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Trends in litigation often reflect changes in our society, or at least afford a reflection of our ability to publicly address matters that we used to keep secret. One such issue is the emerging presence of litigation arising out of sexual molestation of children by parents, relatives, family friends, clergy and others. Although the problem of improper sexual contact with children has always existed, our courts have just recently been required to address how our civil justice system is to deal with these very sensitive and difficult issues.

Whereas in most sexual torts the cause of action is readily cognizable, the ability of the aggrieved plaintiff to recover is not. The vast majority of sexual tortfeasors are persons of no means or of very limited means, thus requiring the victim to seek redress through some form of insurance coverage, usually provided by the perpetrator's homeowners' insurer or general liability insurer. Most of these insurance policies were not written with sexual torts in mind; thus, most of the litigation focuses on whether or not the policy language excludes coverage for this type of risk.

I. THE "EXPECTED OR INTENDED" EXCLUSION—A SUBJECTIVE OR OBJECTIVE INQUIRY?

Most liability insurance policies contain some form of "intentional acts" exclusion, commonly exempting from coverage acts of a tortfeasor which are "expected or intended from the standpoint of the insured." Since the insurance contract itself is the law between the parties,[1] the initial inquiry must look to the specific policy language to determine what the policy actually excludes. Outside of the sexual molestation arena, the clause has been found to require the finder of fact to undertake a subjective analysis into the intent of the insured, usually the tortfeasor.

The most detailed analysis of how to interpret this "expected or intended" exclusion is in *Breland v. Schilling*.[2] In *Breland*, one baseball player punched another in the jaw after heated words were exchanged. The victim suffered unusually severe fractures as a result of the altercation. The policy excluded coverage for "bodily injury or property damage which is either expected or

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1. Jackson v. Rogers, No. 95-0486, slip op. at 3 (La. App. 1st Cir. Nov. 9, 1995).

2. 550 So. 2d 609 (La. 1989). *See also* Leland R. Gallaspy, Breland v. Schilling: *Louisiana's Approach to "Injuries Expected or Intended From the Standpoint of the Insured,"* 52 La. L. Rev. 199 (1991).

intended from the standpoint of the Insured."[3] The court held that the specific language of that policy excluded the injury which the insured intended, not the one which he caused, however intentional the injury-producing act. The court found the specific language excluded coverage only for those injuries which the defendant subjectively desired to inflict.

The court distinguished the meaning of "intent" in this insurance policy from the legal meaning of "intent" in other areas, such as worker's compensation, criminal law and tort law, and defined intent, under the interpretation of that particular insurance contract, as follows:

> In adopting the fact-sensitive test for the insured's subjective intent, we reject the approach, followed by certain courts, that an insured intends, as a matter of law, all injuries which flow from an intentional act.
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> . . . .
>
> While the insurance policy, perhaps in part for public policy reasons, bars payment of claims for injuries "intended or expected . . . from the standpoint of the insured," it does not bar coverage for unintentionally grievous injuries which, though precipitated by the insured, were never intended by him.
>
> We hold, therefore, that when minor bodily injury is intended, and such results, the injury is barred from coverage. When serious bodily injury is intended, and such results, the injury is also barred from coverage. . . . [W]hen a minor injury is intended, and a substantially greater or more severe injury results, whether by chance, coincidence, accident, or whatever, coverage for the more severe injury is not barred. Whether a given resulting bodily injury was intended "from the standpoint of the insured" within these parameters is a question of fact. Such factual determinations are the particular province of the trier of fact, in this instance the trial jury.[4]

In *Yount v. Maisano*,[5] three altercations occurred on the beach in Destin, Florida. In the last altercation, the defendant attacked the plaintiff and beat him with repeated blows and kicks to his face. The policy excluded bodily injury "expected or intended by the insured."[6] The defendant testified that he did not consciously desire to inflict serious injury to the plaintiff. The court, properly paying homage to *Breland*, stated that the inquiry was as to the subjective intent of the insured to determine whether an act is "expected or intended." The court stated that an act is intentional "if the perpetrator desires the results of his action

3. *Breland*, 550 So. 2d at 610.
4. *Id.* at 613-14 (footnote omitted).
5. 627 So. 2d 148 (La. 1994).
6. *Id.* at 150.

or he believes that the results are substantially certain to occur."[7] The court decided that, in spite of the defendant's testimony, a review of all of the facts and circumstances revealed that he intended or expected to inflict serious injury.[8]

II. CHILD MOLESTATION CASES

It is with this backdrop that we undertake to study how the Louisiana courts have dealt with this "expected or intended" exclusion in sexual molestation cases.

In *Smith v. Perkins*,[9] the defendant sexually molested a young girl. Her mother asserted a cause of action against the perpetrator and his homeowners' insurer. The insurance contract contained the "expected or intended" exclusion. Citing *Breland*, the court studied the differing language in policy exclusions in several cases, found that the inquiry was a subjective one, and held as follows:

> In *Doe v. Smith*, insurance coverage was excluded for bodily injury or property damage "which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person." The defendant allegedly molested a minor child and the court considered whether the act was intentional and whether the damage could reasonably be expected to result from that act. On the first issue, the court acknowledged that summary judgment is rarely appropriate for a determination of subjective facts such as intent and stated:
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> > In cases dealing with battery, theft and shootings, the facts may influence a finding of negligence rather than intentional conduct. . . . *However, child molestation is one such rare instance where a factual determination of negligence or intentional conduct is inappropriate as a practical matter. These types of acts cannot result from careless conduct and only occur as a result of a deliberate act by the perpetrator. Additionally, the alleged acts giving rise to the instant suit occurred repeatedly over an almost ten-year period. Clearly, Smith's acts of child molestation were deliberate and, therefore, intentional acts.*
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> The focus of the Court at that point of the opinion was whether the act was intentional, not whether the resulting damages were intentional.
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> The second inquiry under the policy language in *Doe* was whether the damage could reasonably be expected to result from the intentional

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7. *Id.* at 152 (quoting Great Am. Ins. Co. v. Gaspard, 608 So. 2d 981, 985 (La. 1992)).

8. *Id.* at 153. *See also Great Am. Ins. Co.*, 608 So. 2d at 981 (lessee burned his property and burned property of adjoining tenants); Pique v. Saia, 450 So. 2d 654 (La. 1984) (police officer injured by defendant during an arrest); Baugh v. Redmond, 565 So. 2d 953 (La. App. 2d Cir. 1990) (altercation at a softball game); and Lewis v. Hayes, 659 So. 2d 515 (La. App. 4th Cir. 1995) (fatal shooting of one brother by another).

9. 648 So. 2d 482 (La. App. 4th Cir. 1994), *writ denied*, 651 So. 2d 292 (1995).

act. The court applied an objective reasonable man standard to determine same.

The First Circuit later expanded application of the rule that exempted child molestation from factual inquiry when the court granted summary judgment for an insurer based on a clause that excluded coverage for bodily injury which was intended or expected by the insured. Thus, the same rule was applied, although the question under the policy was not whether the act was intentional but whether the resulting damage was intentional.

Two cases from this Circuit have considered "intent" under exclusionary clauses in a molestation case. *Shaw v. Bourn*, 615 So. 2d 466 (La. App. 4th Cir.), *writ denied*, 618 So. 2d 409, 412 (1993); *Hackett v. Schmidt*, 630 So. 2d 1324 (La. App. 4th Cir. 1993), *writ denied*, 635 So. 2d 1123 (1994).

Like *Doe v. Smith*, the exclusionary clause in *Shaw v. Bourn* was written in terms of a reasonable man standard. That policy excluded coverage for bodily injury or property damage:

> a. which results from an act:
>
> (1) that is intended by any insured to cause harm; or
>
> (2) that an insured could reasonably expect would cause harm.

This Court determined that:

> The use of the words "reasonably" and "an" instead of the word "the" [in the exclusionary clause] indicates that the policy does not look to the subjective fact-based test of the particular insured, but rather uses a reasonable man standard. As such, even if (defendant) is incapable of foreseeing the harm to the plaintiffs which we find was substantially certain to follow his acts of molestation, he *should have* because any, indeed, every reasonable man expects children to be harmed by molestation. Thus (defendant's) state of mind is irrelevant in light of the policy language. . . . We further adopt the holding of *Doe v. Smith* . . . and *Wallace v. Cappel* . . . . Having concluded that as a matter of law child molestation is an intentional act, we find that the trial court committed reversible error in submitting the question on policy coverage to the jury.

By adopting the holding of *Doe* and *Wallace*, this Court attempted to adopt a rule that child molestation is per se an intentional act for which coverage is excluded.

In *Hackett*, the policy excluded coverage for "bodily injury or property damage intentionally caused by an insured person." The Court found that, unlike *Shaw*, the *Hackett* policy indicated that a subjective standard must be applied.

> When an insured's subjective intent must be determined, the court should consider "all the facts and circumstances bearing

> on such intent or expectation." Since those determinations of subjective intent are factual, the trier of fact is given much discretion in determining intent.[10]

The court in *Smith*, however, after discussing that the tortfeasor's intent must be analyzed subjectively, found that, objectively:

> The sexual molestation of a child is certainly a deliberate, intentional act, and the emotional and physical damage is such a fundamental and natural consequence of the molestation that any predator must be held to realize that damage will result. We hold that, as a matter of law, the mere commission of sexual molestation on a juvenile is sufficient to establish that any resultant injury is "expected or intended from the standpoint of the [i]nsured."[11]

In *Menard v. Zeno*,[12] a sixteen-year-old child held a knife to the throat of an eight year old and forced the latter to submit to a sex act. The policy excluded coverage for bodily injury that is "either expected or intended from the standpoint of an insured."[13] Citing *Breland*, the court stated that the subjective intention and expectation of the insured determine which injuries fall within, and which fall beyond, the scope of coverage under the policy. The court went on, however, to state:

> Although, in the usual case, the issue concerning the application of an intentional injury exclusion involves a factual determination which would preclude summary judgment, in our view, the conceded facts concerning the intentional act and the claimed injuries in this case are such that there can be no factual dispute material to a determination that the intentional injury exclusion of the Aetna policy is applicable.[14]

Significantly, *Menard* was a fact-sensitive case wherein the court followed *Breland*, but apparently decided, even under a subjective inquiry, that the facts of the case required that the exclusion apply.

In *Shaw v. Bourn*,[15] the policy excluded coverage for bodily injury or property damage "which results from an act that is intended by any insured to cause harm, or that *an insured* could *reasonably* expect would cause harm."[16] In *Shaw*, the court held that the use of the word "reasonably" and the use of the words "an insured," instead of the words "the insured," indicated that the policy

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10. *Id.* at 485-86.
11. *Id.* at 486.
12. 558 So. 2d 744 (La. App. 3d Cir. 1990).
13. *Id.* at 746.
14. *Id.* at 748.
15. 615 So. 2d 466 (La. App. 4th Cir.), *writ denied*, 618 So. 2d 409 (1993).
16. *Id.* at 468 (emphasis added).

did not look to a subjective fact-based study of that particular insured, but rather used a reasonable man standard. The court went on to state that Mr. Bourn "should have" foreseen the harm that would be caused by molestation, thereby precluding recovery using an objective test.[17]

In *Doe v. Smith*,[18] a child's parents brought an action against a neighbor and his homeowner's insurer arising out of the neighbor's molestation of their daughter over a ten year period. The policy excluded "bodily injury or property damage which may *reasonably* be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by *an insured* person."[19] Based on that language, the court used an objective standard to determine intent. The court primarily relied on the use of the word "reasonably" and the words "an insured," as opposed to "the insured," and stated:

> In *Pique v. Saia*, the Louisiana Supreme Court, in interpreting a homeowner's liability policy clause excluding coverage for "bodily injury . . . which is either expected or intended from the standpoint of the insured," determined that such provision excluded only injuries resulting from intentional acts and did not exclude the negligent acts committed by defendant.
>
> The aforementioned cases and the cases which follow *Breland* and *Pique* are clearly distinguishable from the instant case. The policy exclusions in *Breland* and *Pique* dealt with the narrow area of "bodily injury or property damage . . . *expected or intended" by the insured* and not any "bodily injury . . . which *may reasonably be expected to result* from the intentional . . . acts of an insured." The language of the Allstate exclusion clause in this case is significantly different from the provision in *Breland* and *Pique*. Here, the exclusion is not limited to the injury or damages intended by the insured, but broadly excludes coverage for all damages *reasonably expected* to result from an insured's intentional act, regardless of his intention to cause any of the damage suffered.[20]

Based on an objective analysis, the court found that the plaintiff intended the injury.

In *Piraro v. Dupuy*,[21] the court studied a policy with the "expected or intended" language. The court did not specifically state whether it was using a subjective or objective inquiry, but found factually that the defendant intended the harm caused. The petition alleged that the defendant, Dr. Dupuy, "threatened the child by telling her that if she would ever reveal or disclose to any person

17. *Id.* at 471.
18. 573 So. 2d 238 (La. App. 1st Cir. 1990).
19. *Id.* at 241 (emphasis added).
20. *Id.* at 242 (citation omitted) (footnote omitted).
21. 618 So. 2d 48 (La. App. 3d Cir. 1993).

what they were doing, he would deny her accusations and neither her parents nor members of her family nor any third person would ever believe her."[22] He further told her that "her family would hate and shun her if she revealed this information."[23] The court's decision was, obviously, very fact-sensitive. Although the court did not discuss the subjective-objective dichotomy, the court could have easily resolved the case using a subjective inquiry based upon the evidence presented.

In *Wallace v. Cappel*,[24] the policy "excluded coverage expected or intended by the insured." The court, acting on a writ application, reversed the denial of a defendant's motion for summary judgment and stated: "Child molestation is a rare instance in which a factual determination of negligence or intentional conduct is inappropriate as a practical matter."[25]

Where does this leave the innocent victim who seeks recovery from the typically impecunious tortfeasor?

III. THE STANDARD OF CIVIL RESPONSIBILITY AND SUBJECTIVE INTENT—*BRELAND* + *VON DAMECK*

A subjective analysis requires a peek into the mind of the perpetrator to discern his intent. What if the tortfeasor has a mental disease or defect which exempts him from civil responsibility for his acts?

In *von Dameck v. St. Paul Fire & Marine Ins. Co.*,[26] the court set forth the standard for civil responsibility when the defendant has such a mental disease or defect. In *von Dameck* the tortfeasor, Dr. Cayer, shot his wife three times with a handgun, then shot himself, committing suicide. The policy excluded "bodily injury which is expected or intended from the standpoint of the insured."[27] The court stated:

> However, to this court's knowledge a legal standard of insanity, insofar as delictual responsibility is concerned, has never been established by the jurisprudence or laws of the State of Louisiana.
>
> "Insane persons" are defined in La.R.C.C. Article 31 as:
>
> > "Persons of insane mind are those who do not enjoy the exercise and use of reason, after they have arrived at the age at which they ought, according to nature, to

22. *Id.* at 48.

23. *Id.*

24. 592 So. 2d 418 (La. App. 1st Cir. 1991), *writ denied*, 593 So. 2d 651 (1992).

25. *Id. See also* Doe v. Dep't of Health and Human Resources, 623 So. 2d 72 (La. App. 1st Cir.), *writ denied*, 627 So. 2d 653 (1993) (molestation of a mentally handicapped student by an employee of a state school); Doe v. Doe, No. 95-0006 (La. App. 1st Cir. Nov. 9, 1995) (sexual molestation of a child); and Belsom v. Bravo, 658 So. 2d 1304 (La. App. 5th Cir.), *writ denied*, 661 So. 2d 482 (1995) (sexual contact between two teenagers).

26. 361 So. 2d 283 (La. App. 1st Cir. 1978).

27. *Id.* at 288.

> possess it, whether the defect results from nature or accident. . . ."
>
> "Insanity" is defined in Black's Law Dictionary as:
>
> ". . . such a want of reason, memory, and intelligence as prevents a man from comprehending the nature and consequences of his acts or from distinguishing between right and wrong conduct."
>
> In the recent case of *Turner v. Bucher*, the Supreme Court, in discussing the delictual responsibility of minors and insane persons, stated the following:
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> ". . . (T)he Louisiana and French concepts coincide in holding that nondiscerning persons do not possess the capability of knowing the consequences of their conduct; they lack the moral guilt usually associated with delictual responsibility and, therefore, they should not be legally liable for acts under an objective standard designed for normal reasoning persons."
>
> . . . .
>
> In view of the above jurisprudence and definitions of insanity for civil liability, we find that the trial judge was in error in simultaneously concluding that Dr. Cayer, by his actions, intended to inflict bodily injury. If a person has such a want of reason, memory, and intelligence as prevents him from comprehending the nature and consequences of his acts, he cannot at the same time intentionally inflict injury. Though Dr. Cayer may have had the intent to shoot his wife, his insanity prevented him from having the requisite intent to inflict injury.[28]

The court found the "expected or intended" exclusion inapplicable, found that the insured was not liable for his torts, found that the insurer could not avail itself of that defense because it was personal to the insured, and allowed recovery.

No court has yet applied *von Dameck* to sexual molestation cases. However, after *von Dameck*, if the plaintiff in a sexual molestation case can prove that the tortfeasor's mental disease or defect was sufficient to deprive the tortfeasor of the ability to understand the nature and consequences of his actions, the tortfeasor's insurer may be required to provide coverage, in spite of the "expected or intended" exclusion.

IV. CONCLUSION

If the language of the exclusion contains the word "reasonably," or refers to "an insured," an objective or "reasonable man" analysis must be used. If the

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28. *Id.* at 286, 288 (citations omitted).

exclusion refers to "the insured," an analysis of the tortfeasor's subjective intent is necessary. It appears that the courts view sexual molestation of children as the abhorrent social evil that it is. Consequently, the courts usually find that the tortfeasor intended the injury, regardless of whether the analysis the court uses is subjective or objective. As of yet, the Louisiana Supreme Court has neither spoken directly on these issues nor dealt with how a tortfeasor's mental disease or defect will affect the applicability of the "expected or intended" exclusion.