice, liability insurance is inherently tied to the operation of tort law. This is especially so if tort law is viewed as primarily serving the function of compensating the victims of careless conduct. In some contexts, liability insurance is compulsory to ensure that compensation is available. Third parties are given direct rights of action and sometimes even protected against conduct of the insured which might otherwise prejudice the availability of insurance. The idea of protecting third parties in this way is not restricted to statutory arrangements as evidenced by the approach adopted by the courts with respect to cases where the insured has been guilty of criminal conduct.

To the extent that tort law can be said to provide a form of deterrence, it must be conceded that allowing liability insurance in any form detracts from this. But if the objective is not to promote absolute deterrence, merely to find some optimal level of dangerous activity that preserves the social benefits of that activity, liability insurance can be seen as an advantage. It allows people to indulge in a degree of "carelessness" when it may be beneficial to do so. This applies to calculated risks as well as to mere inadvertence.

If the general contention that liability insurance enhances (or should enhance) the operation of tort law is accepted, the law relating to liability insurance should be shaped and applied with that in mind.[93] In the context of arguments about fortuity this, in my view, means that the balance should tip in favour of allowing recovery under the policy unless its terms expressly preclude cover in the circumstances or the loss is deliberately caused. I do not believe that this threatens the viability of the insurance industry. Loss would still occur only randomly and insurers can calculate premiums accordingly. Where a specific activity is regarded as jeopardising the integrity of cover, express exclusions can be included.

This means that the view adopted by the majority in *Walkem* that a third party who suffered the loss be compensated by the tortfeasor's insurer despite arguments that the insurer had taken a calculated risk which caused the damage, is the correct one. It is an approach the adoption of which I would recommend for other jurisdictions such as New Zealand and Australia.

93 I would not object to a rule allowing insurers, in certain cases, to receive from the insured amounts paid over to third parties. However, this would probably require legislative action or the inclusion of relevant provisions in policies.