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## Liability Insurance at the Tort-Crime Boundary

*Tom Baker*\*

Liability insurance defines the boundaries of tort law-in-action in a variety of ways. As a formal matter tort law generally ignores whether defendants have liability insurance, as well as the prevailing verbal and dollar limits on that insurance. (Stapleton 1995)<sup>1</sup> Yet, liability insurance is close to a *de facto* element of tort liability whenever the potential defendants are individuals, and liability insurance even shapes claims against large, well-funded organizations. (Baker 2006, Black et al 2006, Zeiler et al forthcoming. Cf. Baker & Griffith). Tort liability certainly exists out from under the liability insurance umbrella, but tort lawyers do not go out there very often, because there is less return in it. While there are exceptions, lawyers prefer to ask a liability insurer to pay – because paying claims is the business of liability insurance. (Baker 2001) For this reason, liability insurance must be counted among the sites in which to investigate the relationship between tort law and culture. Whatever legal culture is, it surely affects liability insurance institutions, and these, in turn, affect – and are affected by – the development of tort law.

This essay explores how liability insurance mediates the boundary between torts and crime. Liability insurance sometimes separates these two legal fields, for example through the application of standard insurance contract provisions that exclude insurance coverage for some crimes that are also torts. These exclusions largely remove these crimes from the reach of civil law, as demonstrated, for example, by the dearth of tort claims involving domestic violence, molestation, and other assaults, notwithstanding the prevalence of these crimes in the U.S. (Wriggins 2001). With respect to these crime-torts, liability insurance operates to create a greater *de facto* separation between tort and criminal liabilities where, *de jure*, the two liabilities would appear to overlap.

Perhaps less obviously, liability insurance also can draw parts of the tort and criminal fields together. For example, professional liability insurance civilizes the criminal law experience for some crimes that are

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\* University of Pennsylvania Law School. Thank you to Youngjae Lee and John Witt for comments on an earlier draft. This chapter benefited from discussion at Fordham Law School and at the faculty of law of Bar Ilan University.

<sup>1</sup> For an exception, see *Ard v. Ard*, 412 So. 2d 1066 (Fla. 1982) (lifting the traditional parental immunity only to the extent of the available liability insurance).

also torts by providing defendants with an insurance-paid criminal defense that provides more than ordinary means to contest the state's accusations. Notable examples include the recent spate of high profile white-collar prosecutions involving former executives from Enron, HealthSouth, and WorldCom, in which directors' and officers' liability insurers helped fund the criminal defense. (Brickey 2006) The availability of liability insurance for the criminal defense both reflects and signals that these crimes are more like torts than other crimes and, perhaps, that the defendants are not real criminals. (Cf., Singer and Husack 1999, Mann 1991)

On the books and in theory, criminal and civil liability are governed by largely independent norms and institutions. (Steiker 1997; but see Becker 1968) In effect, tort and criminal liability occupy different legal dimensions and, thus, the idea of a boundary between them might seem to make little sense. An act can be both a crime and a tort, and whether it falls into one of those categories typically has little to do with whether it falls into the other. The most obvious exception to the independence of tort and criminal law occurs when criminal law supplies a legal standard to tort law, for example through the doctrine of negligence *per se*. (Dobbs 2000 at 215). Here, the dominant spatial metaphor is overlap, not boundary.

In practice, however, torts and crime do constitute different fields in the "good fences make good neighbors" sense, and, continuing that metaphor, liability insurance forms part of the fence between them. Liability insurance distinguishes between people and acts that are governed by the "hard treatment" of criminal justice institutions (Hart 1968) and people and acts that are governed by civil justice. Only the state has the power to "govern through crime" (Simon 2007), but liability insurance markets help determine the extent to which civil justice retreats in response.

As Kenneth Abraham has described, liability insurance grew up together with tort law over the course of the 20<sup>th</sup> century. (Abraham 2008) Liability insurance did not exist until the 1880s, and in the 19<sup>th</sup> century tort claims were rare events. (Id; Rabin 1999) In a symbiotic relationship, the new tort liabilities associated with industrialization, the automobile, and other new forms of activity created a demand for liability insurance, liability insurance stimulated the growth of tort claiming, the growth of tort claiming increased the demand for liability insurance, and so on. (See also Syverud 1994, Yeazell 2001, and Pandya 2007).

Like the underlying tort liabilities to which they apply, liability insurance policies might at first seem to be unrelated to the criminal dimension of the legal universe. Indeed, one can search the early liability insurance literature in vain for any reference either to crime or criminal liability. This silence is consistent with the traditional view of liability insurance offered by philosophers of tort law. In that view, tort liability comes first, creating rights and obligations, and liability insurance comes

second, merely shifting the financial burdens of these tort obligations to the insurance pool. (E.g., Waldron 1995; Stapleton 1995) Wherever tort law goes, liability insurance follows, and there is no need in the liability insurance arena for consideration of the nature or limits of the underlying liability, except perhaps when there are economic or technical issues that affect the operation of liability insurance itself.

Yet, as Mary Coate McNeely first described in the *Columbia Law Review* in 1941, liability insurers have from the beginning struggled to separate liability insurance from crime for reasons that are not purely economic or technical. (McNeely 1941)<sup>2</sup> Moreover, as I shall argue, this struggle affects the underlying tort liabilities themselves, challenging tort theorists' hierarchical understanding of the relationship between tort and liability insurance.

Professor McNeely locates the struggle over liability insurance coverage for crime-torts within a larger story about "Illegality as a Factor in Liability Insurance," and the story she tells is a familiar one in the insurance law genre. Denials of insurance coverage based on broad principles and exhortations to public policy gradually but surely fail, leading insurance underwriters to sharpen their pencils and write exclusionary provisions in their insurance contracts that courts largely enforce. (E.g., Rossmiller 2007) The preoccupation with crime is also familiar within the insurance genre. Life and fire insurers struggled for much of the 19<sup>th</sup> century to avoid association with crime (Zelizer 1979, Baker 1997), and the insurance adjuster as detective remains a staple of crime fiction today.<sup>3</sup>

Allowing for differences in style and ambition, much of Professor McNeely's article could have been written today. Insurance institutions continue to refine the standard form contract provisions they use to exclude coverage for tort claims arising out of crimes, and they continue to justify this effort using the forms of reasoning that she identifies: consequentialist reasoning that distinguishes among illegal acts according to ideas about incentives that today we call moral hazard (see e.g., Heimer 1985) and moral reasoning that distinguishes among illegal acts according to degrees of blameworthiness.

Few commentators today would agree with Professor McNeely's ultimate conclusion, however. She predicted that the emerging concept of liability insurance as a victim compensation fund would replace the old fashioned concept of liability insurance as protection for the defendant and, as a result, liability insurers would gradually abandon the effort to exclude coverage for torts arising out of crimes. Today this prediction seems as

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<sup>2</sup> Of note to insurance scholars, the article was adapted from her master's thesis written under the direction of Edwin Patterson.

<sup>3</sup> See [www.law.uconn/library/ilc/fiction.htm](http://www.law.uconn/library/ilc/fiction.htm) (portal to the insurance fiction collection).

quaintly utopian as the related but more familiar prediction that the concept of social insurance would take over tort law. (Cf. Sebok 2003) To be sure, liability insurance *is* a victim compensation fund, but it is not only that – and not even primarily that, except in workers compensation (which hardly is considered to be liability insurance anymore) and, perhaps, in auto insurance. Indeed, the move to extend the compensation idea beyond workers compensation has made very little progress in the nearly 70 years since McNeely’s article. (Abraham 2008) The one possible exception may have been products liability, but whatever force there was in the social insurance concept of product liability law is, at the very least, dissipating. (Schwartz 1981 & 1992. Cf. Stapleton 1995)

In the sections that follow I expand on four points suggested by a contemporary rereading of Professor McNeely’s mid-20<sup>th</sup> century treatment of liability insurance and crime. First, I confirm that liability insurers continue to use contract provisions that exclude claims arising out of criminal acts. Second, I demonstrate that the crime-tort separation in liability insurance cannot be explained by economic incentives, alone. Morality matters, too. Third, I argue that this separation both reflects and reinforces a concept of liability insurance as protection for defendants, rather than as a fund for victims. Fourth, I argue that this concept of insurance, in turn, both reflects and reinforces an understanding of tort claims as encounters between particular plaintiffs and defendants, rather than as a price setting or loss spreading insurance mechanism.

In a concluding section, I describe situations in which liability insurance provides coverage for criminal defense costs. I argue that this extension of liability insurance into the criminal field suggests that liability insurance institutions could cover a broader swath of crime torts than they do, providing further support for the claim that consequentialist reasoning, alone, cannot explain the observed relationship between liability insurance, torts, and crime.

#### **A. Excluding Crime-Torts from Liability Insurance Contracts**

Liability insurance contracts today limit liability insurers’ responsibility for crime-tort losses in four ways.

First, although liability insurance contracts provide broad defense and indemnity coverage for tort proceedings and tort damages, they typically do not provide defense coverage for criminal proceedings, and, to my knowledge, they never provide any coverage for criminal fines or penalties.<sup>4</sup> This means, for example, that a driver charged with driving under the influence after running over a pedestrian, will get a tort defense

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<sup>4</sup> Of note, liability insurance contracts generally do not cover fines or penalties that are assessed by civil authorities, either. The relationship of civil fines and penalties to the tort-crime boundary is a topic for future work.

lawyer from his insurance company, but not a criminal defense lawyer. Moreover, if the driver is assessed a fine as part of his punishment for a DWI conviction, the insurance company will not pay or reimburse him for that fine, even though the insurer will readily pay much larger amounts of money to settle the associated tort action or to satisfy a tort judgment.

The fact that some liability insurance policies today do provide criminal defense coverage (as I will discuss in the concluding section of this chapter) brings this aspect of the separation into greater relief. Indeed, the fact that no liability insurance policies appear to have provided criminal defense coverage in the 1940s may explain why Professor McNeely did not even mention it. This aspect of the crime-tort separation in liability insurance may have been so obvious and accepted that she did not even notice it.

Second, liability insurance contracts generally contain clauses that exclude coverage for claims arising out of intentional injuries by the insured. These clauses do not explicitly withdraw liability insurance from crime-torts. But, in addition to the obvious economic explanation (moral hazard), they reflect concerns about the propriety of insulating people from the consequences of criminal actions. Indeed, when enforcing intentional harm exclusions, courts commonly stress the criminal nature of the conduct in question and refer in moralistic terms to the public policy concerns that would be raised by providing insurance for crime.<sup>5</sup> This justification is an echo of the earlier, general principle Professor McNeely described. Although courts today would be unlikely to uphold the denial of coverage based on this broad principle in the absence of an explicit contract provision,<sup>6</sup> the principle nevertheless retains some value as an explanation for these contract provisions.

Third, some liability insurance contracts contain clauses that exclude coverage for punitive damages, and some courts allow insurance companies to refuse to pay for punitive damages even in the absence of such exclusionary language. (Sharkey 2005) Like exclusions for intentional harm, these explicit and implicit exclusions for punitive damages do not directly withdraw liability insurance from crime, but they do withdraw liability insurance from punishment, a defining aspect of criminal remedies. (Hart 1968) Moreover, courts that allow insurance companies to refuse to pay punitive damages commonly stress the criminal nature of the conduct in question and the similarity between punitive damages and criminal fines. (Sharkey 2005) Instead of withdrawing liability insurance entirely from the

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<sup>5</sup> See, e.g. *State Farm Mut. Auto. Ins. Co v. Martin* 660 A.2d 66 (Pa. Super. Ct. 1995); *Blackman v. Wright*, 716 A.2d 648 (Pa. Super. Ct. 1998); *Sullivan v. Equity Fire & Cas. Co.*, 889 P.2d 1285 (Okla. App. 1995); and *State Farm Mut. Auto. Ins. Co. v. Wertz*, 540 N.W. 2d 636 (S.D. 1995) (*compiled by RA – need to check.*).

<sup>6</sup> See, e.g., *Ambassador v. Montes*, 388 A. 2d 603 (NJ 1978).

tort claim in question, a punitive damages exclusion withdraws coverage from the quasi-criminal aspect of the tort law remedy. Like the public policy based prohibition of insurance for intentional harm, the prohibition on insurance for punitive damages appears to be on the wane.<sup>7</sup> Nevertheless, the reasoning behind both prohibitions suggests that explicit exclusions for intentional harm and punitive damages in liability insurance contracts can be understood as part of the crime-tort separation.

Fourth, many liability insurance contracts contain additional clauses that specifically state that the insurer will not pay for tort claims arising out of criminal acts, whether the resulting injuries were intentional or not. These clauses are the most explicit manifestation of the crime-tort separation, and they include broadly worded exclusions that eliminate coverage for foreseeable injuries from any “criminal act” as well as more narrowly worded exclusions that eliminate coverage for injuries related to specific crimes, such as molestation. These criminal act exclusions appear in some professional liability insurance policies that include coverage for some criminal defense costs, so the tort-crime separation in those parts of the tort and liability insurance field is far from complete. But these criminal act exclusions have also begun to appear in homeowners’ insurance policies, which never provide coverage for criminal defense costs. (Eidsmoe & Edwards 1998-99). The homeowners’ insurance company may still have to pay for some or all of the tort defense costs of the alleged criminal, and that tort defense obligation gives these crime-tort cases a settlement value for insurance companies. (Pryor 1997) Nevertheless, the insurers putting these clauses in their contracts clearly aim to reduce the extent to which they have to pay for any costs related to criminal activity, and the courts on the whole support that effort. (Baker 2008 at 449).

### **B. The Limits of the Moral Hazard Explanation**

For people accustomed to thinking about law in economic terms, moral hazard might at first seem to provide an obvious and important part of the explanation for the insurance contract provisions just described. Moral hazard – the tendency for insurance to reduce the incentive to prevent loss – is a longstanding concern in all kinds of insurance, and liability insurance is no exception. (Baker 1996) Almost all tort liabilities involve harm that potential defendants can avoid to at least some degree, if only by reducing the extent to which they or people they control engage in activity that may cause harm. Indeed, in economic analysis, loss prevention is the primary

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<sup>7</sup> Sharkey 2005 reports that it is a “minority” position recognized in only 9 U.S. states and, in most of those states, vicariously assessed punitive damages are insurable. See Baker 1998b for an explanation of how large corporations are able to obtain offshore insurance that indemnifies the corporation for punitive damages assessed in jurisdictions in which such insurance is contrary to public policy.

justification for tort liability. (Shavell 1987) Thus, to the extent that liability provides an incentive to take care, all liability insurance creates at least the potential for moral hazard. (Shavell 1979).

In that regard at least, insurance for crime-torts is hardly alone. The question is whether the incentive problem becomes significantly more serious when a tort is also a crime. If so, then moral hazard provides a satisfying explanation for the crime-tort separation. If not, we need to look elsewhere.

As a moment's reflection should be sufficient to make clear, criminal liability does not exacerbate the moral hazard created by liability insurance. Rather, criminal liability reduces moral hazard. Adding criminal liability on top of tort liability helps offset the moral hazard of providing insurance for the related tort liability, at least as long as the criminal penalty is not insured, and, to my knowledge, it never is.

When the criminal penalties include going to jail, the presence or absence of liability insurance seems likely to have little or no effect on incentives. Even a short stay in a jail cell surely would loom larger in the imagination than an uninsured tort liability. Moreover, if person in question knows very much about the real life operation of the tort system, she knows that the odds are very strongly against a tort lawsuit if there is not any insurance. (Gilles 2006) Given almost any prospect of criminal law enforcement involving imprisonment, the presence or absence of liability insurance seems likely to affect only slightly the expected cost of crime, *ex ante*.

It is of course possible to imagine a crime-tort for which the only criminal liability is a small fine, and for which there are no significant shame or other non-monetary sanctions attached to a criminal conviction. In that event, the criminal liability would not do much to offset any moral hazard created by the insurance that covers the associated tort. But I predict that insurance companies would be willing to offer tort liability insurance in all such cases (subject to ordinary moral hazard control measures), because the small size of the fine relative to the potential injury would indicate that society does not strongly condemn the activity and therefore that the moral objections to the insurance would not be substantial.

Traffic laws provide a good example. Speeding, crossing a solid yellow line, going the wrong way on a one-way street, and other traffic law violations are, as Professor McNeely described, criminal offenses in many jurisdictions, and these traffic violations are subject to fines that are small relative to the potential harm. Yet, insurance against tort liabilities for traffic crime-torts is universally available. True, insurance will not pay for the speeding ticket or any other traffic-related fine. But the cost of those fines pales in comparison to the potential damages that a liability insurer



would readily pay in the event a serious accident results from the traffic law violation.

I do not mean to suggest that liability insurance for crime-torts never poses a moral hazard problem. Instead, I suggest simply that the criminal status or label does not create or exacerbate the moral hazard and, all other things being equal, the potential for criminal liability actually reduces that problem.<sup>8</sup> Of course, all other things often are not equal. In particular, crime-torts do seem more likely to involve intentional harm than other torts. But the higher degree of moral hazard that might be created by providing liability insurance for such crime-torts results from the intentional nature of the harm, not the criminal status of the offense.

A further demonstration of the limits of the moral hazard explanation comes from the fact that there is an easily implemented and arguably more effective approach to managing the moral hazard of liability insurance for intentional harm than simply excluding coverage under the liability insurance contract. Under this alternative approach, the liability insurance contract would provide coverage for the tort, and the liability insurance company would manage the moral hazard by subrogation – i.e., by going after the insured to recoup the money paid to the victim.<sup>9</sup>

If anything, this pay and then subrogate approach would provide greater deterrence than the current approach of excluding insurance coverage for intentional harm. Because of the liability insurance exclusions, almost no one bothers to bring a tort claim for many crime-torts, unless there is a third party who was merely negligent or who can be held vicariously liable (Rabin 1999), with the result that the civil law in action often provides no real sanction for the criminal tortfeasor. (Baker 1998a; Pryor 1997)<sup>10</sup> For crimes involving family and friends, the absence of civil sanction can mean that there is no legal sanction at all, because family and friends are reluctant to call in the criminal law, as the domestic violence and acquaintance rape situations suggest. (Wriggins 2001).

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<sup>8</sup> A possible exception, discussed in Wriggins 2001, might be crime-torts in which the perpetrator believes that the victim will share the liability insurance proceeds with the perpetrator. As Wriggins discusses, this is a possible concern in the domestic violence context.

<sup>9</sup> In cases involving intentional harm, the usual rule prohibiting insurance companies from subrogating against their own insureds does not apply. See, e.g., *Ambassador Ins. Co. v. Montes*, 388 A.2d 603 (N.J. 1978).

<sup>10</sup> The one obvious exception is drunk driving, because the overwhelmingly compensatory purpose of compulsory automobile liability insurance has prevented automobile insurance companies from putting drunk driving exclusions in their policies. (Schermer) The divorce context may be another significant exception to this generalization. Apparently, tort claims arising out of spousal abuse are not uncommon in the divorce context, particularly when there are significant assets in the spousal estate or held separately by the husband. See Ira Mark Ellman and Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?* 55 Md. L. Rev. 1268 (1996). Thank you to Anne Dailey for bringing this to my attention.

Providing liability insurance for intentional harm could change that situation. With liability insurance money at stake, the civil law process would at the very least announce the wrong and, possibly, shame the defendant. (Hampton 1992) In addition, the public nature of the tort suit and subsequent subrogation action might even increase the chance that criminal prosecutors would get involved.

Moreover, plaintiffs might well refuse to settle without some payment of “blood money” on the part of the defendant, as occurs in drunk driving tort claims. (Baker 2001) Even a small blood money payment is more than the zero payment that would be assessed when a plaintiff cannot bring a tort action because there is no liability insurance policy that makes the claim worthwhile for a contingent fee lawyer. As a repeat player, the liability insurer would enjoy some advantage over the individual plaintiff in actually collecting money from the wrongdoer, so the defendants may well be required to pay even more money in subrogation. (Cf., Gilles 2006 on the difficulties involved). In combination, the blood money and subrogation possibilities may have the, superficially surprising, consequence that intentional tortfeasors whose liability insurance policies include coverage for intentional injuries would be more likely to pay some of their own money to plaintiffs than intentional tortfeasors whose liability insurance policies exclude that coverage.

If the real problem with insuring domestic violence, rape, and other assaults were moral hazard, then something like this pay and then subrogate approach would at least be on the public policy agenda for discussion. Yet it is not. The leading appellate decision supporting this approach, the New Jersey Supreme Court’s decision in *Ambassador Insurance v. Montes*,<sup>11</sup> has

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<sup>11</sup> 76 N.J. 477, 388 A.2d 603 (1978). In that case, Ambassador Insurance Company asked the New Jersey courts to declare that it had no duty to defend or pay for a wrongful death claim. The claim arose out of a crime for which Ambassador’s policyholder was convicted and sent to prison: he burned down a building in the middle of the night knowing that his tenants were inside. The trial court agreed with Ambassador that liability insurance did not cover that claim and granted summary judgment. When the landlord appealed, however, it became clear that the insurance policy in the official record did not contain an intentional harm exclusion, and the landlord argued for reversal on that ground. The appellate court rejected the landlord’s contract-based argument and, like the late 19<sup>th</sup> century court decisions that Professor McNeely reviewed, held that no explicit exclusion was necessary because liability insurance for intentional harm is against public policy. On further appeal, the New Jersey Supreme Court reversed, as McNeely would have predicted, on the grounds that the policy did not contain an explicit contract provision excluding claims arising out of intentional harm. The court used this unusual situation to state emphatically that liability insurance for intentional harm does not violate public policy because the proceeds of the insurance policy go to the victim, not the criminal. Moreover, as the court explained, this insurance would not create a dangerous incentive because the liability insurance company would be free to bring a subrogation action against the policyholder to recoup the money it had paid to the victim. (The fact that, as a practical matter, the insurance

been confined to its facts.<sup>12</sup> Professor Wriggins' proposal to require personal liability insurance policies to cover domestic violence has gone nowhere. And I can barely even persuade my law students to consider the benefits of liability insurance for intentional harm.

Why? Because their main concern about insurance for crime-torts is not, in fact, the effect of liability insurance on incentives. Instead, as my students strenuously argue, it is simply not fair for law-abiding liability insurance policyholders to have to pay, through their insurance premiums, for the costs of rapists' or arsonists' crimes. They object, in other words, that *liability insurance protects defendants*, and that some defendants – rapists and arsonists for example – do not deserve the protection.

Of course, as I always respond, potential victims also share the costs of any liability insurance compensation, either through their own liability insurance premiums or through the prices that they pay for goods and services that they buy from businesses with liability insurance, just as consumers share the costs of products liability and workers share the costs of workers compensation. (Cf. Stapleton 1995) I respond, in other words, that *liability insurance protects victims*. If any victims deserve that protection, victims of serious crime-torts like arson and rape surely do.

Professor McNeely surely would have agreed with this argument, as would Justice Traynor and other supporters of the social insurance approach to tort liability, but not my students. “Nice move,” is the typical response, “but I’m not persuaded.” Almost universally, my students remain firmly of the view that liability insurance protects the defendant, and that it is wrong for liability insurance to provide that protection in a case involving a “real” crime.

Although this classroom experience hardly constitutes conclusive proof, repetition over many years has persuaded me. Liability insurance separates crimes from torts, not primarily because of concerns about the increased cost due to moral hazard, but rather because of moral objections to including some criminals in the liability insurance pool.<sup>13</sup>

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company would be unlikely to bring an action against a criminal sitting in jail has no bearing on the question of incentives: if the defendant has no assets and no insurance, the victim would be equally unlikely to bring an action.)

<sup>12</sup> Allstate Ins. Co. v. Malec, 514 A.2d 832 (N.J. 1986).

<sup>13</sup> I should be clear that an insurer may not be able to unilaterally adopt the pay and then subrogate approach, for reasons sketched in Baker 2008 at 437-38. In short, few people would choose to purchase a, more expensive, liability insurance policy that authorized the insurance company to pay the victim and then pursue them, so cheaper policies with an intentional harm exclusion can be expected to dominate the market. But a state legislature or insurance regulator could easily solve that problem by requiring all liability insurance policies in a specified market to be structured in this way. To those who object that the pay and then subrogate approach would be impractical, I point to the automobile insurance market. Auto liability policies generally contain intentional harm exclusions, but uninsured

### **C. The Crime-Tort Separation and Liability Insurance as Defense Protection**

The crime-tort separation not only reflects a concept of liability insurance as protection for defendants, it also reinforces that concept. Intentional harm and criminal act exclusions produce a claims-handling structure that regularly *performs* the understanding of liability insurance as defendant protection. In that structure, insurance adjusters regularly investigate whether tort claims arise out of crime and, if so, they initiate the legal process that permits them to withhold or withdraw insurance protection.

The following (long) quotation from an article by two insurance defense lawyers illustrates this point:

The axiom that bad facts make bad law could not have been any truer than in the case of Robert A. Berdella. In 1984, Berdella, a Kansas City, Missouri area resident went on a four-year torture and killing spree. Over that period of time Berdella killed at least six men, all in gruesome fashion. ... When police investigated Berdella's home, they found human skulls, photographs of men being sodomized and tortured, and journal notes describing the torture. ... The criminal record indicated that Berdella injected the victims with drugs and kept them alive for his "perverted desires." ...

Civil suits were filed against Berdella's estate by the victim's families for wrongful death. Although Berdella had only \$63,000 in personal assets, he did have a homeowners insurance policy with \$100,000 per occurrence limits (arguably each murder could have been a separate occurrence). Berdella was insured by Economy Fire and Casualty Company (Economy). In the wrongful death actions, the plaintiffs attempted to trigger coverage by alleging that Berdella's actions amounted to negligence. In response, Economy filed a separate declaratory judgment action, citing its common policy language found in all home liability policies (in one form or another) that excludes liability coverage for bodily injury or property damage "expected or intended" from the standpoint of the insured. ...

The Court of Appeals ruled that the mere fact that Berdella pled guilty to three counts of second degree murder did not establish that he intended to kill the three men for purposes of the civil or the declaratory actions. ... By finding that Berdella intended to torture his victims but did not expect or intend to kill them, the court handed the case back to the jury. This decision also placed the case back into the realm of potential coverage under Economy's homeowner's policy.

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motorists (UM) coverage typically steps in to fill the gap, and the insurance company that issued the UM policy is permitted to subrogate against the tortfeasor. This approach is even more unwieldy than what I am suggesting (because two different liability insurance companies are involved), but it achieves essentially the same end. (Cf. Wriggins 2001 arguing for using the uninsured motorists approach to compensate victims of domestic violence.)

The rest is history. The resulting jury verdict in the civil case, one year after the Court of Appeals ruling on the declaratory judgment action still stands today as the highest compensatory award in United States legal history. The livid jurors awarded the Stoops family \$5 billion (\$2.5 billion for wrongful death and \$2.5 billion for "aggravating circumstances"). Although Economy had planned to appeal the verdict, its policy of insurance also covered pre-and post-judgment interest on the entire judgment. The interest on \$5 billion amounted to \$600,000 a day! Economy was forced to settle the claim rather than appeal and risk insolvency on the outcome of one appeal. Economy paid the Stoops family \$2.5 million. The death claims presented by the Howell and Ferris families were settled out of court for undisclosed sums. ... (Eidsmore & Edwards)

The Berdella case is just one, particularly graphic example from an entire genre of moral monster stories that have emerged in the insurance case law out of the effort to enforce the crime-tort separation. These stories feature drunken brawlers, wife batterers, child molesters, doctors and dentists who rape sedated patients, and other moral monsters who commit a second crime by asking the insurance company to pay for their first one. Among published opinions, the Berdella case is unusual principally in the fact that the insurance company lost. For that reason, it played an important, "never again" role in the subsequent effort to include a criminal acts exclusion in some homeowners' insurance policies.<sup>14</sup>

It is easy to see these moral monster stories as a result of the crime-tort separation, but they also reproduce that separation. They allow insurance companies to occupy the moral high ground while refusing to pay victims who indisputably deserve compensation. The stories place the spotlight of attention on the moral monster, not the deserving victim, and they appropriate the victim's wrong for the insurance company. In the process, they legitimate a crime-tort separation that makes the outrage in the Berdella insurance case the fact that Berdella's insurance company had to pay, rather than the fact that the company for years refused to pay the victims' families. (Cf. Baker 1994, describing the claims story of the immoral insured; Ericson et al 2004 describing insureds as suspects)

At least in part as a result of the crime-tort separation in liability insurance, the more clearly intentional or criminal the harm, the less likely the perpetrator will be called to account in a civil forum, and the less likely the victim will receive real compensation, given the well-recognized inadequacy of the public compensation funds for criminal victims.<sup>15</sup> (E.g.,

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<sup>14</sup> As of fall 2008, Allstate is the largest U.S. homeowners' insurer to include this exclusion. State Farm (among others) does not ordinarily use such an exclusion.

<sup>15</sup> The two exceptions to this morally objectionable situation in the United States today are the same two fields that Professor McNeely mentioned in 1941: crimes at work and crimes involving automobiles. If an employer intentionally injures a worker, the worker not only gets to collect workers' compensation benefits, he also

Levmore & Logue 2003) In my view, this result is morally objectionable, but that opinion is only tangential to my main point here: Ideas about the nature of liability insurance affect tort law on the ground. (Cf. Ewald 1991 on the power of “insurance imaginaries”)

There are, it should be acknowledged, two mitigating developments in U.S. tort practice. First, the growth of what Robert Rabin has aptly named “enabling torts” means that victims sometimes are able to recover from non-criminal third parties whose conduct can be causally linked to the crime, although this growth has been subject to counter-attack in the form of legislative restrictions on joint and several liability. (Rabin 1999) For example, a building owner may be sued for inadequate security in the event of a rape or other assault in the building. Second, common law rules relating to insurers’ duty to defend and settle claims have facilitated a practice of “underlitigation” – e.g., pleading an intentional tort as a negligent tort – that may help victims in cases in which the evidence on intent is less than clear. (Pryor 1997, Baker 1998a). Notwithstanding these developments, however, domestic violence, acquaintance rape, and most other assaults remain largely outside the reach of tort law – not because of technical limits on what can and cannot be the subject of liability insurance, but rather because of an understanding of, and commitment to, liability insurance as defendant protection.

At a more general level, the crime-tort separation in liability insurance and the accompanying moral monster stories also reflect and reproduce an understanding of a tort claim as an encounter between a specific plaintiff and a specific defendant, rather than as the price setting or loss spreading mechanism that a social engineer might describe. There are, of course, other institutions that promote this individualized, corrective justice understanding of tort law, but the crime-tort separation in liability insurance is special because it operates within an institution – insurance – that, in so many other ways, promotes the price setting and loss spreading approaches.

Thanks in part to the crime-tort separation, a liability insurance claims file is not just an administrative record classifying the nature and economic value of bodily injury or other harm. Instead, the claims file is also an inquiry into the state of mind of the defendant. Like every other aspect of the claims-handling process, this inquiry undoubtedly becomes routinized and subject to rules of thumb that reduce the individualized nature of the inquiry (Ross 1970). Nevertheless, the crime-tort separation provides an

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gets to bring a tort action against the employer (despite the fact that, ordinarily, workers’ compensation precludes tort claims against the employer). The auto insurance situation is a bit more complicated (reflecting the fact that auto insurance never completed the transformation to a victim compensation fund that McNeely predicted), but victims of intentional harm usually are able to recover: if the driver’s insurer does not have to pay, the victim’s uninsured motorists’ insurer usually will have to pay. (Schermer)

additional fault-line, beyond those provided by tort law, along which the bureaucratic claims handling process can break down, releasing the individualized drama of litigation.

### **Conclusion**

This chapter has explored how liability insurance separates the tort and criminal fields by withdrawing insurance protection for crime-torts. Before concluding, I will complicate this picture by briefly describing how liability insurance makes the criminal law experience more like the tort law experience for some defendants in some cases.

Despite the exclusion of coverage for criminal fines and penalties, some liability insurance contracts do provide coverage for criminal defense costs. I have found this criminal defense coverage in two kinds of liability insurance policies: (1) in professional liability policies sold to high status professionals, such as directors' and officers' liability insurance<sup>16</sup> and medical liability insurance,<sup>17</sup> and (2) in an excess liability insurance policy available to members of the National Rifle Association.<sup>18</sup>

This coverage civilizes, to at least some degree, the criminal defense experience by providing the means for the criminal defendant to contest the state's allegations. In-depth exploration of this insurance coverage awaits future work. Topics to be addressed include: the history of the coverage, the reasons liability insurers offered for its introduction, and whether there was any resistance on the part of insurance regulators or courts; whether there are features of the criminal liabilities likely to be covered that suggests that they are somehow less "criminal" than paradigmatic crimes; and what, if anything, liability insurers do to address potential adverse selection concerns (i.e. that policies with this coverage might be systematically more appealing to higher risk applicants).

For present purposes, the existence of these limited forms of criminal defense coverage simply highlights the absence of this protection in other forms of liability insurance and also provides additional evidence that liability insurers could, as a technical matter, expand the range of services they provide to defendants accused of crime-torts, without running into insurmountable moral hazard or adverse selection problems. This strengthens the claim that economic incentives do not adequately explain the crime-tort separation in liability insurance.

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<sup>16</sup> D&O insurance defines the operative terms "claim" and "defense expenses" broadly enough to include criminal defense costs. (E.g., Executive Risk 1996).

<sup>17</sup> Medical liability insurance provides ongoing criminal defense cost coverage for "criminal charges against an Insured Person arising out of the rendering of or failure to render Medical Services." (E.g., Executive Risk 1998).

<sup>18</sup> The NRA's liability insurance policy promises to reimburse criminal defense costs in cases involving self-defense, as long as the charges eventually are dropped or there is an acquittal. See <http://www.locktonrisk.com/nra/selfdefense.asp> (last visited December 2, 2007).

## References:

- Kenneth Abraham, *The Liability Century* (Harvard U. P. 2008).
- Tom Baker, *Insurance Law and Policy: Cases Materials and Problems*, Second Ed.. Aspen Publishing. (2008)
- Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law, 12 Conn. Ins. L. J. 1 (2006).
- Blood Money, New Money and the Moral Economy of Tort Law in Action, 35 Law & Society Review 275 (2001).
- “Transforming Punishment Into Compensation: In the Shadow of Punitive Damages,” 1998 Wis. L. Rev. 101 (1998a).
- “Reconsidering Insurance for Punitive Damages,” 1998 Wis. L. Rev. 211 (1998b).
- “On the Genealogy of Moral Hazard,” 75 Tex. L. Rev. 237 (1996).
- “Constructing the Insurance Relationship: Sales Stories, Claims Stories and Insurance Contract Damages,” Texas Law Review 72:1395-1433 (1995).
- Tom Baker and Sean S. Griffith, “How the Merits Matter: D&O Insurance and Settlements in Securities Class Actions,” 157 *University of Pennsylvania Law Review* – (forthcoming 2009) (available at: <http://ssrn.com/abstract=1101068>)
- Gary S. Becker, “Crime and Punishment: An Economic Approach,” 76 J. Pol. Econ. 169 (1968).
- Bernard S. Black, Brian R. Cheffins & Michael Klausner, “Outside Director Liability,” 58 STANFORD L.REV. 1055 (2006).
- Kathleen F. Brickey, “In Enron’s Wake: Corporate Executives on Trial,” 96 Journal of Criminology and Criminal Law 397 (2006).
- Dan Dobbs, *The Law of Torts* (St. Paul: West Publishing 2000).
- Daniel C. Eidsmoe and Pamela K. Edwards, Home Liability Coverage: Doest the Criminal Acts Exclusion Work Where the “Expected or Intended” Exclusion Failed?, 5 Conn. Ins. L. J. 707 (1998-99).
- Richard Ericson, Aaron Doyle and Dean Barry 2003 *Insurance as Governance*. Toronto: U. Toronto Press.
- Francois Ewald, 1991. “Insurance and Risk,” in G. Burchell et al. (eds.) 1991, *The Foucault Effect: Studies in Governmentality*. Chicago: U. Chicago Press. 197-210.
- Executive Risk Indemnity, Inc. (1998), *Medical Practitioners Professional Liability and Legal Defense Reimbursement Policy*.



Executive Risk Indemnity, Inc. (1996), *Broad Form Directors and Officers' Liability Insurance*.

Stephen Gilles, "The Judgment Proof Society," 63 *William & Mary L. Rev.* 603 (2006).

Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," 39 *UCLA L. Rev.* 1659 (1992).

H.L.A. Hart, *Punishment and Responsibility* (1968).

Carol Heimer, *Reactive Risk and Rational Action: Managing Moral Hazard in Insurance Contracts*. (Berkeley: University of California Press 1985).

Saul Levmore and Kyle D. Logue, "Insuring Against Terrorism – and Crime," 102 *Mich. L. Rev.* 268 (2003)

Kenneth Mann, "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law," 101 *Yale L. J.* 1795 (1991).

Mary Coates McNeeley (1941), *Illegality as a Factor in Liability Insurance*, 41 *Columbia Law Review* 26

----- (1940), *The Genealogy of Liability Insurance Law*, 7 *University of Pittsburgh Law Review* 169.

Sachin Pandya, "Liability Insurers in America: 1886-1910" (working paper).

Ellen S. Pryor, "The Stories We Tell: Intentional Harm and the Quest for Insurance Funding," 75 *Tex. L. Rev.* 1721 (1997).

Robert L Rabin, "Enabling Torts," 49 *DePaul L. Rev.* 435-54 (1999)

Ross, H. Laurence. 1970. *Settled Out of Court: the Social Process of Insurance Claims Adjustments*. Chicago: Aldine Pub. Co.

David Rossmiller (2007), "Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond, --- *Current Critical Issues* 43 (2007).

Gary T. Schwartz, "The Vitality of Negligence and the Ethics of Strict Liability," 15 *Georgia L. Rev.* 963-1005 (1981).

----- "The Beginning and the Possible End of the Rise of Modern American Tort Law," 26 *Georgia L. Rev.* 601-702 (1992).

Sebok, Anthony J., "The Fall and Rise of Blame in American Tort Law," 68 *Brooklyn L. Rev.* 1031-53 (2003).

Catherine M. Sharkey, "Revisiting the Noninsurable Costs of Accidents," 64 *Md. L. Rev.* 409 (2005).

Steven Shavell, "On Moral Hazard and Insurance," 93 *Q.J. ECON.* 541 (1979)

----- *Economic Analysis of Accident Law* (Harvard U. P. 1987)

Jonathon Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007).

Richard Singer and Douglas Husak, "Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer," 2 *Buff. Crim. L. Rev.* 859 (1999).

Jean Stapleton, "Tort, Insurance and Ideology," 58 *Modern Law Review* 820 (1995)

Carol S. Steiker, "Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide," 85 *Geo. L. J.* 775 (1997).

Syverud, Kent, "On the Demand for Liability Insurance," *Texas Law Review* 72:1629-54. 1994.

Jeremy Waldron, "Moments of Carelessness and Massive Loss," *Philosophical Foundations of Tort Law* 387 (David G. Owen ed., 1995)

Jennifer Wriggins, "Domestic Violence Torts," 75 *So. Cal. L. Rev.* 121 (2001).

Yeazell, Stephen C., "Refinancing Civil Litigation," 51 *DePaul L. Rev.* 183-217 (2001).

Viviana Zelizer, *Morals and Markets: The Development of Life Insurance in the United States*. New York: Columbia University Press (1979).