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Insuring Fortuity—and Intent: A Comment on Professor French’s *Insuring Intentional Torts*

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I. INTRODUCTION

Intentional torts are, and can be, insurable. We agree with Professor French when he concludes that the default rule in insurance law should be that liability insurance can provide coverage for intentional torts, absent compelling reasons.¹ Indeed, Professor French notes a number of examples where a variety of intentional torts are already insured as a matter of course in a number of liability insurance contexts.² He proposes that the public policies of both freedom of contract and innocent third party victim compensation support this approach and that courts should be reluctant to reject coverage on “lack of

* Respectively, Professor of Law, Queens University-Canada and Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas and. With gratitude to Christopher French, an honorable colleague and friend in insurance law who has left us too soon, while he still had much to say. The opinions expressed in this article are of course our own and should not be attributed to any of those we cite or thank. © 2022 Erik S. Knutsen and Jeffrey W. Stempel.

¹ Christopher C. French, *Insuring Intentional Torts*, 83 OHIO ST. L.J. 1069, 1072 (2022).

² *Id.* at 1084–1103. Professor French lists the following intentional injuries presently insured by liability insurance:

- a) Shareholder fraud covered by directors and officers liability insurance;
- b) Discrimination covered by employment practices insurance;
- c) Sexual abuse covered by sexual misconduct insurance;
- d) Intentional torts covered by personal and advertising liability coverage under the standard Commercial General Liability insurance policy;
- e) Punitive damages covered by commercial general liability insurance policies (among other policies);
- f) Criminal conduct and intentional auto accidents covered by automobile liability insurance;
- g) Intentionally caused injuries from self-defence covered by commercial general liability insurance and residential liability insurance.

fortuity” grounds unless this is clearly required by policy language, insuring intent and purpose, or public policy.³

We agree with this sentiment but wonder whether insurance risk management principles alone can move the argument to the same place. We agree with the impetus to be mindful of the effects of insurance coverage decisions on compensation for innocent third-party accident victims. But we question whether one needs to reach to insurance’s alleged contractual underpinnings to allow for the creation of this default rule (in fact, we are concerned one may be trapped by this in the wake of prevalent liability insurance policies on the market which have specific exclusions aimed at dealing with intentional conduct⁴).

We posit that the problem with insuring intentional conduct in the present insurance market is not heavily driven by concern about punishing wrongdoers by yanking insurance coverage. We agree, along with Professor French,⁵ that threatening a policyholder with yanking coverage has little to no practical effect on policyholder behavior, especially in the heat of the moment. Rather, the problem is one that arises from the use of established tort law principles as the rough-and-ready categorical “window” or trigger of insurance coverage.

We think there is a serious conceptual misalignment by using tort principles as a sort of coverage filter for liability insurance coverage purposes. Tort law is not insurance law—it exists for a very different set of purposes. As we will discuss below, tort law acts as an often-poor categorizer of behavioral risk for insurer and policyholder purposes alike.

II. THE RISK-BASED SOLUTION TO INSURING INTENTIONAL TORTS

The bedrock principle of insurance is that it is to protect against losses arising from only fortuitous events—risks or chances.⁶ Insurance does not insure against a certainty. Otherwise, the entire arrangement of risk-based transfer breaks down between insurer and policyholder. Within that realm of fortuitous events insurable as a matter of first principles, one can find a lot of conduct on which to base some insurable arrangement (at least in theory). In fact, as a yardstick for determining what is—or is not—insurable, the fortuity

³ *Id.* at 1082–84, 1107–11.

⁴ See JEFFREY W. STEMPER & ERIK S. KNUTSEN, STEMPER & KNUTSEN ON INSURANCE COVERAGE § 1.06[A] (4th ed. 2016 & 7 Supp. 2022) [hereinafter STEMPER & KNUTSEN ON INSURANCE COVERAGE].

⁵ French, *supra* note 1, at 1105–06.

⁶ See, e.g., *id.* at 1071; Erik S. Knutsen, *Fortuity Clauses in Liability Insurance: Solving Coverage Dilemmas for Intentional and Criminal Conduct*, 37 QUEEN’S L.J. 73, 75–8 (2011) [hereinafter Knutsen, *Fortuity Clauses*]; Erik S. Knutsen, *Fortuity Victims and the Compensation Gap: Re-envisioning Liability Insurance Coverage for Intentional and Criminal Conduct*, 21 CONN. INS. L.J. 209, 212–13 (2014) [hereinafter Knutsen, *Fortuity Victims*].

concept is rather loose and covers a great deal of uncertain loss-resulting behavior in the liability insurance sphere.⁷

There can be factual uncertainty—whether or not some liability-attracting behaviour will occur to cause a loss.⁸ There can be temporal uncertainty—uncertainty when a certain known event will actually occur in the future to result in a loss. And finally, there can be extent uncertainty—one knows when there will be liability for a known loss-causing event but the extent or value of the loss is what is unknown. In each of these settings, there exists some fortuity on which to fix a commercially sensible risk-based arrangement between policyholder and insurer such that the insurer can still make some money because “something” is unknown.

The examples Professor French sets out in which various spheres of liability insurance actually do insure intentional actions⁹ are each examples of how insurers are using “some” uncertainty to still create profitable insurance arrangements, even though there is some technically intentional conduct insurable on the part of the policyholder.

Although it superficially looks like a violation of the fortuity concept, this is the essence of commercial general liability and business auto insurance. A trucking company “knows” that no matter how great its safety protocols, its vehicles will be involved in some collisions. At a minimum, the “intent” concept of an “expected or intended” exclusion must be narrow enough to permit coverage of these losses.

Similarly, the inquiry must always focus on the subjective understanding of the policyholder. Barring coverage for conduct the policyholder “should have known” was injurious would eliminate coverage for negligence which would in turn eliminate coverage for torts which would in turn make the liability insurance fail its essential purpose.

One can view the existence of seeming exceptions to insuring intentional conduct as perhaps not exceptions at all. Instead, proscribing a policyholder’s conduct as intentional torts and thus a categorical bar to insurance recovery is likely the underlying inconsistency. If one sticks instead with solid risk-based principles of risk transfer, risk pooling, and risk allocation using fortuity as the gatekeeper for insurability,¹⁰ the “exceptions” to insurers insuring intentional conduct fall away.

Each exception has an element of fortuity to it. No one knows *ex ante*, for example, when liability-resulting conduct will attract punitive damages. When

⁷ See, e.g., Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 TORT & INS. L.J. 777, 790–93 (2001) (principle not self-evident); James A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 96 (1990) (“[I]t is easier to state the concept than apply it in practice or to reconcile the applications.”).

⁸ Knutsen, *Fortuity Clauses*, *supra* note 6, at 77.

⁹ French, *supra* note 1, at 1084–1103.

¹⁰ See, e.g., STEMPER & KNUTSEN ON INSURANCE COVERAGE, *supra* note 4, § 1.03; Knutsen, *Fortuity Victims*, *supra* note 6, at 211.

the perpetrator of sexual misconduct abuses others, the insured organization that purchased sexual misconduct insurance is liable vicariously and does not know if, when, and to what extent the harm will be, because the harm was committed by someone within the organization. Or one who becomes liable for being forced into taking action in self-defence has done so in a manner completely fortuitous to them—they had no idea they would be required to take defensive action because they likely could not have foreseen the threat.

The law has often utilized short-hands for legal principles which can often get away from the original intent of such a mechanism. The uninsurability of intentional torts is one such mechanism. It is likely derived from an amalgam of the public policy rule in operation in many states that criminals cannot profit from their crimes¹¹ (and hence enjoy insurance reimbursement for damages resulting from committing crimes) plus a rough concept of the fortuity principle.

If most crimes involve an element of *mens rea*, or mental intent, and if one's intentional action can turn a chance loss into a certain loss, then at first blush it may stand to reason that those concepts together must mean that intentional torts are thus not insurable. But, as mentioned above, there can be a great deal of fortuity in intentional conduct (timing and extent, for example). And intentional actors in liability insurance contexts seldom if ever “profit” from their crimes. Further, a coverage denial results in a loss of victim compensation to the third party, as most policyholders are largely judgment proof.¹²

So, the more holistic way to approach things might instead be to say that insurance can insure fortuitous risks—using a concept of fortuity that cuts a wide swath of liability-causing behaviour, in terms of happenings, timing and extent.

But this raises the question: why do so many courts¹³ and commentators¹⁴ focus so intently (pardon the pun) on intentional conduct as a limitation on insurability? Another shorthand—the ill-filling use of tort law as a categorical “window” for coverage-limiting behaviour.

¹¹ See Knutsen, *Fortuity Victims*, *supra* note 6, at 233. See generally Mary Coate McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26 (1941) (examining, in historical fashion, how various types of insurance have dealt with illegal conduct, and in particular how liability insurance is becoming less about the protection of the policyholder and more about the needs of injured people).

¹² See, e.g., Stephen Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006) (most tortfeasors unable to satisfy a judgment against them); Knutsen, *Fortuity Victims*, *supra* note 6, at 241; Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 275 (2001); see also Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 ARIZ. L. REV. 957, 962 (2020).

¹³ French, *supra* note 1, at 1081–82.

¹⁴ *Id.*

III. THE MISALIGNMENT OF THE TORT “WINDOW” FOR COVERAGE

There is a misalignment between how tort law views intentional conduct for the purposes of tort law and how intentional conduct as defined by tort actually meshes with insurance law’s fortuity principle. Liability insurance basically imports some nomenclature of tort’s intentional conduct structures into the insurance world by invoking it in insurance policy exclusions for certain conduct.¹⁵ Therein lies the problem.¹⁶

Intentional conduct from the tort world is designed with the tort system in mind—a system not built on commercially sensible risk management principles but instead for a system designed to ferret out fault, wrongdoing, and individual blame as a guidepost to providing victim compensation.¹⁷ The tort system (depending on how one views tort) operates in a separate civil law “universe” than insurance¹⁸ (which, again depending on how one views insurance, is related to contract law¹⁹—the law of the bargain).

The reason intentional conduct attracts tort (not insurance) liability is because the tortfeasor intentionally—by its own volition—took some action to

¹⁵ See, for example, the “expected or intended” exclusion in the standard commercial general liability policy or the “intentional or criminal act” exclusion in the standard residential liability policy. Knutsen, *Fortuity Victims*, *supra* note 6, at 215.

¹⁶ This problem was recently highlighted by Cardi and Chamallas who write about the uninsurability of sexual assaults and offer a prescription to this problem of leaving sexual assault victims uncompensated. See generally W. Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 TEX. L. REV. 1, (2022). The real issue here, too, is the abject mismatch between the tort and insurance system and the internal structures of each as separate legal spheres attempting to do very different jobs: one in a fault-based universe, one in a commercial risk-based contractual setting.

¹⁷ See generally DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, *THE LAW OF TORTS* (2d ed. 2011) (treatise on torts); see also John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 926 (2010); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L. J. 403, 410–13 (1989). While tort scholars have debated the philosophical purposes of the tort system (especially in the last half-century—from corrective justice rights-based accounts versus civil recourse theory to a more economic approach), the fact remains that the tort system relies on the insurance world for the money for victim compensation. See generally Tom Baker, *Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1 (2005); Erik S. Knutsen, *Five Problems with Personal Injury Litigation (And What to Do About It!)*, 40 ADVOCATES Q. 492, 495–96 (2013) (both detailing the fact that insurance is the baseline funding mechanism for the tort system).

¹⁸ See, e.g., Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 968–72 (2010) (principles of causation in insurance are necessarily different from causation principles in tort law; insurance law causation has a contractual element to it); STEMPEL & KNUTSEN ON INSURANCE COVERAGE, *supra* note 4, § 7.01.

¹⁹ See generally Jeffrey W. Stempel & Erik S. Knutsen, *Rejecting Word Worship: An Integrative Approach to Judicial Construction of Insurance Policies*, 90 U. CINN. L. REV. 561 (2021) (outlining the various ways—both helpful and unhelpful—that construction of insurance policies is anchored in contract law principles).

purposely cause some harm to another individual. The civil law mechanism for redress for the victim is tort (suing in either negligence or as an intentional tort) because the tortfeasor's faulty behaviour resulted in harm to the victim. To "right" that wrong, the victim is owed compensation from the wrongdoer. So the underpinning for tort (not insurance) liability is that faulty behavior—it has nothing to do with the fortuity behind the behaviour.

In fact, intentional conduct in tort can still have elements of fortuity to it which make it, at heart, technically insurable conduct. In the tort of battery, for example, a defendant commits an intentional unwanted physical touching of the plaintiff. Many things can occur here where that loss-causing conduct can be seen as fortuitous. Perhaps the defendant did not intend to startle or make contact with the plaintiff, and more damage was caused than expected.²⁰ Perhaps the defendant did not expect to be provoked by the plaintiff and acted in the heat of the moment, in a split-second reaction. Perhaps the defendant was in a state unable to appreciate fault at all.²¹

For the tort of intentional infliction of emotional distress, for example, there is also a great deal of fortuity in that loss-causing conduct. In many instances, the tortfeasor defendant may not be able to predict—or may have some complete incapacity to understand—just how serious the plaintiff's mental distress will be as a result of the defendant's conduct. Imagine a bully who subjectively thinks his behavior is "funny"—but it is anything but amusing to the victim.

Using the intentional tort category as a "window" of coverage-losing behavior in the liability insurance context just does not work for all instances. This, we argue, is Professor French's true target in his wise suggestions for reform and the addition of a default rule. There is nothing inherently uninsurable about every single intentional tort. Far from it. Using the grab-bag category of intentional torts to say that such loss-causing behavior which can be labelled as such is always uninsurable for all time is incorrect (as Professor French concludes²²).

It is more accurate to say that behavior which moves a loss from fortuity to certainty is uninsurable. That type of behavior could be an intentionally caused loss but only if the behavior actually makes the move from fortuity to certainty. Otherwise, intentional conduct is theoretically insurable.

²⁰ Take the venerable battery case of *Vosburg v. Putney*, where a schoolboy kicked in the shin suffered greater than expected injuries because his leg was already afflicted with a condition. 50 N.W. 403, 403 (Wis. 1891). While the bully who kicked him caused greater than expected damages, the court held that the bully was responsible for the entire unforeseeable loss, because he intended at least some harm. *Id.*

²¹ See, e.g., *Fiala v. Cechmanek*, where a runner experienced a severe delusional manic episode without any prior warning, and ran into traffic and choked a driver of a vehicle. 281 A.R. 248 (Can. 2001). The driver stepped on the gas and struck another vehicle. The Alberta Court of Appeal held that there could be no liability on the part of the runner because he was in such a mental state as to not appreciate the faulty consequences of his actions.

²² French, *supra* note 1, at 1111.

IV. THE PROBLEM OF STANDARD EXCLUSIONARY LANGUAGE

There is one potential snag to this thinking: liability insurance policies utilize exclusions that appear to import the notion of intentional torts into their wordings.²³ This, we argue, contributes to the confusion and the perpetuation of the myth of a separate rule that tort concepts of intentionality somehow (incorrectly) permeate into insurance law's fortuity-based world. We think Professor French's default rule is correct—and we offer a way to utilize it even in the face of ubiquitous liability insurance policy language that appears to encompass intentional torts (hint: it does not).

The “expected or intended from the standpoint of the insured” exclusion from the standard commercial general liability policy is one example.²⁴ It includes the word “intended” but that does not mean it has to be referring to “intentional torts.” What it means is the loss-causing behaviour for which liability will attach will not be insured if (as Professor French correctly points out) the policyholder subjectively intends to bring about both the act and the end-result harm.²⁵ In that case, the policyholder has frustrated fortuity—taking a chance loss and moving it into the realm of certainty by taking such an action. The policyholder would have had to “expect” the harm to result, meaning expected it as a certain result in a subjective fashion.

Alternatively, the policyholder would have had to subjectively “intend” the harm to result—which is really meaning the same thing, from a fortuity lens: doing something to make a chance loss a certainty. But barring those two important qualifiers to the liability-resulting behavior (intending both the action and the result), the loss caused by the intentional conduct should be fortuitous and thus insurable and should not run afoul of the exclusion as written.

Many liability policies attached to residential homeowner's policies contain an even more specifically worded exclusion for loss-causing behaviour: the policy ousts coverage for losses caused by or resulting from “intentional” (and sometimes “criminal”) acts.²⁶ Here again, one should read this exclusion with a risk-based fortuity purpose (not a tort law purpose). The exclusion should only be removing liability insurance coverage for those losses where the insured subjectively meant to bring about the loss that ensued, thus moving the loss from a chance occurrence to a certainty.

Even though the exclusion explicitly uses the word “intentional,” it is not a cue to import all concepts from intentional torts and the tort system. Instead, the word “intentional” must be read in context with the text immediately surrounding it. “Losses” caused by or resulting from intentional acts are

²³ Fischer, *supra* note 7, at 110.

²⁴ See STEMPER & KNUTSEN ON INSURANCE COVERAGE, *supra* note 4, § 1.06 (canvassing how the “expected or intended” exclusion in the standard commercial general liability policy operates as a fortuitybased exclusion).

²⁵ French, *supra* note 1, at 1077; Knutsen, *Fortuity Victims*, *supra* note 6, at 201; Knutsen, *Fortuity Clauses*, *supra* note 6, at 73.

²⁶ See STEMPER & KNUTSEN ON INSURANCE COVERAGE, *supra* note 4, § 1.06.

excluded. The exclusion does not say intentional “torts” are excluded. It says “losses” from intentional acts. The focus is on the “losses” caused by some action through which the loss is intentionally caused.

This is the only sensible way to interpret the exclusion in a risk-based context and keep that interpretation consistent with existing jurisprudence. Otherwise, the exclusion makes no sense—not every intentional act triggers the exclusion because, as Professor French notes,²⁷ any human action has an intentional component to it. One must “intend” to move one’s arm. That does not mean that the harm resulting from an arm movement is intentionally caused. One could have been simply putting on one’s coat and moving one’s arm while someone else walked into the arm. No tort liability would result there, as no harm was intended, nor was there negligent conduct. Most courts (though not all) have interpreted this exclusion to mean that coverage is ousted only for those losses where the policyholder subjectively intended both the loss-causing action and the harm itself.²⁸ In short, only non-fortuitous losses are excluded from coverage.

V. THE FLAWS WITH FREEDOM OF CONTRACT

Professor French argues that the tenets embedded within freedom of contract largely explain the reason why there should be a default rule allowing insurability of intentional torts.²⁹ Because insurers and policyholders should be left to bargain as they wish, and because American law holds high the notion of contractual freedom (particularly in the world of insurance law),³⁰ courts should be expected to simply defend the language agreed upon by the parties instead of imposing something extra-contractual like a notion that intentional torts are not insurable.

We are concerned with two elements of this argument: 1) there is the potential for the argument to work against itself in the face of the standard liability insurance exclusions mentioned above when construed by strict constructionist courts; and 2) relatedly, we think the contractual underpinnings of insurance law are largely overplayed, to the detriment of policyholders and insurers alike (yes, even insurers).

If freedom of contract reigns supreme in American insurance law (as many believe it does and should)³¹, then what does that mean when the vast proportion of liability insurance policies have specifically worded exclusions designed to

²⁷ See French, *supra* note 1, at 1079; Knutsen, *Fortuity Victims*, *supra* note 6, at 210; Knutsen, *Fortuity Clauses*, *supra* note 6, at 77.

²⁸ See French, *supra* note 1, at 1079–80; Knutsen, *Fortuity Victims*, *supra* note 6, at 219–21.

²⁹ French, *supra* note 1, at 1082–83.

³⁰ See generally Stempel & Knutsen, *supra* note 19 (outlining, and often arguing against, the excessive influence of textualist contracts thought).

³¹ Though we do not count ourselves among those. See generally *id.* (arguing for a less textualist, less contractarian approach to insurance policy construction).

exclude from coverage losses that have some intentional component to the loss-causing behaviour?

We think it would result in many courts, especially strict constructionist courts dealing in contractual “pure-ism,” construing these exclusions as meaning that they import intentional tort constructs from tort law right into insurance law, bypassing altogether any notions of fortuity whatsoever (and thus being over-inclusive in construing these exclusions, to remove coverage in ways that actually are not true to the very nature of the bargain between insurer and policyholder).

For example, the “expected or intended” exclusion or the “intentional act” exclusion could be (and often are³², incorrectly in our view) read as having “intended” mean the “intent” from all intentional torts is the “intent” that ousts liability insurance coverage. That is certainly one plausible (though certainly coverage-limiting) version as to how one could interpret this clause. Such a result would very likely be arrived at by any court relying on a dictionary meaning of “intended” and sprinkling in a little knowledge of basic first year tort law: *Vaughan v. Menlove*³³ and *Vosburg v. Putney*³⁴ and that entire trip down 1L memory lane.

But, as mentioned above, that view suffers serious over-inclusion in its misalignment with insurance (not tort) purposes of fortuity. Insurance law is not the forum to assess blame, fault and responsibility. There are no checks and balances in insurance coverage law on that sort of conduct, as there are in the tort system (including constructs like the defences of consent, mistake, duress, intent, and even contributory negligence in some cases). This is because, again, the tort system is designed specifically to assess fault, blame and responsibility on the conduct of some actor—those moral judgments to which we then attach the requirement to compensate the victim as a consequence of injury-causing behavior. In the insurance sphere, it is a simple inquiry about what the words of the policy are meaning to trigger based on events that occurred: an amoral question.

The freedom of contract notion may actually prompt courts to be so over-inclusive in construing these exclusions simply because the language of the exclusions seem to hearken to tort law’s intentional torts constructs by their very words. Many a court can rest an interpretive decision on finding that the wording of an insurance exclusion must be upheld because that is what the “parties” intended. We find this highly problematic because insurance policies really do not have a mechanism which includes the policyholder with any say on wording or in any drafting role whatsoever.

³² See French, *supra* note 1 at 1079–80; Knutsen, *Fortuity Victims*, *supra* note 6, at 219–21.

³³ See generally *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490 (C.P.) (the first introduction of the objective “reasonable person” concept in English common law).

³⁴ See generally *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891) (bully responsible for the entire unforeseeable loss because he intended at least some harm).

Insurance policies are take-it-or-leave-it written constructs which, in our view, are not contracts at all but instead memorializations of intentions of the insurer to agree to shoulder transferred risk in exchange for the payment of a premium by the policyholder.³⁵ The “words” are not the “contract;” therefore, upholding the words in the name of freedom of contract is a false shibboleth. Insurance policies in this regard arguably have as much kinship with products and statutes as with contracts.³⁶

The policyholder agreed to nothing because there is no way any reasonable policyholder, *ex ante*, could guess the future events that would transpire to lead to the liability from the loss-causing behaviour. The court, however, may well be construing the operative nature of the clause by importing incorrect tort law principles into the insurance law sphere. Such an exercise may be done without regard to keeping the two worlds within their proper lanes but instead done with a literalist intent, often with the aid of the dictionary. This often results in an “I know what intentional conduct is because I know” result.

Freedom of contract, in this vein, is therefore used to publicly bolster a court’s often knee-jerk and ill-informed interpretation of an insurance policy term by referring to a principle which of course everyone agrees (who wouldn’t agree to freedom of contract?) but which has no actual relevance to the interpretive exercise. The parties did not choose those words—only one party did, and that party sold a commercial risk-based product that is grounded in fortuity principles with an actuarial (not tort) basis. Seen in this light, freedom of contract may actually inhibit the good work of Professor French’s move to have coverage for intentional torts be a default rule in insurance disputes.

VI. SUBROGATION RIGHTS MAY BE HOLLOW RIGHTS

Finally, we commend Professor French for suggesting that liability insurers be provided subrogation rights as against their own insureds when those insurers provide coverage to policyholders for losses arising from their intentional torts.³⁷ Such a move compensates the innocent third-party victim and

³⁵ See, e.g., Jeffrey W. Stempel & Erik S. Knutsen, *supra* note 19, at 583 (detailing the adhesionary nature of insurance policies as one-sided “contracts” better described as “policies”).

³⁶ See Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1389 (2007); Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1491 (2010); Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203, 204 (2010); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813, 814–15 (2009); see also Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 653 (2013); Erik S. Knutsen, *Auto Insurance as Social Contract: Solving Automobile Insurance Coverage Disputes Through a Public Regulatory Framework*, 48 ALTA. L. REV. 715, 716 (2011) (both adding insurance-as-regulated-industry to the alternate characterizations of insurance policies).

³⁷ French, *supra* note 1, at 1108–11.

immediately takes that issue out of the equation. It leaves the payment question between the policyholder-tortfeasor and the insurer to sort out.

We understand that, in proposing his default rule solution, Professor French may wish to be throwing a bone to insurers who will be forced to pay for claims for losses they now are able to avoid. They can then chase their payment rights as against the very wrongdoer party who caused the loss, and recoup the payout. However, and despite actually being sympathetic to the cause, we wonder whether this may be a hollow right for insurers in the end—and perhaps a very difficult and expensive right to prove.

If most losses arising from intentional conduct have a fortuitous element, and if most policyholders in behaving in such a way as to cause those losses do so in a fortuitous (subjectively to them) manner, then we wonder how an insurer will be able to prove its subrogation right to chase its money. The insurer would have to have evidence that the loss was “expected or intended” from the standpoint of the policyholder.

How can an insurer get evidence of the subjective state of mind of its policyholder who is now adverse in interest? One would have to objectively prove through circumstantial or other evidence that the true stated intent of the policyholder was something other than they now say it is (because we expect the policyholder to act self-interestedly to say they did not intend the harm). That can be a tall—and very expensive—evidentiary threshold to meet.

There is then the second hurdle—collection. As Professor French³⁸ and others³⁹ have noted, most tortfeasors are judgment-proof. They are average folk, drowning in consumer debt and mortgaged up to the eyeballs. Most insurers would be hard pressed to collect anything from their subrogation effort. Most insureds could not likely even afford a lawyer to defend them if sued by their own insurer.

To be sure, the right to subrogate against one’s own insured would be best exercised against an institutional policyholder who can afford to pay for the loss and can afford defence counsel. But even for many small businesses who may have commercial general liability insurance and the like, it may well be a more efficient decision to declare bankruptcy instead of fighting one’s own insurer in a subrogated action.

In the end, we think Professor French’s thesis is strong enough to not require this right for insurers. He notes (and we absolutely agree) that the behavioural deterrent effect for policyholders of the threat of liability insurance loss is minimal to none—and the threat of subrogation would likely be even less than that. Few policyholders could guess or even understand the circumstances under which they would find themselves in a complicated subrogated action as a defendant when their own insurer is suing them for reimbursement.

We are also mostly concerned with the slippery slope of allowing subrogated actions against insureds in the first place. Traditionally, such actions

³⁸ *Id.* at 1083–84.

³⁹ See sources cited *supra* note 12.

have not been allowed—and for good reasons. We worry that allowing insurers to subrogate in this albeit limited fashion may open the door for such subrogation rights to be granted in other situations where coverage and behaviour are somehow linked. Such a move may be quite detrimental to the insurer-policyholder relationship in perhaps very unsuspecting ways one cannot even imagine at this point (to say the least about bad faith issues which may loom large).

There has long been a hard wall against insurers subrogating against their own insureds for precisely that reason. We are not yet absolutely convinced that Professor French's proposal requires this boon to be given to insurers, even in the very conscribed and controlled way he carefully sets out.

VII. CONCLUSION

Notwithstanding our concerns over some implications of Professor French's analysis and its operationalization, we find his central point unassailable. There is nothing inherent about insurance that bars coverage for intentional actions, even if (and perhaps especially if) those actions become tortious. Such an argument, often used by insurers when resisting claims, but seldom addressed when selling policies, would unduly restrict the social utility of insurance with little gain for carrier profitability or public safety. Insurance requires an acceptably broad view of fortuity, volition, and expected or intended injury.