Insurance Coverage For Punitive Damages and Intentional Conduct in Massachusetts

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I. INTRODUCTION

Liability insurance coverage for punitive damages has become the subject of considerable controversy in recent years.[1] Insurers in Massachusetts have traditionally taken the position that intentional conduct and punitive damages are not covered by liability policies. A review of standard form liability policies and the various punitive damage statutes, however, raises questions about the correctness of this position. Insurers are continuing to litigate over the type of conduct that falls within the scope of the "intentional act" exclusion of standard form liability policies.

Only one published decision of the Massachusetts courts has addressed the issue of insurance coverage for punitive damages. The case, however, addressed the relatively narrow issue of coverage for punitive damages in the context of a claim for underinsured motorist benefits.[2] Therefore, whether Massachusetts public policy forbids a tortfeasor's liability insurer from paying a punitive damage award remains unanswered.[3] In cases not involving vicarious liability, courts in other jurisdictions are divided as to whether public policy, and the objective of punishment and deterrence, would prohibit liability insurance coverage for punitive damages.[4]

This article first discusses the various types of statutory punitive damages recoverable in Massachusetts and the insurance coverage is-

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1. *See* Annotation, *Liability Insurance Coverage as Extending to Liability for Punitive or Exemplary Damages*, 16 A.L.R. 4th 11 (1982).

2. Santos v. Lumbermens Mut. Casualty Co., 408 Mass. 70, 556 N.E.2d 983 (1990).

3. *Id.* at 84 n.17, 556 N.E.2d at 991 n.17.

4. *Id.* at 80-84, 556 N.E.2d at 989-91.

sues which arise as a result of the imposition of such damages. The article then reviews the recent Massachusetts cases which discuss the concept of "intent" as used in insurance policy exclusions. Finally, the authors apply a suggested analytical framework to specific coverage situations involving punitive damages.

II. Coverage For Punitive Damages

The analysis of the coverage question involves a two-step process. First, one must determine whether punitive damages are within the scope of coverage under the liability policy issued to the defendant. If, on the face of the insurance contract coverage applies, one must next determine whether coverage for punitive damages is contrary to public policy.

A. *Definition of Punitive Damages*

It is necessary to first define what are "punitive" damages. The purpose of punitive damages is to deter and punish proscribed conduct. Compensating a victim for a loss is not the primary purpose.[5] As discussed below, punitive damages in Massachusetts are recoverable either as explicit "punitive damages" or as statutory "multiple damages" which are also punitive in character. In Massachusetts there can be no recovery for punitive damages unless a statute authorizes such damages.[6] In some statutes punitive damages are explicitly provided. One example is the Wrongful Death Act[7] which authorizes the award of

5. The common law of punitive damages lies at the border of tort and criminal law. Ordinarily, damages in a civil action are awarded for the purpose of compensating the plaintiff for the losses he has suffered as a result of the defendant's wrongful conduct. C. McCormick, Handbook on the Law of Damages § 77 (1935); W. Prosser & W. Keeton, Prosser and Keeton on the Law of Torts § 2 (5th ed. 1984). On the other hand, when a crime is committed, the state may bring criminal proceedings against the perpetrator in order to protect the public interest. The criminal justice system accomplishes its objectives by punishing the guilty defendant, which in turn serves to deter the defendant and others from engaging in future criminal conduct. W. LaFave & A. Scott, Jr., Criminal Law § 1.3 (1986).

Common law punitive damages interject the elements of punishment and deterrence into the civil law. The primary purpose of punitive damages, called "smart money" in colonial times, is to punish the defendant. K. Redden, Punitive Damages § 2.1 (1980); C. McCormick, *supra*, § 77. In addition, punitive damages purportedly serve to deter the defendant and others from future wrongdoing. Thus, as a general rule, punitive damages at common law do not represent compensation for the injury suffered by the plaintiff, and are awarded in addition to compensatory damages. *See, e.g.*, Dr. P. Phillips & Sons, Inc. v. Kilgore, 152 Fla. 578, 582, 12 So. 2d 465, 467 (1943).

6. USM Corp. v. Marson Fastener Corp., 392 Mass. 334, 353, 467 N.E.2d 1271, 1284 (1984); Boott Mills v. Boston & Me. R.R., 218 Mass. 582, 589, 106 N.E. 680, 683 (1914).

7. Mass. Gen. L. ch. 229, § 2 (1988).

"punitive damages." More common, however, is a statute which imposes punitive damages in the form of a multiple recovery of compensatory damages.[8] For example, although the Consumer Protection Act[9] does not use the term "punitive," it is clear that the multiple damages recoverable under it are punitive, since they are intended to "deter and punish."[10]

These Massachusetts multiple damage statutes, however, differ from common law punitive damages in several respects. First, the fault element under most of these statutes consists of something less than the "malicious" state of mind necessary to recover punitive damages at common law. Indeed, in some instances, the defendant may be held strictly liable for statutory multiple damages.[11] Other statutes provide for multiple damages where the defendant has been "negligent,"[12] while only a few require "wilful"[13] misconduct or "malice"[14] on the part of the defendant.

Furthermore, at common law, the jury generally is permitted to consider evidence of the defendant's wealth in determining liability for punitive damages.[15] Whereas, a plaintiff presumably cannot introduce evidence of the defendant's wealth where statutory multiple damages are involved, because the defendant's finances are irrelevant to statutory liability. Finally, at common law, the jury has wide discretion in awarding punitive damages. Contrastedly, statutory multiple damages are automatic both in assessment and amount.[16]

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8. *See* K. REDDEN, *supra* note 5, § 5.2(A)(21), for a comprehensive listing and brief description of Massachusetts multiple damage and punitive damage statutes.

9. MASS. GEN. L. ch. 93A (1988).

10. International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 856, 443 N.E.2d 1308, 1317 (1983); McGrath v. Mishara, 386 Mass. 74, 85, 434 N.E.2d 1215, 1222 (1982).

11. *See e.g.*, MASS. GEN. L. ch. 140, § 159 (1988) ("dog bite" statute providing for treble damages against owner where animal previously ordered restrained).

12. MASS. GEN. L. ch. 91, § 59A (1988) (double damages for negligent discharge of petroleum in waters).

13. MASS. GEN. L. ch. 242, § 7 (1988) (treble damages for "wilful" destruction of trees).

14. MASS. GEN. L. ch. 165, § 24 (1988) (treble damages for "malicious" injury to aqueduct).

15. Parrott v. Bank of America Nat'l Trust & Sav. Ass'n, 97 Cal. App. 2d 14, 25, 217 P.2d 89, 96 (1950); Pendleton v. Norfolk & W. Ry. Co., 82 W. Va. 270, 277-78, 95 S.E. 941, 944 (1918); Hinson v. Dawson, 244 N.C. 23, 29, 92 S.E.2d 393, 397 (1956). The purpose of introducing evidence of the defendant's finances is to enable the jury to tailor the punishment to the defendant. *See also* Suzore v. Rutherford, 35 Tenn. App. 678, 684, 251 S.W.2d 129, 131 (1952).

16. *See* Cieslewicz v. Mut. Serv. Casualty Ins. Co., 84 Wis. 2d 91, 101-102, 267 N.W.2d 595, 600-01 (1978) (discussing differences between common law punitive damages and statutory multiple damages). *But see* MASS. GEN. L. ch. 93A, § 9 (1988) (giving judge discretion to award double or treble damages).

B. *Analysis of Coverage Under Standard Form Liability Policies*

1. What Constitutes an "Accident" or an "Occurrence"?

The threshold question on the issue of insurance coverage for punitive damages in Massachusetts is whether the language of the standard form liability policies would preclude such coverage. Most standard policy forms contain no specific exclusion for punitive damages.

Although few insurance policy forms define the types of "damages" covered,[17] most standard liability insurance policies do exclude coverage for some types of conduct which would trigger punitive damages. For example, the standard Comprehensive General Liability (CGL) form uses a definition of "occurrence" which limits coverage to acts that are "neither expected nor intended from the standpoint of the insured."[18] Thus, to the extent that punitive damages are awarded because of intentionally caused harm, there should be no occurrence and, therefore, no coverage.

Similarly, the Massachusetts Automobile Insurance Policy defines the term "accident" as an "unexpected, unintended event that causes bodily injury or property damage. . . ."[19] The optional bodily injury section of the automobile policy excludes coverage for damages "intentionally caused" by the insured.[20]

A similar exclusion is found in the standard homeowner's policy, which excludes coverage for bodily injury or property damage "which is expected or intended by the insured."[21]

As in other jurisdictions, the Massachusetts courts have expansively

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17. In the absence of clear exclusionary language some courts have found punitive damages within the scope of coverage. For example, the Supreme Court of Idaho reasoned:

> [T]he policy provisions . . . make no distinction as between actual and punitive damages. Punitive damages are not specifically excluded from the policy language. Under the provisions of the policy the company promises to pay all sums which the insured shall be legally obligated to pay as *damages* . . . .

Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co., 95 Idaho 501, 507, 511 P.2d 783, 789 (1973).

Some policies contain language which limits the type of damages which are covered. For example, in an unreported 1986 Massachusetts Federal District Court case, the court ruling in favor of the defendant insurer on its motion for summary judgment held that policy language allowing recovery for "compensatory damages" would not cover penalties imposed in favor of the United States as a plaintiff in tax litigation. Tiernan v. North River Ins., No. 86-1697, slip op. at 3 (D. Mass. Nov. 26, 1986).

18. COMPREHENSIVE GENERAL LIABILITY POLICY, *reprinted in* Tinker, *Comprehensive General Liability Insurance—Perspective and Overview*, 25 FED'N INS. COUNS. Q. 217, 293 app. (1975).

19. MASSACHUSETTS AUTOMOBILE INSURANCE POLICY 2 (4th ed.).

20. *Id.* at 12.

21. HOMEOWNERS 3, SPECIAL FORM § II, 1(a) (7-77 ed.).

interpreted the insurance policy when insurers have attempted to disclaim coverage on the grounds that the insured intentionally caused some injury or damage. The Massachusetts courts have consistently distinguished between intentional means and intentional results, and accordingly have held that an intentional act by the insured which causes an unintended injury is nonetheless an "accident." For example, in *J. D'Amico, Inc. v. City of Boston*,[22] the Massachusetts Supreme Judicial Court (SJC) held that if the insured contractor committed an act of trespass and cut down several trees based on a mistaken factual assumption, the loss was an "accident" within the meaning of a liability policy.

Several recent Massachusetts cases have construed the intentional act exclusion of the homeowners policy. The first case, *Quincy Mutual Insurance Co. v. Abernathy*,[23] involved an insured who had thrown a piece of blacktop off a highway bridge and hit a young girl in the rear passenger seat of a passing car. The SJC reversed a summary judgment in favor of the insurer, Quincy Mutual, on the ground that there was an issue of fact as to the insured's intent. The court held that even if the insured had intended to hit the car, it could not be inferred as a matter of law that he intended or expected to cause bodily injury. The court ruled that the policy language required proof that the insured "specifically intend[ed] to cause the resulting harm or [was] . . . substantially certain that such harm [would] occur."[24]

The court expressly refused to find, on the given facts, that as a matter of law the insured intended to injure the minor plaintiff.[25] In the court's view, a finding of an "expected or intended" injury required Quincy Mutual to establish either that the insured subjectively intended to strike and injure the young girl in the back seat of the car at the time that he threw the blacktop, or alternatively, that the insured in fact knew with substantial certainty, that the young girl would be injured.[26]

Even more disturbing to Massachusetts insurers, however, was the suggestion in the *Abernathy* opinion that an injury is "unexpected or unintended" if the insured intends some harm, but not the extent of harm which actually results.[27] In the recent case of *City of Newton v.*

22. 345 Mass. 218, 224, 186 N.E.2d 716, 720 (1962).
23. 393 Mass. 81, 469 N.E.2d 797 (1984).
24. *Id.* at 84, 469 N.E.2d at 799.
25. *Id.* at 88, 469 N.E.2d at 801-02.
26. *Id.* at 87-88, 469 N.E.2d at 801-02.
27. The relevant portion of the *Abernathy* opinion reads:

> [t]his court consistently has stated that the resulting injury which ensues from the volitional act of an insured is still an 'accident' within the meaning of an insurance policy if the insured does not specifically intend to cause the resulting harm or is not substantially certain that such harm will occur.

Id. at 84, 469 N.E.2d at 799 (citations omitted).

Krasnigor,[28] the trial judge, relying upon *Abernathy*, held that even though a teenaged insured *deliberately* set a fire inside a Newton junior high school, the ensuing property damage to the school was nonetheless "unexpected or unintended" within the meaning of a homeowner's policy because the youth did not intend to cause "the substantial damage which was ultimately sustained."[29] By special verdicts, the jury held that the youths intended to start fires in the school but did not "specifically intend[] to cause the substantial damage which was ultimately sustained."[30]

The SJC vacated the judgment against the insurance company and reasoned that: "the policy's exclusion applies when there is a showing of a deliberate [act] by the insured with the intent of causing *some* property damage. The insured need not intend to cause the exact extent of the injury which results, in order for the exclusion to apply."[31]

The most recent case on this issue is *Worcester Insurance Co. v. Fells Acres Day School, Inc.*,[32] where the court held that in the case of a sexual assault on a minor, intent to cause harm to the victim would be inferred as a matter of law. The *Fells Acres Day School* case involved allegations of sexual assaults by day care employees on young children. The court concluded that a special multi-peril commercial liability insurance policy which defined "occurrence" as "an accident . . . neither expected nor intended from the standpoint of the insured," would not cover sexual assaults. The court distinguished this conduct from the conduct of the insured in *Abernathy*, where the intent to commit the act did not necessarily require an intent to cause physical harm. The court also reasoned that the motive of the tortfeasor was not dispositive of the intent question in the context of sexual assaults.

However, in a separate holding reminiscent of the *Abernathy* case, the court decided that parental claims for loss of consortium arising out of the insured's sexual assault on the parent's minor child were not within the purview of the exclusion in standard form homeowners' policies for "expected or intended" injuries.[33] The court stated that the claims for loss of consortium would be excluded only if the insured intended to harm the consortium claimant.[34]

It appears that the *Krasnigor* and *Fells Acres* cases signal a partial retreat from the broad holding in *Abernathy*. The court based the different conclusions on the "nature of the acts" which in both *Krasnigor* and *Fells Acres* required a finding of intent to cause "some injury." The test

28. 404 Mass. 682, 536 N.E.2d 1078 (1989).
29. *Id.* at 683, 536 N.E.2d at 1080.
30. *Id.*
31. *Id.* at 685, 536 N.E.2d at 1081 (emphasis added).
32. 408 Mass. 393, 558 N.E.2d 958 (1990).
33. *Id.* at 413, 558 N.E.2d at 971-72.
34. *Id.* at 400, 558 N.E.2d at 965.

for such acts according to the court are those with a "direct and forcible nature . . . of the . . . inherently injurious kind."[35] The court cited rape, assault and battery and sexual assault as acts meeting this test.

Although the *Krasnigor* and *Fells Acres* decisions limited the scope of the *Abernathy* case, Massachusetts courts still have considerable latitude in determining whether a given act is an "accident" or whether injury is "expected or intended" within the meaning of a liability policy. Thus, in Massachusetts as in most other jurisdictions, the underlying act giving rise to a punitive or multiple damage award generally will be deemed an "accident" unless the insurer can establish that at the time of the loss the insured acted with the specific intent to cause some injury or damage or that the act was of a "direct and forcible nature . . . of the . . . inherently injurious kind."[36]

2. Proof of Intent

While the *Krasnigor* and *Fells Acres* cases put to rest some of the issues arising from the intentional act policy exclusions, issues still remain with respect to the relationship between the insured's mental capacity and the concept of "intent." In *Baker v. Commercial Union Insurance Co.*,[37] the SJC decided that wrongful conduct of an insured caused by an involuntary mental condition did not negate insurance coverage. The SJC ruled that a person who is insane is not subject to the policy exclusion which exempts the insurer from liability where the insured neglects to use all reasonable means to save and preserve property.[38] In *Baker*, a house was destroyed by a fire set by the co-insured, who stayed at the scene and watched the house burn.[39] She had a history of psychiatric treatment and the court held that:

> [i]t is a well-established rule that '[i]f the insured was insane at the time that he wilfully or intentionally caused the fire, the insurer remains liable on the policy' unless there is an express provision to the contrary in the policy . . . for, in such cases, the insured is deemed to be incapable of forming a fraudulent intent.[40]

The *Baker* holding that the insured was deemed incapable of forming an intent because of involuntary insanity, is consistent with most jurisdictions which have found the insane-insured outside the scope of

35. *Id.*

36. *Id. See, e.g.*, Jurczyk & Ream, *Applying the Intentional Act Exclusion to Sexual Molestation Cases*, FOR THE DEFENSE, Sept. 1990, at 2. In the case of punitive damages which are vicariously imposed, such as for the wrongful conduct of an employee, the employer does not share the employee's state-of-mind and should be covered. Ohio Casualty Ins. Co. v. Welfare Fin. Co., 75 F.2d 58, 60 (8th Cir. 1934).

37. 382 Mass. 347, 416 N.E.2d 187 (1981).

38. *Id.* at 350-51, 416 N.E.2d at 189-90.

39. *Id.* at 347-49, 416 N.E.2d at 188.

40. *Id.* at 350-51, 416 N.E.2d at 189 (citations omitted).

the intentional act exclusion.[41]

On the issue of coverage for a person who causes injury while voluntarily intoxicated and claims a lack of intent, there is no published Massachusetts decision. However, in a pending Massachusetts Superior Court civil case, the insured is a college freshman who voluntarily ingested both LSD and marijuana and then broke into a woman's apartment and sexually assaulted her.[42] He was convicted of assault and battery, and he was later civilly sued by the victim. His criminal defense was that, because of the hallucinogenic drugs, he was incapable of forming an intent. This defense was advanced by the testimony of a psychiatrist who acknowledged the insured's incapability of forming an intent given the mind altering properties of the hallucinogenic drugs. In the civil case, the insured/assailant demanded insurance coverage from his homeowners insurer for the same reason. On a motion for summary judgment, the court ruled that the insured could assert the taking of drugs to prove a lack of intent.

Under Massachusetts criminal law, the voluntary ingestion of drugs is not a defense to a "general" intent crime. In the leading case of *Commonwealth v. Henson*,[43] the SJC ruled that evidence of the taking of alcohol or drugs was not a defense to the general intent crime of assault and battery: "[t]he judge . . . instructed the jury that voluntary intoxication could not be an excuse or justification for the crimes charged. That is undoubtedly true of the crime of assault and battery by means of a dangerous weapon because no specific intent is involved in the proof of that crime."[44]

However, the court has permitted evidence of the voluntary taking of drugs for "specific" intent crimes. In first degree murder prosecutions, where the additional specific mental state of premeditation must be proven, the accused may show that because of the ingestion of drugs he was incapable of forming the requisite specific intent. In *Commonwealth v. Costa*,[45] the defendant claimed to be a frequent user of hallucinogenic drugs at the time of a murder, and a defense psychiatrist was allowed to testify that the defendant's mental capacity had been seriously diminished by the use of drugs.

3. Relitigation of Intent

The cases construing the intentional act exclusion have held that

41. *See, e.g.*, George v. Stone, 260 So. 2d 259, 262 (Fla. 1972) (insane insured shot plaintiff doctor and shot and killed his mother-in-law and then himself).

42. Hanover Ins. Co. v. Talhouni, No. 88-6751-B (Middlesex Super. Ct. 1990).

43. 394 Mass. 584, 476 N.E.2d 947 (1985).

44. *Id.* at 592, 476 N.E.2d at 953.

45. 360 Mass. 177, 274 N.E.2d 802 (1971).

there is no liability coverage for an assault and battery.[46] In *Massachusetts Property Insurance Underwriting Association (MPIUA) v. Norrington*,[47] however, the SJC ruled that an assault and battery victim who was not a party to the criminal prosecution may relitigate the question of intent in a suit for civil damages. The court rejected the argument that principles of collateral estoppel barred the relitigation of the issue of intent.[48]

In the previously mentioned suit brought by the young woman assaulted by the intoxicated college freshman, a jury could theoretically return a verdict based on negligence, which would be covered by the homeowner's policy. Since the assault and battery conviction would not be admissible for collateral estoppel purposes under *Norrington*, it is probable that the jury would never learn of it.

As a result, this procedure makes it difficult for the insurer to protect its interests. Until the recent *Fells Acres* decision, the case law was clear that if a civil complaint contained a negligence allegation the insurer had to undertake a defense, even if intentional conduct was alleged in the alternative.[49] This was because the duty to defend was triggered by the allegations in the complaint, while the duty to indemnify was determined by the facts ultimately decided by the jury.[50] In the *Fells Acres* case, however, the court ruled that the insurer did not have to defend the negligence claims because they arose from *"the same acts which [were] contended to be the basis of [the] assault and battery claims."*[51] That decision may be limited to its facts, however, since the parties had stipulated to the conduct which was the subject of the insurance coverage dispute.

An additional problem for insurers is that defense counsel in a negligence action cannot protect the coverage position of the insurer by attempting to show intentional rather than negligent conduct. To be sure, the insurer can possibly move to intervene through other counsel in order to request special jury questions,[52] yet this effort yields little control over the critical stages of the presentation of evidence.

Absent the *Norrington* rule permitting the relitigation of the issue of

46. *See, e.g.*, Sabatinelli v. Travelers Ins., 369 Mass. 674, 676-77, 341 N.E.2d 880, 882 (1976).

47. 395 Mass. 751, 481 N.E.2d 1364 (1985).

48. *Id.* at 753, 481 N.E.2d at 1367-68. In the companion case to *Norrington*, Aetna Casualty & Surety v. Niziolek, 395 Mass. 737, 481 N.E.2d 1356 (1985), the court ruled that despite the lack of mutuality of parties an insurer was entitled to assert a criminal conviction of an insured to defeat a claim for first party coverage by the insured. *Id.* at 742, 481 N.E.2d at 1359-60.

49. *See* Worcester Mut. Ins. v. Marnell, 398 Mass. 240, 496 N.E.2d 158 (1986).

50. *See, e.g., id.* at 245, 496 N.E.2d at 161.

51. Worcester Ins. Co. v. Fells Acres Day School, Inc., 408 Mass. 393, 410, 558 N.E.2d 958, 970 (1990) (emphasis in original).

52. *See* City of Newton v. Krasnigor, 404 Mass. 682, 536 N.E.2d 1078 (1989).

intent, the insurance coverage issue would rarely arise in situations where the insured was successfully prosecuted for the harmful conduct. In *Norrington*, the court reasoned that allowing the victim to relitigate intent "does no violence to the substantive principle that an injured party succeeds only to the insured's rights against the insurer."[53] The *Norrington* rule clearly affords the victim greater rights against the insurer than those possessed by the insured. The *Norrington* rule forces the insurer to litigate the application of the intentional act exclusion despite a finding of intentional misconduct under the judicial system's most stringent standard of proof. The relitigation of intent would permit the anomalous result of a civil jury finding a lack of intent after a criminal jury has found beyond a reasonable doubt that there was intent for the very same conduct. This result is especially unfair to insurers, since the *Fells Acres* court held that intent to cause harm would be inferred as a matter of law in a case involving assault and battery.[54]

If the issue of intent is relitigated after a criminal conviction, there is a real danger of collusion between the insured and the victim.[55] Since a money payment is at stake in a civil suit, both the victim and the assailant/insured are similarly motivated to persuade a jury that the harmful conduct was accidental and thus covered by insurance. While an academic analysis of the principles of collateral estoppel may justify this process, it does little to promote reliable fact finding, and it is scarcely equitable to insurers.[56]

If society is willing to imprison the assailant for the wrongful conduct, the insurer should be entitled to rely on the criminal decision to deny coverage. After all, the insurance policy is a private contract between the insurer and the wrongdoer. Ordinarily, neither the victim nor the insured would have a reasonable expectation of insurance coverage for the intentional criminal act.[57] The victim is not a third party beneficiary of the liability insurance contract.

4. What Constitutes "Bodily Injury" and "Property Damage"?

Certain insurance policy definitions may restrict the availability of coverage for punitive damages awarded under certain Massachusetts statutes. The grant of coverage in most standard liability policies is to

53. MPIUA v. Norrington, 395 Mass. 751, 756, 481 N.E.2d 1364, 1368 (1985).

54. *See supra* notes 32-35 and accompanying text.

55. *See* Genova v. Genova, 28 Mass. App. Ct. 647, 652-53, 554 N.E.2d 1221 (1990) (interests of opposing parties to lawsuit adverse to liability insurer where plaintiff and defendant family members).

56. Mutuality of estoppel is not required in Massachusetts. *See* Bell v. Stephens, 403 Mass. 465, 531 N.E.2d 251 (1988); Bailey v. Metro Property Ins., 24 Mass. App. Ct. 34, 505 N.E.2d 908 (1987).

57. American Family Mut. Ins. Co. v. Peterson, 405 N.W.2d 418, 422 (Minn. 1987); *see generally* Boyle, *The Reasonable Expectations in Massachusetts Insurance Law*, 32 B.B.J. 16 (Mar.-Apr. 1988).

indemnify the insured for legal liability because of "bodily injury" or "property damage," as those terms are defined by the policy.[58] Thus, the insurer will not indemnify the insured for damages which are not the result of "bodily injury" or "property damage."

The 1973 CGL policy's somewhat circular definition of "bodily injury" provides that "bodily injury" means "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."[59] On the one hand, where the plaintiff in the underlying lawsuit has suffered some physical injury, there is generally no dispute that the insured's alleged liability is for "bodily injury." On the other hand, certain torts which result in non-physical injury to the plaintiff's person, such as libel, slander, or invasion of privacy, do not constitute "bodily injury," unless accompanied by some physical manifestation of harm.[60] Hence, damages recoverable under the Massachusetts Wiretap Statute, chapter 272, section 99 of the Massachusetts General Laws, for violation of the plaintiff's "personal [or] privacy interest," including punitive damages recoverable thereunder, should not be covered under a liability policy which limits the indemnity protection to damages resulting from "bodily injury."

Similarly, the definition of "property damage" in the 1973 CGL policy requires physical injury or loss of use of tangible physical property.[61] Intangible economic loss is not "property damage" within the meaning of the CGL policy.[62] Accordingly, coverage should not apply, for example, to damages awarded under chapter 93, section 42 of the

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58. *See, e.g.*, COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY, *reprinted in* Tinker, *supra* note 18, at 299 app.. Some courts have found this language ambiguous and therefore to be construed in favor of coverage. *See* Ohio Casualty Ins. v. Welfare Fin. Co., 75 F.2d 58, 59 (8th Cir. 1934); General Casualty Co. v. Woodby, 238 F.2d 452, 458 (6th Cir. 1956).

The MASSACHUSETTS AUTOMOBILE INSURANCE POLICY (4th ed.) provides in the compulsory coverage section: "[W]e will pay damages to people injured or killed by your auto in Massachusetts accidents. The damages we will pay are the amounts the injured person is entitled to collect *for bodily injury* through a court judgment or settlement." *Id.* at 4 (emphasis added).

59. COMPREHENSIVE GENERAL LIABILITY POLICY, *reprinted in* Tinker, *supra* note 18, at 291 app..

60. *See* G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 44:287 (1982).

61. The CGL Policy defines "property damage" as follows:

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
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> (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

COMPREHENSIVE GENERAL LIABILITY POLICY, *reprinted in* Tinker, *supra* note 18, at 294 app..

62. *See id.*

Massachusetts General Laws, which allows treble damages for the taking of trade secrets, because the loss of a trade secret is not "property damage."

III. Massachusetts Public Policy As A Limitation On Insurance Coverage

A. *Judicial Decisions*

1. Is the Policy Void?

In order to determine whether Massachusetts public policy prohibits coverage for punitive damages, one must first examine Massachusetts common law and statutes.

There are relatively few expressions of public policy limitations on insurance coverage contained in Massachusetts judicial decisions and statutes. In the case of *Wheeler v. O'Connell*,[63] the SJC suggested, in dicta, that with respect to insurance other than compulsory automobile liability coverage, "a policy indemnifying an insured against liability due to his wilful wrong is void as against public policy. . . ."[64] However, the coverage at issue in *Wheeler* was compulsory auto liability insurance, mandated by statute. Because the applicable statute did not preclude coverage for injuries caused by wilful misconduct by the insured, the court held that the nature of the insured's conduct was immaterial with respect to the availability of compulsory auto coverage.[65]

It is debatable, however, whether the SJC has followed the *Wheeler* dictum that a policy indemnifying an insured against a wilful wrong is "void." For example, the actions of the insured in *Abernathy*, who deliberately threw a piece of blacktop at a passing car, arguably constituted a "wilful wrong," but the SJC apparently found no public policy limitations on coverage. Indeed, in the aftermath of the *Abernathy* decision, it would appear that the public policy limitations on coverage for intentional acts, as expressed in *Wheeler*, would be less restrictive than limitations already contained in the language of standard form insurance policies. Conduct constituting a "wilful wrong" that is sufficiently egregious to make coverage contrary to public policy probably would not be covered under standard insurance contracts in the first instance, because such conduct would not constitute an "accident" or an "occurrence."

The public policy issues are arguably inapplicable where statutes

63. 297 Mass. 549, 9 N.E.2d 544 (1937).

64. *Id.* at 554, 9 N.E.2d at 547. *See also* Sheehan v. Goriansky, 321 Mass. 200, 203, 72 N.E.2d 538, 541 (1947).

65. *Wheeler*, 297 Mass. at 554, 9 N.E.2d at 546-47. *See also* Gibralter Fin. Corp. v. Lumbermens Mut. Casualty Co., 400 Mass. 870, 873, 513 N.E.2d 681, 683 (1987) (contrary to public policy to indemnify for intentionally unlawful conduct); Cannon v. Commerce Ins., 18 Mass. App. Ct. 984, 470 N.E.2d 805 (1984).

impose punitive damages for conduct which is neither illegal nor intentional. Furthermore, the public policy issue of insurance coverage for punitive damages has resulted in a split of authority in other jurisdictions.[66] One view is that public policy requires that there should never be coverage for punitive damages because such damages are intended to punish and deter. To permit recovery of such damages under an insurance contract would undermine these public policy objectives.[67]

A contrary view holds that there should be coverage because punitive damages are in reality a form of compensation. Moreover, deterrence comes from other circumstances including criminal penalties, higher insurance rates and awards in excess of insurance coverage.[68] The proponents of this view argue that society should not interfere with contractual rights, and that insurers who do not expressly exclude such coverage are presumed to have covered such damages and to have charged a premium for such coverage.[69]

2. Can the Insured Rely on Voluntary Intoxication to Claim Coverage?

There is also a split of authority on the public policy question of whether an insured should be entitled to present evidence of voluntary intoxication to establish lack of intent to avoid the policy exclusion. For example, the New Jersey Supreme Court held that the burden was on an insurance carrier to prove "that the insured, notwithstanding his intoxication, formed an intent to cause [harm]."[70]

In contrast, in *American Family Mutual Insurance Co. v. Peterson*, the Minnesota Supreme Court ruled that "voluntary intoxication may not be used to deny an intent [to cause injury where the circumstances of

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66. *See* Annotation, *supra* note 1.

67. For that reason, the weight of authority holds that it is contrary to public policy to indemnify for punitive damages. *See, e.g.*, City of Newark v. Hartford Accident & Indem., 342 A.2d 513, 518 (N.J. Super. 1975) ("indemnification should not be permitted for an act that constitutes a crime or involves . . . other outrageous conduct").

68. *Tort Law: Reviews of Leading Current Cases*, 31 J. AM. TRIAL LAW. A. 42, 50 (1965).

69. Harrell v. Travelers Indem. Co., 279 Or. 199, 213, 567 P.2d 1013, 1019-20 (1977).

The Massachusetts appellate courts have instructed that the policy goals of multiple damages are to deter proscribed conduct and encourage vindictive lawsuits. McGrath v. Mishara, 386 Mass. 74, 85, 434 N.E.2d 1215, 1222 (1982). Multiple damages serve to make it "unprofitable" for a defendant to violate the statute. Int'l Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 857, 443 N.E.2d 1308, 1318 (1983). To achieve these legislative objectives, the courts have ruled that punitive damages under Chapter 93A are assessed separately as to each defendant. *Id.* at 856, 443 N.E.2d at 1317.

70. Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 399, 267 A.2d 7, 15 (1970).

the incident] otherwise compel an inference of intent to injure."[71] In *Peterson*, the insured ingested two or three quarts of whiskey, and struck his girlfriend's landlady with a hammer while telling her that he was going to kill her. On the policy issue the court stated that the "policyholder's expectations are to be considered in light of the purpose of the intentional act exclusion."[72] The court reasoned that: "[a]bsent an understandably provocative situation which induces an instinctive reflex or an impulsive defensive reaction, we do not think an insured reasonably expects his assault committed while voluntarily intoxicated to be within his policy coverage any more than an assault committed while sober."[73] The court was "not inclined to create a situation where the more drunk an insured can prove himself to be, the more likely he will have insurance coverage."[74]

A similar position was taken by the Missouri Court of Appeals in *Hanover Insurance Co. v. Newcomer*.[75] In *Newcomer*, the court ruled that the law must not permit the insured to defend his action by evidence of being under the influence of intoxicants and marijuana to show that he did not intend to harm the victim who had been injured by a swinging machete.[76]

In Massachusetts, the unanswered question remains whether the same public policy concerns that apply to criminal cases should also apply to civil lawsuits. The public policy argument was articulated by former Chief Justice Hennessey who stated: "[i]t is not in the public interest to conclude that a defendant's voluntary intoxication is relevant to most crimes of violence. We turn our backs on the realities of today's society if we move in that direction."[77]

This public policy concern is no less applicable to civil suits where voluntary intoxication is offered as a defense to the application of the intentional act policy exclusion. If an insurer is held to provide indemnity for injuries caused by an insured while voluntarily intoxicated, a significant sanction is shifted away from the wrongdoer.

As a practical matter, it is very difficult for an insurer to disprove a claim of lack of intent caused by voluntary intoxication. The blood chemistries which provide objective evidence of intoxication are ephemeral and some drugs have no measurable physical effect. Thus, the insurer is often faced with the insured's subjective claim of lack of

71. American Family Mut. Ins. Co. v. Peterson, 405 N.W.2d 418, 422 (Minn. 1987).

72. *Id.*

73. *Id.*

74. *Id.*

75. 585 S.W.2d 285, 289 (Mo. Ct. App. 1979).

76. *Id.*

77. Commonwealth v. Henson, 394 Mass. 584, 594, 476 N.E.2d 947, 954 (1985).

intent coupled with the shared motive of the victim and assailant to invoke insurance coverage.

B. *Limitations on Coverage Derived from Statutes*

The statutes of the Commonwealth send mixed signals concerning public policy limitations on insurance coverage. One such limitation is contained in chapter 175, section 47 of the Massachusetts General Laws, which sets forth the powers granted to insurers incorporated in Massachusetts. Section 47 expressly prohibits coverage for intentionally caused property damage. The relevant clause provides, in pertinent part, that insurers may be incorporated in Massachusetts for the purpose of insuring:

> any person against legal liability for loss or damage on account of the injury or death of any other person or on account of any damage to property of another, except that *no company may insure any person against legal liability for causing injury, other than bodily injury, by his deliberate or intentional crime or wrongdoing* . . . .[78]

To date, no Massachusetts appellate court has invalidated a liability insurance policy as contrary to the above-quoted language. In *J. D'Amico*, the insurer argued that insurance coverage for treble damages pursuant to chapter 242, section 7 for "wilfully [cutting] down trees on the land of another" would violate the statutory prohibition against insuring a person for intentionally caused property damage.[79] However, the SJC declined to reach this issue on the record before it.[80] It is interesting to note that the SJC's opinion in the *Krasnigor* case, which involved property damage resulting from arson by the insured, did not address the issue of whether insurance coverage on those facts would have been contrary to chapter 175, section 47.[81] It appears that the standard policy requirement that the loss must be "unexpected or unintended" brings the insurer into compliance with the statute, and the statute imposes no further restrictions on coverage.

In *Santos v. Lumbermens Mutual Casualty Co.*,[82] the only published Massachusetts decision addressing the issue of coverage for punitive damages, the SJC held that punitive damages under the Massachusetts wrongful death statute were not covered by the uninsured/underinsured motorist provision of the standard form Massachusetts automobile policy.[83] The court reached this conclusion by examining the

78. MASS. GEN. L. ch. 175, § 47 (1988) (emphasis added).

79. J. D'Amico, Inc. v. City of Boston, 345 Mass 218, 225, 186 N.E.2d 716, 721 (1962).

80. *Id.* at 226, 186 N.E.2d at 722.

81. *See* City of Newton v. Krasnigor, 404 Mass. 682, 682-88, 536 N.E.2d 1078, 1078-82 (1989).

82. 408 Mass. 70, 556 N.E.2d 983 (1990).

83. *Id.* at 83-84, 556 N.E.2d at 989-91. *See* MASS. GEN. L. ch. 229, § 2 (1988) (wrongful death statute).

provisions of chapter 175, section 113L, which require uninsured/underinsured motorist coverage [hereinafter uninsured coverage], in conjunction with the Massachusetts wrongful death statute.[84]

At the outset, the court observed that damages recoverable under the wrongful death statute were ostensibly within the purview of the uninsured coverage which all Massachusetts automobile insurers are required to provide. The pertinent language of chapter 175, section 113L reads:

> [n]o policy shall be issued or delivered in the commonwealth with respect to a motor vehicle . . . unless such policy provides coverage in amounts or limits prescribed *for bodily injury or death* . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . and hit-and-run motor vehicles *because of bodily injury, sickness or disease, including death resulting therefrom* . . . .[85]

However, the court found that the above-quoted language was ambiguous as to whether or not coverage for "bodily injury or death" included coverage for punitive damages. To resolve this ambiguity, the court examined the uninsured coverage and the wrongful death statutes for a common objective or purpose, such that the legislature could be deemed to have authorized insurance coverage for punitive damages.[86]

The purpose of the uninsured motorist statute is to provide guaranteed compensation to travelers injured on the highways of the Commonwealth by financially irresponsible motorists. The objectives of the punitive provisions of the wrongful death statute, punishment and deterrence, bear no apparent relationship to the goal of compensating injured motorists.[87] The court observed that punitive damages under the wrongful death statute are not compensatory, and they are awarded in addition to compensatory damages. Therefore, allowing coverage for punitive damages would not further the goal of compensation.[88] Likewise, allowing coverage would not serve the goals of punishment and deterrence, because the "punishment" would be borne by an insurer whose relationship with the tortfeasor was altogether fortuitous.[89]

While the *Santos* case resolves the issue of coverage within the narrow context of uninsured motorist coverage for punitive damages recoverable under the wrongful death statute, the decision appears to be

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84. *Santos*, 408 Mass. at 81-83, 556 N.E.2d at 989-91.

85. MASS. GEN. L. ch. 175, § 113L (1988) (emphasis added).

86. *Santos*, 408 Mass. at 81-83, 556 N.E.2d at 989-91.

87. *Id.* at 82, 556 N.E.2d at 990.

88. *Id.*

89. The court intimated that, in the context of liability insurance, coverage might not be inconsistent with punishment and deterrence because the tortfeasor whose insurer paid a punitive award might be "punished" by an increase in his insurance premiums. *Id.* at 82-83, 556 N.E.2d at 990.

limited to its facts.[90] The issue as to whether a liability insurer, as distinct from an uninsured motorist insurer, might be required to pay a punitive damage award was intentionally unanswered.[91] Moreover, the coverage at issue in *Santos* involved coverage mandated by the legislature. Outside the context of compulsory automobile insurance, the court's analysis will necessarily differ, because the court will not be faced with the issue of whether the legislature has required that the insurer afford coverage for punitive damages.

Thus, it appears that the statutory authorizations for various types of liability insurance, and the express limitations on insurance coverage as set forth in Massachusetts cases and statutes, give no clear indication of whether the public policy of Massachusetts forbids insurance coverage for punitive damages.

IV. Massachusetts Punitive Damage Statutes and Public Policy

Somewhat surprisingly, Massachusetts appellate courts have not published a decision about whether liability coverage for statutory multiple damages would be contrary to Massachusetts public policy. Outside Massachusetts there is conflicting authority on this issue. For example, in a Wisconsin case involving a strict liability "dog bite" statute similar to the Massachusetts "dog bite" statute, the court held that there was coverage for multiple damages under a homeowners policy.[92] The Wisconsin court reasoned that the statute imposed multiple damages without regard to the state-of-mind of the dog owner and, therefore, public policy would not be thwarted by insuring such damages.

The Connecticut Supreme Court reached the opposite conclusion in *Tedesco v. Maryland Casualty Co.*.[93] In *Tedesco*, double damages were awarded against the insured under a Connecticut statute which provided for multiple recovery, in the discretion of the trial judge, for the violation of Connecticut statutes pertaining to the "rules of the road."[94] Upon examination of the history of the multiple damages statute, the court concluded that the extra damages recoverable thereunder were of a *qui tam* nature. In other words, an individual is permitted to obtain and hold a penalty as a reward for securing the punishment of one who has committed an offense which the legislature deems to be a public wrong.[95] The court in *Tedesco* held that Connecticut public policy forbade the insurer from paying this statutory penalty:

> [a] policy which permitted an insured to recover from the insurer fines

90. *See id.* at 83-84, 556 N.E.2d at 990-91.
91. *Id.* at 84 n.17, 556 N.E.2d at 991 n.17.
92. Cieslewicz v. Mut. Serv. Casualty Ins. Co., 84 Wis.2d 91, 101-02, 267 N.W.2d 595, 599-601 (1978).
93. 127 Conn. 533, 18 A.2d 357 (1941).
94. *Id.* at 535, 18 A.2d at 358.
95. *Id.* at 537, 18 A.2d at 359.

> imposed for violation of a criminal law would certainly be against public policy. The same would be true of a policy which expressly covered an obligation of the insured to pay a sum of money in no way representing injuries or losses suffered by the plaintiff but imposed as a penalty because of a public wrong. If the language of the policy is reasonably open to two constructions, one of which would avoid such a result, that should be adopted.[96]

The Connecticut Supreme Court reached the conclusion that the multiple damages at issue in *Tedesco* were not covered, by using public policy as an aid to interpret the insurance contract.[97]

It may be possible to reconcile *Cieslewicz* and *Tedesco*, inasmuch as the two cases stand for somewhat different propositions. The excess recovery in *Tedesco* was analogous to a fine, or a sum payable to the state for the violation of a criminal statute, although awarded to a private litigant in the context of a civil case. Whereas, the multiple damages at issue in *Cieslewicz* were in the nature of enhanced tort damages since the dog owner had knowledge of his animal's dangerous propensities, as prescribed by the statute. Thus, the statutes involved in these two cases arguably implicated disparate public policy considerations.

A. *Public Policy Analysis Applied to Specific Massachusetts Statutes*

1. Coverage for Treble Damages Under the "Dog Bite" Statute

The *Cieslewicz* and *Tedesco* analyses are largely persuasive on the facts of each case. Thus, Massachusetts courts should find that public policy does not preclude insurance coverage for statutory multiple damages where the applicable statute merely provides for enhanced recovery in the context of a statutorily-defined strict liability tort. The Massachusetts "dog bite" statute, chapter 140, section 159, provides a good example of statutory multiple damages recoverable on a "strict liability" basis. The statute reads, in pertinent part, as follows:

> [i]f a dog which the selectmen of a town, chief of police of a city or the county commissioners, or . . . a district court, shall have ordered to be restrained shall wound any person . . . the owner or keeper of such dog shall be liable in tort to the person injured thereby in treble the amount of damages sustained by him.[98]

The above-quoted statute imposes multiple damages on a dog owner whose dog causes damage after the issuance of a restraint order. There need be no showing of either negligence or intentional conduct by the dog owner. In contrast to the "malicious" behavior necessary to impose liability for punitive damages upon a defendant at common law, there is nothing particularly outrageous about the conduct necessary to trigger an award for treble damages under the dog bite statute. It is

96. *Id.* at 537-38, 18 A.2d at 359.
97. *Id.*
98. MASS. GEN. L. ch. 140, § 159 (1988).

not unlawful to keep a dog which has been previously ordered restrained, but if the owner chooses to do so, he must pay treble damages when the dog causes injury to someone else. The increased damages apparently are coextensive with a legislative determination of the increased risk to others of harboring a dog which has been previously ordered restrained.

Although the "dog bite" statute contains elements of punishment and deterrence, these considerations are not so overwhelming as to be dispositive of insurance coverage within this context. The tortious act at issue lacks the character of outrage, associated with conduct necessary to trigger an award of common law punitive damages.

2. Coverage for "Punitive" Treble Damages Under the "Lead Paint" Statute

Contrarily, where multiple damages are recoverable for conduct which can be fairly characterized as a "public wrong," because of its quasi-criminal nature, Massachusetts public policy should preclude coverage. On this point, the First Circuit recently held in *Travelers Insurance Co. v. Waltham Industrial Laboratories Corp.*[99] that an insured's settlement of a civil action by the Commonwealth for violations of several Massachusetts statutes pertaining to water pollution, encompassed "civil penalties" as opposed to "damages."[100] Because the liability policy at issue provided coverage for the insured's legal obligation to pay "damages," the insurer had no obligation to indemnify its insured for a settlement representing civil penalties.[101] Although technically the First Circuit's decision was based on a construction of the insurance contract rather than public policy, it appears that the court was influenced by the public policy implications in allowing insurance for quasi-criminal liability.

Such legislation that allows multiple recovery to a private litigant for quasi-criminal conduct constituting a "public wrong," is the Massachusetts "lead paint" statute.[102] This statute provides for recovery of actual damages on a strict liability basis when a child under the age of six is injured from the ingestion of lead in paint or other materials which the owner fails to remove from any residential premises.[103] In addition, the property owner is liable for treble damages when he is notified by a housing code enforcement agency that his premises contain unsafe

99. 883 F.2d 1092 (1st Cir. 1989).

100. *Id.* at 1099.

101. *Id.*

102. MASS. GEN. L. ch. 111, § 199 (1988).

103. *Id.*; *see* Bescome v. Kokoras, 400 Mass. 40, 41, 507 N.E.2d 748, 749 (1987) (liability is imposed regardless of property owner's knowledge with respect to unsafe lead levels on premises).

levels of lead, and fails to take proper measures to remedy this condition. The relevant statutory provision reads as follows:

> [t]he owner of any residential premises who is notified of a dangerous level of lead in paint, plaster, soil or other material present upon his premises pursuant to section one hundred and ninety-four,[104] and who does not satisfactorily correct or remove said dangerous conditions shall . . . be subject to punitive damages, which shall be treble the actual damages found.[105]

Admittedly, the above-quoted provision does not require "malicious" conduct on the part of the property owner to establish liability for treble damages. However, unlike the Massachusetts "dog bite" statute, the punitive provisions of the "lead paint" statute should not be interpreted as allowing recovery of multiple damages on a strict liability basis. Rather, it appears that the conduct necessary to trigger the multiple award under the "lead paint" statute, is statutorily-defined negligence.

Although the defendant's conduct may have been merely negligent for the imposition of treble damages under the "lead paint" statute, he has nevertheless committed a public wrong. One who is subsequently liable for treble damages, has failed to take affirmative measures required by the legislature to correct a condition known to pose a serious health threat to a discrete and particularly vulnerable group of persons, that is, young children. Moreover, in order to be liable for punitive damages under the lead paint statute, the owner must have failed to act after receiving notice that his or her premises contained unsafe lead levels and that children under the age of six resided therein.[106]

Violations of the lead paint statute are sufficiently serious that the Commonwealth can bring a criminal action against the non-complying property owner.[107] In addition to criminal sanctions, other code enforcement agencies may seek injunctive relief in the district and superior courts.[108] Further, actions for violations of the "lead paint" statute are treated as emergency matters, to be heard on an expedited basis by the courts.[109] Thus, the act rendering the defendant liable for punitive damages under the Massachusetts "lead paint" statute is at least as much a "public wrong" as the traffic violations deemed analogous to a *qui tam* action by the Connecticut Supreme Court in *Tedesco*.

In light of the foregoing, and the legislature's express characterization of treble damages under the "lead paint" statute as "punitive,"

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104. MASS. GEN. L. ch. 111, § 194 provides, *inter alia*, that housing code enforcement agencies shall inspect residential premises for dangerous lead levels, when children residing therein have been diagnosed with lead poisoning.

105. *Id.* § 199.

106. *See id.* §§ 197, 199.

107. *Id.* § 198; MASS. REGS. CODE tit. 105, § 460.800 (1989).

108. *See id.*

109. MASS. GEN. L. ch. 111, § 198 (1988).

insurance coverage for these multiple damages should be contrary to Massachusetts public policy. That is, if coverage were allowed, the punitive effect of the award would be diminished, as would the incentive for the property owner to take prompt steps to delead the residential premises when ordered to do so.

Argumentatively, if insurers know they are exposed to treble damages, they will take measures to compel compliance with the "lead paint" statute by their policyholders. Thus, permissible insurance coverage for punitive damages will in fact further the primary purpose of the statute.[110] However, insurers are already exposed to the single damages recoverable on a strict liability basis under the lead paint statute, which appear to be covered under standard liability policies in any event. Thus, insurers already have adequate incentive either to encourage their insureds to remove lead-containing materials from residential premises, or not to insure such risks at all. But it is the insured who is legally obligated to correct the dangerous condition, and who, after receiving notice, creates the risk of treble damages. Also, in many instances, the insurer may be placed on notice of a dangerous level of lead in the insured's premises only after a claim for treble damages has been asserted against the insured. It is debatable whether an insurer could compel an insured to delead his premises, if a code enforcement agency is unable to do so.

Summarily, if insurance coverage is allowed for punitive damages under the "lead paint" statute, the elements of punishment and deterrence will consist of punishment of insurers, and deterrence in subscribing to risks.[111] Hence the legislative purposes underlying the "lead paint" statute should preclude insurance coverage for punitive damages awarded thereunder.

V. CONCLUSION

It is difficult to make any general statements concerning insurance coverage for punitive damages in Massachusetts, given the diverse statutory bases on which such damages are available. In some instances, punitive damages will not be covered on the face of the policy, rendering further analysis unnecessary.

However, one can envision that in many instances the insured will dispute the insurer's contention that policy coverage does not apply on its face to a punitive damage award. Such conflicts are often likely to involve the application of policy language, precluding coverage for "expected or intended" injuries. Although the *Krasnigor* case was a partial move in the right direction, the authors submit that Massachusetts

110. *Cf.* Wojciak v. Northern Package Corp., 310 N.W.2d 675, 680-81 (Minn. 1981) (finding liability coverage for statutory multiple damages for retaliatory discharge, where insurer could influence employer to prevent statutory violations).

111. *See* Pomerantz, *Punitive Damages: An Insurers View*, 684 INS. L.J. 21, 29 (1980).

courts should take a more realistic approach to the question of whether a loss is "expected or intended" by the insured. Where the insured commits a criminal assault, as in *Fells Acres* and *Abernathy*, the insured should not be permitted to attest to any non-expectations nor intentions for injury, regardless if directed at the victim of the assault or the consortium claimant. To hold otherwise is to engage in a result-oriented exercise in policy interpretation which violates the insurer's underwriting intent and exceeds the policyholder's reasonable expectations concerning coverage.

Additionally, within the context of assaults perpetrated by a policyholder, the insured should not be afforded the opportunity to raise intoxication as a defense to an insurer's claim that a loss is "expected or intended." Massachusetts should adopt the rule that, as in criminal cases, the insured's voluntary intoxication cannot be used to deny an intent to cause injury. Public policy should mandate that the insured not be able to increase the likelihood of coverage by proof of alleged voluntary ingestion of drugs or alcohol.

Outside the context of the "intentional act" exclusion, the critical issue in the analysis of coverage for punitive damages should likewise involve public policy considerations. The determination as to whether insurance coverage for statutory punitive damages is contrary to the public interest should vary, depending upon the particular statute involved. Factors to be taken into account in analyzing the coverage issue with respect to a given statute should include: the standard of culpability; whether the defendant's actions would also warrant criminal sanctions; whether the statute has been expressly characterized as "punitive" by the courts or the legislature; and the nature of the harm involved.

It would be improper for our courts to adopt a blanket rule that insurance coverage for statutory multiple damages or punitive damages is, or is not, permitted in Massachusetts. Rather, the courts should adopt a flexible approach to the question of whether such coverage is contrary to public policy. The focus of the inquiry in each case should be upon the extent of the public interest in punishing the defendant and deterring others.