# WASHINGTON INSURANCE LAW LETTER™

*A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS*

## edited by William R. Hickman

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# INSURING PUNITIVE DAMAGES

## FACTS:

Fluke makes electrical equipment. It is based in Washington state. In 1988 Fluke sued Talon in California for patent infringement. Fluke lost. In 1993 Talon sued Fluke in California for malicious prosecution. Fluke tendered to its CGL carrier, Hartford. Hartford provided a defense under its personal injury coverage, which defined "personal Injury" to include malicious procecution. Hartford reserved its rights as to coverage for intentional acts and punitive damages.

In 1997 the California jury awarded Talon $2,000,000 in compensatory damages, and $4,000,000 in punitive damages.

In a declaratory action in Washington the trial court said the compensatory award was covered but the punitive damage award was not. On appeal, Division I said everything was covered.

## HOLDINGS:

(1) Where insurance policy language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists.

(2) A policy providing coverage for all sums that the insured becomes legally obligated to pay as damages covers punitive damages.

(3) The court will not add language to the policy that the insurer did not include.

(4) Under California law, it is against public policy to insure against liability for intentional misconduct, such as malicious prosecution, as well as to insure against liability for punitive damages.

(5) Washington courts are reluctant to invoke public policy as a reason to avoid express contract terms. Washington courts rely on public policy to strike down insurance provisions only when that public policy pervades Washington's entire scheme of insurance legislation.

(6) Coverage for compensatory damages or punitive damages arising from malicious prosecution is not against public policy in Washington.

(7) Because coverage is void under California law but not void under Washington law, this case presents an actual conflict of laws.

(8) Washington, not California, has the most significant relationship with this insurance contract.

COMMENT:

Holy cow! Well, we knew that sometime some Washington court was going to have to tell us whether punitive damages were covered by a CGL. The reason for the delay is that punitive damages themselves are deemed to be contrary to the public policy of the State of Washington. Here is how the Supreme Court most recently described the situation:

> Since its earliest decisions, this court has consistently disapproved punitive damages as contrary to public policy. *See Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 50-56, 25 P. 1072 (1891). Punitive damages not only impose on the defendant a penalty generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation.
>
> . . .
>
> Governing resolution of this case is the court's long-standing rule prohibiting punitive damages without express legislative authorization.

*Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574-75, 919 P.2d 589 (1996).

I am very surprised the Court of Appeals gave so little weight to this 100-year-old foundation of Washington law.

Equally troubling is the choice of law analysis. The court did not appear to give weight to the fact the plaintiff was a Californian, who sued in California under a California common law claim, and recovered an award in California which award is not insurable in California.

We will probably hear more on this case. A motion to reconsider has been filed, and a petition can be expected.

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*Fluke Corp. v. Hartford Acc. & Indem. Co.*, ___ Wn. App. ___, 7 P.3d 825 (2000).

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# ADR JERSEY STYLE

FACTS:

Tom told his brother, Gerald, that he was being blackmailed. A few months later Tom said the problem had been taken care of, but he needed some help getting rid of the body.

They put Anne Marie's body in a cooler, put the cooler in Gerald's Chevy, and drove to the Jersey shore. They took Gerald's boat 70 miles off shore. They wrapped the cooler with chains and dumped it into the ocean. It did not sink. They blasted the cooler with a shark gun. It did not sink. They hauled the cooler back on the boat, removed the body, wrapped her with two anchors, and dumped her back into the ocean. She sank.

Gerald's homeowners carrier filed suit seeking a ruling that it had no duty to defend and no duty to indemnify. It claims that there was no occurrence. Gerald argued that because he did not know who Anne Marie was he had no deliberate intent to harm. Therefore the injury suffered by her family was accidental.

The trial court judge did not buy any of it. He found the conduct cruel, inhumane, and outrageous. He also found that there was an intent to injure, and thus no occurrence. He concluded by noting that allowing Gerald to benefit, even by payment of defense costs would violate public policy.

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*Atlantic Employers Ins. Co. v. Capano*, (N.J. Super. Ct., Aug. 7, 2000).

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# PIP OFFSET PREVAILS

## FACTS:

Denise was injured in an auto accident. The tortfeasor's insurer paid her $300,000. Her PIP insurer (Safeco) paid $56,435. Denise claimed that her injuries were worth more than $2 million. She made a UIM claim to Safeco.

There was a dispute about the value of the damages. An arbitration panel said the total damages from the accident were $450,000.

Safeco tendered $450,000 less a $300,000 offset for the liability payment and less a $56,435 offset for the PIP payment: $93,565.

## PROCEDURE:

Denise moved in superior court to confirm the arbitration award less only the liability payment: $150,000. The trial court agreed and refused to offset the PIP payment.

On appeal that was reversed. But then that opinion was withdrawn because the Supreme Court in *Price v. Farmers*, 133 Wn.2d 490 (1997), said that in a confirmation proceeding the court lacked jurisdiction to rule on the question of PIP offset.

So Safeco started another lawsuit. The trial judge ruled that the arbitration award included all damages, including losses for which Safeco had made PIP payments. Denise would recover a double recovery if the PIP offset was not made. The Court of Appeals affirmed.

HOLDINGS:

(1) We cannot overrule *Price*.

(2) *Keenan v. Industrial Indemnity*, 108 Wn.2d 314 (1987), established that contractual PIP offsets do not violate the UIM statute.

(3) The UIM statute does not entitle an insured to recover more than the total damages arising from the accident.

COMMENT:

Hopefully this opinion will lay to rest for a couple of years any questions about the UIM/PIP carrier's right to setoff from the UIM payment the PIP payment.

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*Safeco Ins. Co. v. Woodley*, 101 Wn. App. 1041, ___ P.2d ___, 2000 Wash. App. LEXIS 1209 (Published Sept. 5, 2000).

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# TRAUMATIC MARITAL DISSOLUTION

FACTS:

Patrick and his wife were having some marriage problems. One night Patrick walked into a bar with his Smith & Wesson marriage counselor. He fired 14 shots. He hit Margaret nine times. He also hit Richard. He also shot himself. Everyone died.

Richard's estate sued Patrick's estate. State Farm, which insured Patrick, filed a declaratory action claiming that it had no coverage because what had happened was no accident.

Richard's estate argued that Richard was an innocent bystander who happened to be in the wrong place at the wrong time. Thus, his killing was accidental.

On appeal from a summary judgment in favor of State Farm, the court said that because Patrick's shooting of the gun was substantially certain to cause harm, that the shooting was not accidental. Patrick's action was clearly volitional.

The court pointed out that it did not matter whether the victim was an innocent bystander, or the intended victim. The question was not the status of the victim, but the volitional act of the insured.

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*State Farm v. Boyson*, 2000 Ohio App. LEXIS 3021 (2000).

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# HIDING THE KEY TO THE TREASURY

## FACTS:

Jim went off shopping. While he was gone his home caught fire. A neighbor called the fire department. The chief arrived, called in a second alarm and decided that the best course of action was to confine the fire to the house and garage. It was August, the vegetation was dry, and the wind was blowing.

## PROCEDURE:

Jim sued the fire department claiming negligence in fighting the fire. He found an "expert" who questioned the chief's plan. The trial court dismissed on summary judgment. The Court of Appeals affirmed, finding that Jim failed to establish that the fire department owed him a duty.

## HOLDINGS:

(1) RCW 4.96.010, which abolished sovereign immunity, is qualified by the public duty doctrine. The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability. Traditionally state and municipal laws impose duties owed to the public as a whole and not to particular individuals.

(2) For an individual to recover from a municipal corporation in tort, a plaintiff must show that the duty is owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general.

(3) Two exceptions to the public duty doctrine are:

(1) The rescue doctrine, which applies when governmental agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular person.

(2) The special relationship doctrine, which applies where a relationship exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public and the plaintiff relies on explicit assurances given by the agent or assurances inherent in a duty vested in a governmental entity.

(4) The rescue exception to the public duty doctrine is based on the tort theory that if one undertakes to render aid to another or to warn a person in danger, one must exercise reasonable care.

(5) The special relationship exception to the public duty doctrine is a focusing tool used to determine whether a local government is under a general duty to a nebulous public or whether that duty has focused on the claimant.

(6) Neither exception applies to this case.

COMMENT:

The foregoing superficial review of an extraordinary opinion does not do it justice.

There are two other exceptions to the public duty doctrine: (1) the legislative intent exception which applies when there is a regulatory statute that evidences a clear legislative intent to protect a particular class of people and (2) the failure to enforce exception which requires that a government employee have knowledge of the violation of a statute together with a statutory duty to enforce the statute.

There is an excellent, no nonsense review of all four exceptions in *Smith v. State*, 59 Wn. App. 808, 802 P.2d 133 (1990).

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*Babcock v. Mason County*, ___ Wn. App. ___, 5 P.3d 750 (2000).

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# OH GET REAL

FACTS:

On September 29, 2000, the court did say: The policy does not insure "for loss . . . [c]aused by . . . [s]ettling, . . ."

> The parties agree that, descriptively speaking, the house "settled."
>
> As both the superior court and [the insurance company] note, the Stipulation of Facts provides that, because of the water, "the home had settled about three feet." However, this is not dispositive. That the [insureds] describe the loss in terms of "settling" does not mean that settling was the cause of the damage.

COMMENT:

This is such a mind boggling display of sophistry that I am not even going to mention the court, much less the author. But we will point out that this same court has said that the policy language should be interpreted in the ordinary and popular sense as would a person of average intelligence. They have also said that they would resist the "compulsion" to "torture or twist" the language of a policy.

## JUSTICE LEAPS TO NEW HEIGHTS

FACTS:

Jerald was a 225 lb. 15-year-old. He had been using trampolines since he was six. He had one at home. He knew the risk of injury from "bottoming out" when jumping from a high location onto the trampoline.

One day Jerald was at Phil's house. Phil also had a trampoline. Jerald climbed onto the roof, took a running start, and leaped onto the trampoline. When Jerald landed on the trampoline it "bottomed out" and Jerald broke his leg.

Jerald sued Phil's dad. The trial court dismissed on summary judgment and the Court of Appeals affirmed.

HOLDINGS:

(1) In this premises liability case, Jerald's status as an invitee, licensee, or trespasser determines the scope of the duty of care owed by Phil's father.

(2) A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and (b) he or she fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and (c) the licensees do not know or have reason to know of the condition and the risk involved.

(3) The law does not require that Jerald be told of every possible type of injury that could occur; he need only be aware that he was engaged in a risky activity.

(4) The risk of "bottoming out" was obvious.

(5) A 15-year-old is sophisticated enough to recognize the danger involved in jumping off a roof onto a trampoline.

(6) Phil's dad did not breach any duty to Jerald.

COMMENT:

Oh, the joy to see common sense in a legal opinion.

The court chose not to publish this opinion, probably because it was very similar to *Anderson v. Weslo Co.*, 79 Wn. App. 829, 906 P.2d 336 (1995). In a perfect world that would be true. But this is not a perfect world. This is Washington. And in Washington every WSTLA attorney believes that if he has a hurt client (or even just a client who thinks he is hurt), then he has a God-given right to blame somebody for the injury.

An opinion like this should not be buried in the bowels of the Lexis computer. It should be available to stiffen the backbone of every superior court judge who wants to trim his or her case load.

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*Pollard v. Horan*, 2000 Wash. App. LEXIS 1792 (2000).

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# ALLEY FIGHT EXCLUSION

FACTS:

One night Jeff was sitting in the Alley Bi Saloon. Then in walked his old squeeze, Shannon, together with George.

Shannon invited Jeff outside to the alley for a little tete-a-tete. As they were thus engaged, George came out the back door and inquired, "Havin' a fuckin' problem?" and pushed Jeff. Jeff turned quickly and with a superb backhand planted his beer bottle in the middle of George's face.

George sued Jeff for assault and for negligence. George's homeowners insurer defended under a reservation of rights. George dropped the assault claim and went to the jury just on negligence. The jury awarded $160,000 damages.

The trial court ruled that there was coverage. The circuit court reversed. The Court of Appeals said no coverage, finding that Jeff either expected or intended to cause George's injuries.

HOLDINGS:

(1) An agreement to indemnify against intentional misconduct would, as a general rule, be contrary to public policy and unenforceable.

(2) When an insured acts in self-defense, he is still acting with "intent to harm." Theoretically, he should then be denied coverage regardless of whether his actions were reasonable or whether he intended a particular result.

(3) George's injuries were the natural and ordinary consequence of Jeff's intentional act of swinging at someone with beer bottle in hand.

(4) The parties did not intend to insure Jeff for injuries that he inflicted upon others during barroom scuffles.

COMMENT:

While the opinion appears a bit wishy-washy at times, it does contain a short discussion of when an intentional act (*e.g.,* changing lanes on the freeway) generates an accident, and when it does not.

At the end of the opinion the court noted that it was aware that its ruling probably meant that George's $160,000 judgment was uncollectable. While public policy favors full compensation for injured parties, it is against public policy to permit insurance indemnity for intentional acts.

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*State Farm Fire & Cas. Co. v. Leverton*, 247 Ill. Dec. 762, 732 N.E.2d 1094 (Ill. App. 2000).

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# NO INTENTIONAL ACTS COVERAGE

FACTS:

Four-year-old Dirk was placed in foster care with Kirk and Kim. Kim took Dirk to the hospital four times in the next two weeks. The next week Kim went to church leaving Dirk with Kirk. The medics found Dirk dead. Kirk was convicted of murder and sent off to prison. Dirk's biological mother appeared and sued Kim, alleging that Kim had failed to protect Dirk from Kirk.

Kim and Kirk had been named insureds on a homeowners policy issued by Mutual of Enumclaw. It had an exclusion which provided that there was no coverage for bodily injury which is expected or intended "by an insured." The policy also provided that it applied separately to each insured.

The trial court held that the "an insured" exclusion was unambiguous and excluded coverage for all insureds. The Court of Appeals affirmed.

HOLDINGS:

(1) An exclusion based on the intentional acts of "an insured" excludes coverage for all insureds when the intentional acts of an insured give rise to the injury.

(2) Courts interpret insurance contracts as an average insurance purchaser would understand them and give undefined terms their plain, ordinary, and popular meaning.

(3) If the language in an insurance contract is clear and unambiguous, the court must enforce it as written and may not modify the contract or create an ambiguity where none exits. If a policy provision is ambiguous, the interpretation most favorable to the insured applies. A provision is ambiguous if, on its face, it is fairly susceptible to more than one reasonable interpretation.

(4) An insurance policy exclusion for "an insured" is not restricted to intentional acts of the particular insured sought to be held liable, but broadly excludes coverage for all intentionally caused injury or damage by an insured, which includes anyone insured under the policy.

(5) A severability clause does not negate an intentional acts exclusion or create an ambiguity.

COMMENT:

An extraordinarily correct and lucid reading of the policy. The only thing the court got wrong was the decision not to publish.

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*Mutual of Enumclaw Ins. Co. v. Cross*, 2000 Wash. App. LEXIS 1816 (2000).

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# HOT FLASH!

On October 2, 2000, Division I filed yet another opinion concerning remediation for contamination. (That's a fancy way of saying, how do we hand to the insurance industry the bill for the industrialization of America?) Anyway, in this one called Puget Sound Energy versus a zillion insurance companies, the court had to deal with the question of who has the burden of proof when it comes to allocating settlements proceeds from earlier settlements. The insured argued that the companies have the burden of showing double recovery. The companies argued that the insurers are entitled to a 100% offset of settlement proceeds when a policyholder fails to allocate proceeds from a settlement agreement that releases multiple claims.

The insurers pointed out that the policyholder rule made no sense because if the policyholder made no allocation then there would be no offset. The court noted that prior law supported the view that the policyholder had the burden of allocating settlement proceeds.

The court held that the policyholder must demonstrate how it intends to or has allocated the funds it has received from settling insurers. At that point, the burden shifts to the insurers to prove that the policyholder received adequate compensation.

And then in a blinding stroke of transcendental insight, the court went on to tell the superior court that the prior settlement information was discoverable.

*Puget Sound Energy, Inc. v. Alba Gen. Ins. Co.*, 2000 Wash. App. LEXIS 1894 (2000).

# NOT AS HOT A FLASH!

On August 22, 2000, the U.S. Court of Appeals for the 8th Circuit held that one of its own rules was unconstitutional. The rule, Cir. Rule 28A, provided that unpublished opinions are not precedent, and parties should not cite them. The rule was unconstitutional because the rule purported to confer on the court a power which went beyond "judicial." Why the court did not just change its own rule instead of invoking the power and majesty of the Constitution is not clear. But having done one very silly thing, the court then went on to pontificate about the doctrine of precedent:

(1) Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties.

(2) In determining the law in one case, judges bind those in subsequent cases because, although the judicial power requires judges to determine law in each case, a judge is sworn to determine, not according to his own judgements, but according to the known laws. Judges are not delegated to pronounce a new law, but to maintain and expound the old.

(3) The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the best and most authoritative guide of what the law is, the judicial power is limited by them.

After reading that, I cannot decide whether the judge is hopelessly naïve, or whether I am terminally cynical.

*Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000).