Breland v. Schilling: Louisiana’s Approach to "Injuries Expected or Intended From the Standpoint of the Insured"

Leland Redding Gallaspy
Breland v. Schilling: Louisiana's Approach to "Injuries Expected or Intended From the Standpoint of the Insured"

Ronald "Bug" Schilling lay on the ground after sliding head first into third base in an unsuccessful attempt to knock the softball out of the third baseman's glove. The third baseman, William Breland, looked down at Schilling and released the ball, which struck Schilling on the chin. Angered, Schilling rose to his feet and punched Breland in the jaw, breaking it in two places. Breland subsequently filed a lawsuit against Schilling, who then brought a third party action against his homeowner's insurer, Southern Farm Bureau. Thus the court was confronted with the question of whether the injuries inflicted by Schilling fell within the standard exclusion from liability coverage in his homeowner's policy for "injuries expected or intended from the standpoint of the insured." Obviously, Schilling intended for Breland to suffer some injury; however, Schilling argued that the broken jaw was not intended.

The purpose of this article is to review and analyze the approach the Louisiana Supreme Court adopted in Breland v. Schilling1 to determine the applicability of the exclusion2 when the insured undeniably intended some type of injury but argues that the injury which actually resulted was not intended. This article will also compare the court's analysis with that which has been used in two areas involving similar intent inquiries: personal insurance and workers' compensation. To better facilitate this comparison, an overview of the current jurisprudence in those two areas is included. The article concludes with suggested modifications of the provision's wording which might better serve the purpose of the exclusion.

I. BRELAND v. SCHILLING

In determining whether to afford Breland the protection of liability insurance, the supreme court was confronted with several legal issues and public policy considerations. This portion of the article will discuss

Copyright 1991, by LOUISIANA LAW REVIEW.
1. 550 So. 2d 609 (La. 1989).
2. Unless otherwise stated, the generic terms "the exclusion" or "the provision" refer to the wording of the standard exclusion from liability coverage in homeowner's policies such as that found in Breland. The exclusion precludes liability coverage for "injuries expected or intended from the standpoint of the insured."
the public policy considerations behind the "intentional injury" exclusion and will include a brief overview of earlier Louisiana jurisprudence interpreting and applying the provision to help emphasize the issues faced by the Breland court. The court's approach and resolution of the issues will next be discussed, followed by an analysis of the reasoning employed by the court. The section then concludes with a survey of approaches used by other jurisdictions.

The intentional injury exclusion found in Schilling's homeowner's policy contained language which was common to many homeowner's policies. The exclusion provided that the policy did not apply to "bodily injury or property damage which is either expected or intended from the standpoint of the Insured." Both business and public policy considerations necessitate this intentional injury exclusion.

From a business standpoint, the insurer agrees to compensate the insured in the event of the occurrence of an uncertain loss. The premiums charged are based on actuarial calculations of the random occurrence or risk of such events occurring in a given population. This central concept of insurance is violated if a single insured is allowed, through intentional or reckless acts, to consciously control risks which are covered by the policy.3

Public policy prohibits contracting for indemnification of losses resulting from one's own willful wrongdoing, as transferring financial responsibility serves to decrease the deterrence of these acts.4 As one court explained it, "the provision is designed to prevent an insured from acting wrongfully with the security of knowing that his insurance company will 'pay the piper' for the damages."5 A competing public policy holds that liability insurance exists not only for the protection of the insured but also to provide the victim with an adequate source of funds to redress his damages.6

But the public policies supporting the exclusion take precedence over concern for the victim's receiving proper compensation by way of the aggressor's liability insurance. Through an intentional act, the insured consciously controls the risk and should not be indemnified for losses resulting from his liability for such an act. However, the principles behind the provision do not dictate the outcome so clearly when the insured acts with an intent to cause some injury, but injury of a much

5. Id. at 356, 694 P.2d at 186.
greater magnitude results. When the injury received is much greater than that intended, the insured has not completely controlled the risk covered by the policy. Before *Breland*, the Louisiana courts used various approaches to resolve the coverage issue when the insured acted with an intent to cause some injury or contact but claimed that the resulting injury was not intended.

In *Kipp v. Hurdle*, the first circuit adopted a presumption that the actor intended the consequences of her aggressive action. However, the more severe the resulting injuries are, the more aggressive the act must be to support the presumption. The third circuit, however, criticized and refused to adopt this presumption in *Rambin v. Wood*, citing the traditional Restatement definition of intent, which states that a resulting injury is intended when "the actor desires to cause the consequences of his act, or...he believes that the consequences are substantially certain to result from it."

Some of the earlier cases avoided the issue altogether by concluding that the actor/insured did not intend any harm or injury, even when the facts clearly indicated otherwise. *Borque v. Duplechin* is an excellent example. The plaintiff, Borque, who weighed 140 pounds, was severely injured in a softball game when the defendant Duplechin, who weighed 210 pounds, ran into him five feet outside the baseline. While running full speed, Duplechin "brought his left arm up under Borque’s chin," which resulted in the injury. The court of appeal affirmed the trial court’s conclusion that the defendant’s actions were negligent and did not include an intent to harm, apparently employing the rationale that Duplechin’s intent was merely to break up a double play. The more rational explanation for Duplechin’s acts would seem to be that, although his motive was to break up a double play, he intended to cause Borque at least some harm.

7. 307 So. 2d 125 (La. App. 1st Cir.), writ refused, 310 So. 2d 643 (1975).
8. See Kling v. Collins, 407 So. 2d 478 (La. App. 1st Cir. 1981) (where push from insured caused plaintiff to trip and suffer a wrist injury, the first circuit found the insured’s actions were not “so aggressive” as to support the presumption).
10. Id. at 563. See also Sherwood v. Sepulvado, 362 So. 2d 1161, 1163 (La. App. 2d Cir. 1978) (“When the act is intentional, but the injury is not, the exclusionary clause is not applicable.”).
12. Id. at 41.
13. Id. at 43.
14. Id. at 42. See also Schexnider v. McGuill, 526 So. 2d 513 (La. App. 3d Cir.), writ denied, 532 So. 2d 116 (1988) (insured indicated to the barmaid that he was about to teach plaintiff, Schexnider, a lesson and punched him in the face, causing several broken bones in Schexnider’s face. The third circuit held insured “acted reflexively and without a conscious or deliberate intent to strike a blow and without a belief that his uncontrolled action would cause injury.” 526 So. 2d at 516.).
The supreme court addressed the application and interpretation of the exclusion in *Pique v. Saia*, but the court missed the opportunity to hand down a clear guideline for applying the provision. A scuffle ensued when two police officers, Pique and Rhodes, attempted to arrest the defendant, Charles Saia, Jr. At some point in the altercation, Saia was pushed against a fence, causing the trio to fall onto a concrete driveway. The scuffle continued on the ground until Saia was eventually handcuffed. Pique suffered an elbow injury in the fall.

The court initially determined that, because of ambiguity in the exclusion, it should be construed as excluding only intentional and not "expected" injuries, stating the proper inquiry as follows:

> An injury is intentional, i.e. the product of an intentional act, only when the person who acts either consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to the result.  

However, the court found that the trial court was not manifestly erroneous in its determination that the plaintiff's injury resulted from a negligent act by Saia. The court concluded that it could not declare the trial court unreasonable for finding that Saia's act of pushing away from the fence was performed with a complete absence of intent to do any harm or injury.

This enunciated rule provided no clear guideline. One could very easily conclude that the court, by including the language "i.e., the product of an intentional act" in the analysis and finding negligence, had adopted the position that the intentional tort doctrine should determine the extent of the policy exclusion, i.e., the injury need only result from an intentional tort for the exclusion to be applicable. Such an interpretation of *Pique* was likely given the close association of "intentional act" and "intentional tort" which resulted from jurisprudence in the field of worker's compensation law.

The court could have clarified the issue by concluding the obvious—Saia did intend harmful or offensive contact. Saia was engaged in a fight and was "kicking and flailing his arms about," obviously intending several harmful or offensive contacts. It is unlikely that this intent suddenly deserted him when he was pushed against the fence. The court then could have approached the issue of Saia's liability insurance coverage by affirming the trial court's determination that the

15. 450 So. 2d 654 (La. 1984).
16. Id. at 655.
17. Id. at 656.
18. Id. at 657 (Blanche, J., dissenting).
extensive injury to Pique's elbow was not intentional, i.e., not the result of an act intended to cause such an injury. In doing so, the court could have developed the same rule that would later be developed in Breland.

Breland presented facts to the Louisiana courts which required them to determine the scope of the exclusion. At the trial stage, the jury determined that the injury to Breland was not intended and therefore that the exclusion was not applicable. In an unpublished opinion, the first circuit affirmed this determination. The supreme court granted writs and approached the issue in a two step process. First, the court set out to decide what inquiry was proper in determining what injury the actor intended. Secondly, a rule had to be adopted for determining whether the injury which actually resulted from the action would fall within the exclusion, thus barring coverage.

The supreme court began its analysis by first repeating the earlier Pique holding that the clause was ambiguous and therefore should be construed against the insurer. The ambiguity should be resolved, according to the court, by ascertaining how a reasonable insurance policy purchaser would construe the clause at the time of the entering into of the insurance contract. The court observed that the policy language referred to injury intended "from the standpoint of the Insured," and stated, "[t]he subjective intention and expectation of the insured determine which injuries fall within and which fall beyond the scope of coverage under this policy."

In articulating the proper inquiry to be used in determining an actor's subjective intent, the court began by first stating what inquiries were not appropriate. The intentional tort standard was rejected because it used an objective inquiry which contrasted sharply with the subjective intent required by the exclusion. Similarly, the inquiry used in the worker's compensation "intentional act" exception to the exclusive remedy rule was rejected because the exception applied to injuries produced by an employer or co-employee's intentional act, rather than injuries intended by the actor. The court additionally reasoned that worker's compensation uses a tort-based standard for determining intent that exposes the actor to liability for injuries not in fact intended. The court also rejected the Kipp presumption that an insured intends, as a matter of law, all injuries which flow from an intentional act.

The proper inquiry was determined by reference to definitions of intent adopted by other jurisdictions which also look to the "subjective"

---

21. Id. at 611.
22. Id. at 612.
23. Id. at 613.
intentions of the insured. One such rule stated, "the exclusion refers only to bodily injury that the insured in fact subjectively wanted to be a result . . . or in fact subjectively foresaw as practically certain . . . ."  

Another read: "[a]n insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result."  

Having delineated the appropriate inquiry for intent, the supreme court then looked to the applicability of the provision in instances where some injury but perhaps not the resulting injury was intended. It concluded that the proper interpretation should be the one which a reasonable layman would give the provision, stating the rule as follows:

[W]hen 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. When a severe injury of a given sort is intended, and a severe injury of any sort occurs, then coverage is also barred. But when a minor injury is intended, and a substantially greater or more severe injury results . . . coverage for the more severe injury is not barred.  

The rule was justified by the rationale that "an insurance purchaser would . . . reasonably conclude that the fortuitous occurrence of more serious injuries . . . would fall within the range of risks . . . insured."  

A brief summary of the approach adopted by the court is warranted. The approach is a two step process which requires one to first determine what injury the actor intended. This task is accomplished by utilizing a fact-sensitive test of looking to the insured's subjective intent, i.e., what he subjectively wanted or foresaw as practically certain to result. The second step involves comparing the injury intended (determined in step one) to the injury which actually resulted. If a reasonable insurance purchaser would believe that the resulting injury would be covered by his liability insurance, then the injury is "substantially greater or more severe and coverage is not barred."  

In applying this approach to the facts of the case, the court looked to the testimony of the defendant Schilling to determine what injury was subjectively intended. Schilling testified that he did not intend to

---

26. Id. at 614 (emphasis added).
27. Id. at 613.
28. Id. at 614. The court never expressly declared its approach to be this two step process; however, upon reading the opinion as a whole, this synopsis is this author's evaluation of the court's analysis.
break Breland's jaw or do him any other serious harm. He considered it a freak accident and said that if he hit another ten people, he did not think he could break another jaw. Based on this testimony, the supreme court found that the lower courts were correct in concluding that Schilling did not intend to break Breland's jaw or inflict any other serious injury, impliedly stating that Breland's intent was to "bruise . . . jaw and ego." Given this conclusion, a reasonable layman would interpret the exclusion as not precluding coverage for the more severe resulting injury, a broken jaw. Therefore, the intentional injury exclusion was not applicable and coverage was afforded.

The court based its decision on several fundamentally sound analytical techniques, such as examining how a reasonable insurance purchaser would construe the exclusion language. However, some statements made by the court in its reasoning can be questioned, as can the court's application of its rule to the facts presented in Breland. An analysis of the opinion will better elucidate these points.

II. Analysis

The Breland rule, which allows for coverage for resulting injuries of a much greater magnitude than those intended, is fundamentally sound from both a public policy and a contractual standpoint. Because the resulting injury was fortuitously more severe, the insured did not consciously control the risk against which he insured himself. Although indemnity may diminish the deterrence of these acts to an extent, this decrease is not sufficient to justify depriving the victim of an adequate source of funds with which to redress his injuries. An insurance policy is a contract. As such, the rules of contract interpretation should apply, and a reasonable insurance purchaser would not believe that a resulting injury of a much more severe magnitude than he intended would be excluded from his liability coverage.

However, three aspects of the opinion are questionable. First, in dicta the supreme court makes the statement that intentional tort uses an objective standard for determining intent. Secondly, the court's approach in determining the actor's subjective intent appears to place undue emphasis on the insured's testimony. Finally, and most importantly, the court's application of its rule to the facts of Breland is by far the most narrow construction ever given to the exclusion. Such an application of the rule may conflict with both public policy and contractual interpretation concerns.

29. Id. at 614.
30. Id. at 613.
A. The "Intentional Tort" Dicta

In an effort to properly characterize the "subjective intent" required by the policy exclusion, the supreme court stated that this subjective intent contrasted sharply with the objective inquiry used in intentional tort analysis. In the court's words, "the inquiry regarding intentional torts asks which consequences an objective reasonable person might expect or intend..." This dicta is significant for two reasons.

1. Rejection of the Restatement View?

First, based on statements preceding the dicta, the court may have rejected the traditional Restatement definition of intent. The court made the statement following a citation of the Restatement's "substantially certain" definition of intent, i.e. one intends consequences which he knows are substantially certain to result from an act, whether the actor consciously desires those consequences or not. By determining that the intentional tort "substantially certain" definition offers an alternate objective determination for intent, the court eliminated this alternative from the definition of intent found in the exclusion, as that intent must be "subjective." In other words, the exclusion will be applicable only if the insured consciously desires the injury. Admittedly, the interpretation of the exclusion involves contractual issues and different public policies, so the principles of tort law are not completely analogous or applicable. However, four considerations lead to the conclusion that the "substantially certain" definition of intent should be applicable to the exclusion.

First, to conclude that the "substantially certain" definition is inappropriate for the insurance exclusion clause would lead to results which are obviously contrary to public policy. The following rather extreme example using Prosser's "bomb in the carriage" scenario illustrates this point. Adam consciously desires to kill his brother, Bob, although he harbors no ill will toward his sister, Susan. Adam places explosives in Bob's car sufficient to scatter it and its occupants over five blocks. Adam watches as both Bob and Susan get in the car and, full of hate for Bob and sorrow for Susan, he detonates the explosives.

31. Id. at 611.
32. Id. at 611, citing Restatement (Second) of Torts § 8A (1965).
33. This observation is based on the court's inclusion of the phrase "substantially certain" in quotation marks, prior to its statement that intentional tort uses an objective standard. 550 So. 2d at 611.
In this example, by omitting the “substantially certain” definition of intent from the insurance exclusion clause, the injuries or death to Susan would not be considered “intended by the insured,” as Adam did not consciously desire to injure Susan. Therefore, Adam’s liability insurance would provide coverage for any liability to Susan or her beneficiaries. To allow coverage in such an instance would completely circumvent the basis for insurance, as the insured has consciously controlled the risk against which he is insured. In addition, recovery under these facts would allow contractual indemnification against loss resulting from one’s own willful wrongdoing.

Secondly, support for the inclusion of this definition of intent comes from the common usage and definition of the word “intend.” Webster’s Third New International Dictionary defines “intend” as “to have in mind as an object to be gained or achieved.” This definition does not require one to consciously desire, but only to “have in mind as an object.” One definition given of “object” is: “something that is set . . . before the mind so as to be apprehended or known.” This requires that the end be only known, not necessarily consciously desired.

The most obvious support for the incorporation of the “substantially certain” definition of intent in the exclusion comes from the cited definitions of “subjective intent” used by other jurisdictions which also adhere to a subjective approach. Of the three definitions cited by the Breland court, two incorporate a similar, if not identical, “substantially certain” criterion.

Finally, the court’s conclusion that the intentional tort “substantially certain” definition of intent incorporates an inappropriate objective inquiry is, at least historically, incorrect. The court stated in dicta, “the inquiry regarding intentional torts asks which consequences an objective reasonable person might expect or intend . . . .” In Fallo v. Tuboscope Inspection, this same court just five years earlier rejected this conclusion and called such reasoning “clear error.” Surely the Breland court’s statement was the result of an oversight, as it conflicts with the primary component of intentional tort: that a certain state of mind exists in the actor.

---

34. Webster’s Third New International Dictionary 1175 (1986).
35. Id. at 1555 (emphasis added).
36. Inquiries into the “subjective intent” included some of the following language: “or substantially foresaw as practically certain” and “knowing . . . substantially certain.”
38. Id. at 611.
39. 444 So. 2d 621 (La. 1984).
Prosser's Law of Torts\textsuperscript{41} was cited by the court and offers a possible explanation for the Breland court's misstatement. Following the passage giving the substantially certain definition, Prosser makes the statement that ""[t]he practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with ... as though he had intended it."\textsuperscript{42} But as explained in Prosser and Keeton's fifth edition,\textsuperscript{43} this reference to a reasonable man's belief is simply a method or tool to be utilized as an aid in determining the ultimate criterion: the actor's ""state of mind.""\textsuperscript{44} Prosser and Keeton recognized this misunderstanding as a ""source of great confusion.""\textsuperscript{45} The reasonable man standard is used simply as a means of evaluating an actor's self-serving testimony and allows the jury to infer from the circumstances what the actor's actual intent was. This objective inquiry is not an end to the intent issue in intentional tort but is merely an accurate means for determining what the actor (not the reasonable man) intended.

2. Contradictions in Worker's Compensation Cases

The second significant aspect of the dicta is that it contradicts established jurisprudence in the worker's compensation field which explicitly rejects an objective approach for determining an alleged tortfeasor's intent. The court's statement that intentional tort asks what consequences a reasonable man would have intended must appear as a diamond in the rough for attorneys pursuing executive officer suits. The effect would be to greatly lessen the burden of proof, as one would need only to prove that a reasonable man (as opposed to the actor in the particular case at hand) would have known to a substantial certainty that the result would occur. Evidence supporting the actor's actual intentions would be irrelevant, as the sole issue would be what a reasonable man would have intended. Thus the reasonable man or objective inquiry is converted from a means to an end, which traditionally has been the foundation for an action in negligence.\textsuperscript{46}

In summary, in discussing the contrasting example of intentional tort's "'objective intent,'" the court may possibly have rejected the Restatement's intentional tort's "'substantially certain'" definition of "'intend'" for purposes of the insurance exclusion and, through dictum, may

\begin{itemize}
\item \textsuperscript{41} W. Prosser, The Law of Torts § 8 (4th ed. 1971).
\item \textsuperscript{42} Id. at 32.
\item \textsuperscript{43} W. Prosser and W. Keeton, supra note 40, at 34-36.
\item \textsuperscript{44} Id. at 36.
\item \textsuperscript{45} Id. at 35.
\item \textsuperscript{46} See W. Prosser, The Law of Torts § 32 (4th ed. 1971).
\end{itemize}
have opened the door for objective intent determinations in intentional tort.

B. The Role of the Insured’s Testimony in Determining Subjective Intent

The second aspect of the court’s opinion warranting discussion is the method used to discover the actor’s “subjective intent.” The method of inferring intent was surprisingly absent from the majority opinion, as the court resorted exclusively to the defendant’s testimony. Only Justice Lemmon, stating “[t]he insured’s subjective intent . . . must be determined not only from the insured’s words . . . but from all the facts and circumstances . . .,”47 recognized in his concurring opinion the inference of intent as a valid approach. The majority relied solely on the testimony of the defendant, who stated that he did not intend to break the plaintiff’s jaw and considered it a “freak accident.”48

Perhaps the court’s reliance solely upon the insured’s testimony was the result of its rationale that intent is so “subjective” that only the actor’s testimony can accurately reveal it. One would hope that the court’s action of resorting to the defendant’s testimony to determine intent was because no contrary intent was offered by the circumstances or the facts.49 Otherwise, as stated by the insurer in its brief on application for rehearing:

One wonders how many such feasors, when faced with financial accounting for their brutality, are likely to take the stand, growl at the judge and jury, and allow as how they intended to do just what they did, namely, bash in the victim’s face.50

An additional explanation for the court’s reliance on the actor’s testimony alone is that possibly the court was simply applying the substantial evidence rule. The insured’s testimony is not dispositive proof of his subjective intent but, in this instance, was merely sufficient evidence to support a jury verdict. In the subsequent case of Baugh v. Redmond,51 however, the second circuit failed to interpret Breland as such when faced with nearly identical facts. In this case, the substantial evidence rule favored the insurer because the trial court had concluded,

48. Id. at 614. Justice Lemmon indicated this belief in his concurrence. However, neither the majority opinion nor Justice Lemmon’s concurrence recognized the inference of this intent from the insured’s actions.
49. Id. at 614.
51. 565 So. 2d 953 (La. App. 2d Cir. 1990).
as a finding of fact, that the insured had intended the injury, thus precluding coverage.

The insured was engaged in a softball game and punched the umpire, causing extensive damage to the umpire's teeth and the bones in his mouth. Despite evidence in the record that the force of the blow was so strong that it popped the lens out of the umpire's glasses and knocked him against a fence, the second circuit reversed the trial court primarily because of the insured's testimony. That testimony indicated that he did not think he struck the plaintiff with enough force to inflict a bloody mouth and, further, that he did not intend for the plaintiff to be injured. The court made this conclusion after citing the Breland rule.

The decisions by the supreme court in Breland and by the second circuit in Baugh attribute excessive weight to the insured's testimony and indicate a possibly exaggerated confidence in the power of the oath. In summary, by placing undue emphasis on the insured's testimony, the court has limited the factfinder's ability to infer intent.

C. The Court's Application of Its Rule to the Facts

The aspect of the Breland opinion most deserving of discussion is the court's application of its rule to the facts presented, an application which resulted in a strict construction of the exclusion unequaled in other jurisdictions. The logic of the rule adopted by the court is clear and consistent. The insurance agreement is a contract. Because the exclusion is ambiguous, the issue of whether coverage should be permitted should be resolved by construing the exclusion as a reasonable insurance purchaser would.

To use the example in footnote 8 of the Breland opinion, if an insured slaps another (intending minor injury) and a coma results (serious injury), the exclusion should not be applicable, as this outcome would certainly not be considered by a reasonable layman as an injury which would be excluded under the provision.

The problem arises, however, in the court's application of its rule. When one young man slams his fist into another's face, is the resulting broken jaw really a "freak accident" or so "fortuitous" so as to be classified as "substantially . . . more severe" than the injury intended? The question of whether an injury is "substantially . . . more severe" than that intended is clear in cases where a single punch results in

52. Id. at 956.
53. Id. at 961.
54. See also S. McKenzie & A. Johnson, Insurance Law and Practice § 260, in 15 Louisiana Civil Law Treatise (Supp. 1991) (questioning Breland court's possible recognition of "I didn't mean to do it" defense).
NOTES

paralysis, coma, blindness, or even death; but is it so clear when the result is a broken jaw, shattered teeth, or a broken nose? Prior to the accident, would Schilling really have believed that the exclusion would not be applicable if he punched somebody in the face and broke his jaw?

This dilemma arises because the actual injury intended (step one of the approach) cannot usually be determined as specifically as the court would hope. When Schilling punched Breland, he intended to "injure" him. Because punching someone in the face is not an exact science, it is impossible to determine or try to state the precise injury that Schilling "subjectively" intended. If Schilling's arm could have been stopped in mid-swing and the question presented to him of what injury he was intending, it would have been surprising indeed for him to have astutely responded, "I intend to bruise both jaw and ego;" equally as surprisingly would have been the response, "I intend to fracture the jaw bone in two places, ultimately requiring the mouth to be wired shut for twelve weeks." More likely would have been the response, "I am going to bust him in the face." His intent was simply to "injure" and cannot accurately be drawn more narrowly. He engaged in an act which can produce any number of injuries in a given range. Injuries which occur outside of this range, such as paralysis, coma, blindness, or death, should be excluded. However, a broken jaw should fall within this range. A reasonable insurance purchaser would, in all likelihood, believe that if he punched someone in the face and broke his jaw or nose that the intentional injury exclusion would preclude coverage for the resulting liability.

The more logical application would have been as follows: Schilling subjectively intended to cause injury or harm to Breland's face. It is impractical and inaccurate to attempt to draw his intent more narrowly. Furthermore, a reasonable insurance purchaser would not expect that a broken jaw resulting from the act of striking another in the face would fall within the exclusion, and therefore coverage would be precluded. The extent of the strict construction of the exclusion given by the court is addressed later in this article when the applications of similar rules by other jurisdictions are discussed.

D. Synopsis

In summary, then, the Breland opinion is somewhat difficult to analyze because it requires the reader to infer in many instances what measures are being taken by the court. For example, the question of whether the court rejected the intentional tort "substantially certain" definition of intent for the exclusion at issue is not specifically answered in the opinion. The court based its possible rejection on the belief that this criterion incorporates an inappropriate objective inquiry. Rejection
of this definition is not warranted by public policy or contractual considerations and is based on an inaccurate conclusion that the criterion incorporates an objective determination. The court’s use of intentional tort inquiry as an example of objective intent is not supported by the jurisprudence.

In addition, the court’s discussion of subjective intent and its subsequent reference to the insured’s testimony as proof of that intent raise serious questions regarding the insurer’s burden of proving the insured’s intent. The application of the rule by the court greatly broadens the horizons of potential insurance coverage for intentional injuries. The public policy and contractual considerations which firmly support the rule adopted by the Breland court, and the court’s subsequent questionable application of this rule, can be better understood by comparing the Breland decision with the approaches used by other jurisdictions.

III. APPROACHES USED BY OTHER JURISDICTIONS

Approaches taken by the various jurisdictions range from the most liberal interpretation of the exclusions, such as that found in California, where liability coverage is prohibited by statute for any injury resulting from an act committed with an intent to injure, to more narrow constructions which require that, for coverage to be barred, the resulting injury must be of the same general type as that intended.

A review of the jurisprudence from the different states reveals that three different approaches are commonly used by the courts. One approach adopts the view that "the exclusion applies if the insured acts with an intent to do any harm, regardless if the resulting injury is different in character or magnitude." Thus in Jones v. Norval, the

56. Cal. Ins. Code § 533 (West 1972). Florida has recently adopted a similar approach in Landis v. Allstate Ins. Co., 546 So. 2d 1051 (Fla. 1989), where the court stated that specific intent to cause harm is not required by the intentional acts exclusion as it excludes all intentional acts.


58. 203 Neb. 549, 279 N.W.2d 388 (1979) (applying State Farm Fire & Cas. Co. v. Muth, 190 Neb. 248, 207 N.W.2d 364 (1973)).
exclusion barred coverage when a single punch by the insured knocked the plaintiff unconscious and broke his jaw. The Nebraska Supreme Court inferred the necessary intent and rejected contrary testimony by the insured. However, a case such as *Jones* does not expose the inequities and faults of such an approach. Excluding any and all injuries which might happen to result from an act committed with an intent to cause any injury ignores both the language of the exclusion and the reasonable insurance purchaser's interpretation of that language. The shortcomings of this approach are evidenced by the inequitable results in cases such as *Pachucki v. Republic Insurance Co.* In this case, the insureds and the plaintiff were engaged in a "greening pin war." A greening pin is similar in size and weight to a bobby pin and a "greening pin war" is comparable to the shooting of paper clips with rubber bands. The plaintiff suffered damage to his cornea after one of the greening pins struck him in the eye. Although the court found that the insured's intent was only to "sting" the plaintiff, coverage for the liability resulting from the plaintiff's cornea injury was barred due to the fact that the insured had an intent to cause some injury. It was irrelevant that the actual injury was different in character and magnitude.

Another approach, used in interpreting the exclusion, bars coverage for injuries which are the natural or probable result of the intentional act. A case factually similar to *Breland* which applied this approach is *Farm Bureau Mutual Insurance Company v. Rademacher*, where the insured, Rademacher, struck the plaintiff Eberhart in the face, breaking his jaw. The Michigan Court of Appeals approved the trial court's conclusion that "when one suffers a broken jaw from being hit on the jaw, the injury is a natural, probable, foreseeable and expected result" and coverage was barred. This approach has been rejected by other

---

59. 89 Wis. 2d 703, 278 N.W.2d 898 (Wis. 1979).
60. Id. at 704, 278 N.W.2d at 899.
62. Id. at 201, 351 N.W.2d at 915. See also *Tobin v. Aetna Cas. & Ins. Co.*, 174 Mich. App. 516, 436 N.W.2d 402 (1988) (facial injuries resulting from one punch were barred from liability coverage); *Clark v. Allstate Ins. Co.*, 22 Ariz. App. 601, 529 P.2d 1195 (1975) (coverage denied for insured who punched victim once in his face, crushing his right cheekbone; policy language was slightly different but was interpreted as requiring an intended injury); *CNA Ins. Co. v. McGinnis*, 282 Ark. 90, 666 S.W.2d 689 (1984) ("test is what a plain ordinary person would expect and intend to result from [his deliberate act]"); *Bell v. Tilton*, 234 Kan. 461, 674 P.2d 468 (1983).

The Louisiana First Circuit Court of Appeal also adopted this approach in *Terito v. McAndrew*, 246 So. 2d 235 (La. App. 1st Cir. 1971). The insured knocked the plaintiff off of a bar stool and fell on top of him. The plaintiff suffered an injury to his knee and ankle. In denying coverage, the court stated: "all direct and natural consequences flowing [from an intentional act] ... are considered ... intended by the actor." 246 So. 2d at 239. The first circuit did not mention *Terito* in its unpublished *Breland* opinion.
jurisdictions because it does not necessarily require an intent by the insured to do some injury. If the injury or damage is the natural or probable consequence of the insured's intentional act, then coverage may be barred even though the insured had no intent to do any injury. Such was the case in Argonaut Southwest Insurance Company v. Maupin\(^6\) where the insured purchased soil from an individual whom he believed owned the land, only to discover later that the "seller" was merely a tenant. Unaware of the mistake, the insured removed the soil and was subsequently sued by the true landowner. The Texas Supreme Court denied liability coverage, stating, "[t]he respondent's acts were voluntary and intentional, even though the result or injury may have been unexpected, unforeseen and unintended."\(^6\) Generally, however, courts using this approach have applied it in instances where an intent to do some injury is obvious, as in Rademacher. Argonaut is the only example found where a court denied coverage without first requiring an intent to do some injury.

The third approach contains qualities present in both of the above approaches and appears to be the one adopted in Breland. It generally adopts a rule stating that recovery is barred only if the resulting injury is of the same general type as the injury intended. Breland repeatedly cited United Services Automobile Association v. Elitzky\(^6\) in which the Superior Court of Pennsylvania adopted this approach. The plaintiff was suing for malicious and defamatory statements made by the insured, Elitzky. The petition also sought recovery for intentional infliction of emotional injury. The trial court concluded that, given the allegations, the insured did not have a duty to provide a defense. The Superior Court of Pennsylvania stated that the plaintiff's complaint stated a cause of action which may have been covered by Elitzky's insurance policy, because the intentional injury provision excluded only injury and damage of the same general type which the insured intended to cause.\(^6\)

Elitzky's willingness to provide coverage for injuries "not of the same general type intended" is comparable to Breland's allowance of coverage for injuries "substantially more severe" than those intended. However, Breland distinguishes itself through the court's application of the rule, which results in a much more narrow construction of the exclusion. An example of what the Pennsylvania courts consider an injury "not of the same general type" ("substantially more severe")

---

63. 500 S.W.2d 633 (Tex. 1973) (court was construing policy term of "accident").
64. Id. at 635.
appears in Eisenman v. Hornberger and illustrates the vast difference between the resulting injury and the intended injury envisioned by the respective courts when applying the rule. In Eisenman, a burglar broke into the Eisenman's home in an attempt to steal some liquor. The burglar illuminated his path through the house by lighting matches, dropping each to the floor after it burned. One match landed on a chair and, after smoldering for several hours, ultimately resulted in a fire which completely destroyed the house. In interpreting the Eisenman decision, the Elitzky court stated that the Eisenman court allowed liability coverage because the resulting damage (total destruction of the house) was not of the same general type as the damage intended (stealing some liquor).

The Pennsylvania courts were presented with facts somewhat similar to Breland in Donegal Mutual Insurance Company v. Ferrara. The defendant Ferrara kicked the plaintiff police officer Dobinick in the groin area as he was attempting to arrest her. About forty-five minutes later, she kicked the plaintiff a second time in the groin area. As a result, the plaintiff suffered blood in his urine, ecchymosis of the right thigh, left knee, and right testicle, epididymitis, and groin contusions, all of which resulted in acute and chronic epididymitis requiring removal of his right testicle. The trial court denied the insurer's motion for summary judgment, but the court of appeal reversed, stating, "Ferrara acting knowing the consequences of her act would be damage to [officer Dobinick's] genitalia, and this would be substantially certain to result from her act." The Pennsylvania court, however, did not try to define the actor's intent as precisely as did the court in Breland. It merely stated that she had an intent to do "damage" to the officer's groin.

An additional distinction between the Louisiana courts' approach and that of the other states is the willingness of the other jurisdictions to infer or presume the necessary intent given an act of an aggressive nature such as the one in Breland.

Minnesota, like Pennsylvania, has rejected the presumption that one always intends the natural or probable consequences of his intentional act. However, in Farmers Insurance Group v. Hastings, such an
inference was upheld by the Minnesota Supreme Court based on the facts of the case. The insured, Kenyon, struck the plaintiff Hastings with a fist once in the eye, causing a permanent injury. The insured testified that he was not sure whether he was even trying to hit the plaintiff. The trial court denied liability coverage. The Minnesota Supreme Court affirmed this holding and cited the trial court's reasons approvingly which stated that the "intent to injure may be inferred from the character of the act . . . ."\textsuperscript{14}

At a time when Florida adhered to a similar "subjective intentions" approach to the exclusion, its court of appeal in \textit{Zordan v. Page}\textsuperscript{6} recognized that this intent could be presumed where a person strikes another person in the eye with his fist, causing a fracture of the eye.\textsuperscript{76}

The common thread among these cases is that the jurisdictions which adhere to "subjective intent" standards do not reject per se the intentional tort presumption of inference, i.e. that one intends the natural or probable consequences of his intentional act. This inference or presumption becomes relevant when the insured engages in a sufficiently aggressive act. As recognized by the \textit{Elitzky} court, "the legal presumptions of tort law are relevant . . . if they reflect [the insured's] intent."\textsuperscript{77} The mere fact that these presumptions or inferences exist in tort law does not make them inapplicable in determining an insured's intent under a contractual provision. Presumptions or inferences do not create intent but are merely efficient methods of recognizing it when the facts indicate that no other conclusion is tenable. In many instances it is simply impossible to prove the actor's intent by any means other than by inferring this intent from his actions. Reliance on the insured's testimony is not always an accurate method of determining this intent. The \textit{Elitzky} court agreed and stated:

An insured would be entitled to coverage unless he admitted that he intended the precise injury which occurred. We hope it is not too jaundiced a view of human nature to express doubt that such testimony would be forthcoming.\textsuperscript{78}

This overview of approaches taken by other jurisdictions demonstrates that the rule adopted by the \textit{Breland} court is the most funda-

\textsuperscript{74} Id. at 294.
\textsuperscript{75} 500 So. 2d 608 (Fla. 2d Dist. Ct. App. 1986), rev. denied, 508 So. 2d 15 (1987).
\textsuperscript{76} As noted earlier in supra note 56, Florida has since wholly abandoned any requirement of an intent to do harm and requires only an intentional act. See \textit{Landis v. Allstate Ins. Co.}, 546 So. 2d 1051 (Fla. 1989) (rejecting \textit{Zordan's} requirement of a subjective intent).
\textsuperscript{77} \textit{Zordan} at 611. The court was referring to an earlier decision, \textit{Hartford Fire Ins. Co. v. Spreen}, 343 So. 2d 649 (Fla. 3d Dist. Ct. App. 1977).
\textsuperscript{78} Id. at 373, 517 A.2d at 988.
mentally sound of the three approaches commonly used. However, a review of the application of the rule by jurisdictions adhering to rules similar to that of Breland reveals that the Breland court's application is by far the most narrow construction ever given the exclusion language.

The rules of contractual interpretation justify narrow constructions of exclusions to insurance coverage, although perhaps not to the extent present in Breland. Life and health insurance policies also contain similar provisions, which have likewise been narrowly construed by the courts. However, a broad interpretation has been given to similar language found in the worker's compensation exception to its exclusive remedy rule. The fields of liability insurance, personal insurance, and worker's compensation all incorporate provisions which focus on the actor's "intent." Each can be better understood through a discussion of how the jurisprudential treatment of one compares with and affects the others in light of the Breland decision.

IV. PRESENT JURISPRUDENCE INTERPRETING PERSONAL INSURANCE EXCLUSION AND WORKER'S COMPENSATION EXCEPTION AND COMPARISON WITH BRELAND

A. Personal Insurance

For the purposes of this article, the term "personal insurance" refers to life, accident, and health insurance. Intent is important in this area in determining whether a death was "accidental" or a "suicide," or whether a death or injury was "intentionally inflicted."

The typical life or accident insurance policy allows for recovery when the insured dies "accidentally." The provision usually reads as follows:

The company will pay . . . upon proof that the death resulted from bodily injury affected solely through external, violent and accidental means.\textsuperscript{79}

The Louisiana Supreme Court in Schonberg v. New York Life Insurance Company\textsuperscript{80} stated that an insured's death is produced by accidental means, i.e., is unintended by the insured, when the "average man, under the existing facts, would regard the loss so unforeseen, unexpected, and extraordinary that he would say it was an accident."\textsuperscript{81} This determination


\textsuperscript{80} 235 La. 461, 104 So. 2d 171 (1958).

\textsuperscript{81} Id. at 469, 104 So. 2d at 177. See also 269 So. 2d 507 (La. App. 1st Cir. 1972) (death found to be unexpected and extraordinary when insured choked on a plum seed, ruptured his esophagus, and died).
is made solely from the viewpoint of the insured. Therefore, if the insured is shot by an intruder, his death is accidental, as it was "unforeseen, unexpected, and extraordinary" from his viewpoint. A more recent case, O'Toole v. New York Life Insurance, impliedly narrowed the Schonberg rule to allow recovery. The insured died from an injection of cocaine. The court cited and agreed with the Schonberg rule, and then stated, "although he intentionally injected himself with cocaine, he did not intend to cause nor did he anticipate that this injection would cause his death." Although the insured's death from the use of cocaine is far from "extraordinary," the federal court still found the result accidental, apparently requiring intent to cause death, or anticipation of death, before disallowing indemnity.

Life and accident policies also usually include an exclusion for suicide or "self-destruction." A very heavy burden is placed upon the insurer in proving the applicability of this exclusion, as a presumption exists against the occurrence of suicide. The insurer must prove that the physical facts surrounding the death exclude with reasonable certainty any possibility of accident, and that the insured had a motive for taking his own life sufficient to overcome the presumption against suicide. The motive must make it reasonably certain that the death was the result of a "deliberate intention to take one's own life." The difficulty of overcoming this burden is evidenced by the case of Rome v. Life and Casualty Insurance Company of Tennessee. The insured came home at 5:30 a.m., extremely intoxicated, and took a pistol from beneath his wife's pillow. As he left the house he shouted, "[t]ake care of the baby." He entered his automobile, drove about 200 feet, and stopped next to a wooded area. Two shots were then fired. He was found dead in his car with a bullet hole in his temple. The glove compartment of the vehicle was open, the engine was running, and the deceased had a cigarette in his hand. The court held that the suicide exclusion was not applicable because the physical facts indicated a possibility that the shooting occurred accidentally while Mr. Rome was trying to place the pistol in his glove compartment. Additionally, the facts did not indicate a sufficient motive. Although the insured had been depressed over his wife's recent filing for separation, the court stated that the rest of the

82. 671 F.2d 913 (5th Cir. 1982).
83. Id. at 915.
84. See also Hardy v. Beneficial Life Ins., 787 P.2d 1 (Utah 1990) (repeated user's death from overdose considered accidental although he had previously been warned that continued use would result in his death).
86. Id. at 276.
87. Id. at 275.
NOTES

1991

NOTES

evidence showed he was in good health and had no financial problems.88

When an insured is intentionally injured by a third party, the injury
is considered by the courts to be "accidental." In an effort to avoid
coverage in these instances, life,99 accident, and health insurance policies
usually contain provisions excluding liability for "death (or injury) re-
sulting from intentional act" or "death caused by injuries intentionally
inflicted." Here the beneficiary need only prove that the death (or injury,
in the case of health insurance) was "accidental," i.e., caused by violent,
external, and unforeseen means. The burden then shifts to the insurer
to prove the applicability of the exclusion by showing that the killing
was intentional and that the actual victim was the intended victim.90

Chambers v. First National Life Insurance Company91 illustrates the
narrow construction given this provision by the courts. The insured,
Jessie Chambers, was sitting in a bar when an individual entered the
bar, drew a gun, and repeatedly shot Chambers in the back. The killer
then left, without ever seeing the victim's face. Because a motive could
not be established, the court held that the insurer had failed to meet
the requirement of proving that Chambers (the actual victim) was in
fact the intended victim. The court appeared to be of the opinion that
since the killer never saw the insured's face, the incident could have
been a case of mistaken identity.92

88. Id. at 277. See also Young v. First Nat'l Life Ins. Co., 159 So. 2d 395 (La.
App. 1st Cir. 1963), where the insured, who had previously exhibited suicidal tendencies,
was alone in a room when a shot was fired. He was found dead from a bullet wound
to the head. Although the gun was always kept with the hammer on an empty cylinder
(greatly reducing the chance of accidental discharge), the court held that the facts presented
a reasonable possibility of accident because the bullet entered Young's head from the left
side and his left arm was crippled. For cases finding the required intent, see Newdigate
v. Acacia Mut. Life Ass'n, 180 La. 761, 158 So. 2d 358 (1936) (insured who had severe
emotional and financial problems and had previously expressed a desire to kill himself
was determined to have drowned himself when he disappeared from a cruise liner); and
Green v. Southern Farm Bureau, 390 So. 2d 977 (La. App. 2d Cir. 1980) (insured
expressed her intentions of killing herself immediately after the incident as well as in the
ambulance and hospital prior to death).

89. In life insurance policies the exclusion usually only precludes recovery of the
double indemnity benefits.

91. 253 So. 2d 636 (La. App. 4th Cir. 1971).
92. See also Tornabene, 295 So. 2d 10 (court allowed recovery of life insurance
proceeds of insured, who was found dead in his taxi cab from two bullet holes in the
back of his head, because of insufficient proof to establish an intentional killing or that
insured was intended victim). For another "mistaken identity" case, see Brooks v. Con-
tinental Cas. Co., 13 La. App. 502, 128 So. 183 (1930) (recovery allowed where insured
was mistaken as a robber and killed). For cases interpreting similar exclusions in health
insurance or accidental injury policies, see Culotta v. Security Ind. Ins. Co., 325 So. 2d
863 (La. App. 2d Cir. 1976) (insured not allowed to recover for injuries received when
In Cummings v. Universal Life Insurance Company, the fourth circuit modified the test that it had stated just two years earlier in Chambers. However, the court either failed to recognize the modification or intended it to be applied only in cases interpreting the specific policy language before the court. The case involved the death of Henry Cummings from stab wounds administered by William Kelly. There was some doubt as to whether Kelly intended to kill or only to wound Cummings. The exclusion read, "[d]eath [benefits] ... will not be payable if ... [the death is] a result of injuries intentionally inflicted." The provision in Chambers referred to "[d]eath ... caused by ... intentional act." The court could have simply equated the two provisions and applied the Chambers rule, but instead proceeded as follows:

While under this policy language it was not necessary for the insurer to allege or prove that the assailant intended the death of his victim, but only that he intended the injuries which resulted in death, our prior jurisprudence has established that the insurer relying upon an exclusionary clause relating to intentionally inflicted injuries bears the double burden of proving not only that the injuring act [as opposed to "the killing"] was intentional but also that the actual victim was the intended victim. The court then cited Chambers as authority and found the exclusion applicable, as the infliction of multiple stab wounds, was intentional. By requiring that only the "injuring act" be intentional rather than the "killing" itself, the court greatly lessened the insurer's burden of proving the applicability of the exclusion. The insurer need only prove that the insured died from an act intending to injure; it need not prove that the attacker intended to kill the insured.

Louisiana courts have also refused to allow recovery of life insurance proceeds when the attacker mistakenly believes his actions are justified by self-defense. In Mitchell v. State National Life Insurance Company, the beneficiary argued that because the killing was thought to be in self-defense, the intentional injury exclusion did not apply. The court found that, no matter how blameless the motive, the girlfriend intended the injuring act and therefore the exclusion was applicable.
In summary, intent is relevant in personal insurance coverage in three instances: the context of the broad inquiry concerning whether a death is "accidental," that of the particular inquiry addressing whether an insured has committed suicide, and that pertaining to the inquiry involving whether injuries or death fall within an "intentional injury" or "intentional act" exclusion. A death is considered accidental if a reasonable man would consider it unforeseen, unexpected, and extraordinary from the insured's viewpoint. Intent to commit suicide is only proved when the possibility of an accident has been excluded to a reasonable certainty and the evidence establishes a strong motive for the victim's taking of his own life. The intentional injury exclusion is applicable when the insurer proves that the killing of the insured was either intended or resulted from acts which were intended to inflict injury but not necessarily death. In addition, the insurer must prove that the actual victim was the intended victim. The attacker's belief that he is acting in self-defense does not vitiate his intent.

Questions involving personal insurance coverage involve issues of contractual interpretation. As such, the accompanying statutory and jurisprudential rules for interpreting contracts, and the related public policies, must be considered. However, when the language at issue is found in a statute, the rules of contractual interpretation are not applicable and different public policies must be considered. Such is the case with the exception to the worker's compensation exclusive remedy rule.

B. Worker's Compensation

If an employee is injured as the result of an intentional act by a co-employee or his employer, the Worker's Compensation Act allows him to pursue traditional remedies outside of the Act. The precise language of the statute states:

Nothing in this chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

In Bazely v. Tortorich, the Louisiana Supreme Court addressed the issue of the legislative intent behind the words "intentional act." The legislative history indicated that the legislature's purpose was to impose a sanction against employers or co-employees for intentional

wrongs by allowing the injured employee a delictual remedy. After considering this history, the court stated, "[i]n drawing a line between intentional and unintentional acts, we believe the legislative aim was to make use of the well established division between intentional torts and negligence in common law."100 The court then stated that, for an act to be intentional, the actor must "consciously desire the physical result of his act . . . or know that the result is substantially certain to follow from his conduct . . . ."101 Therefore, in Bazely, the co-employee's "voluntary act" of not blowing the truck's horn to warn plaintiff of an approaching vehicle was not an intentional act as plaintiff had argued, because the defendant did not intend (consciously desire or know to a substantial certainty) that the plaintiff would suffer harm as a result of that act. As explained by the court, "intent has reference to the consequences of an act rather than to the act itself."102 The court also settled conflicting lines of jurisprudence by concluding that the two prongs need not be proven in the conjunctive; a finding of "consciously desiring" or "knowing to a substantial certainty" would be sufficient to prove intent.

The purpose for the "know to a substantial certainty" definition of intent and its distinction from the "consciously desire" basis is very clearly explained by Prosser through the "bomb in the carriage" scenario:

An anarchist who throws a bomb into the royal carriage may actually wish to kill no one but the king; but since he knows that the death of the others in the carriage is a necessary and almost inevitable incident to that end, and nevertheless goes ahead with the deed, it must be said that he intends to kill them.103

This definition does not present an objective or "reasonable man" criterion for determining intent. Plaintiffs would argue that an employer "should have known" that certain acts would result in harm to the employees. However, in Fallo v. Tuboscope Inspection,104 the Louisiana Supreme Court stated that such objective reasoning was clear error. Fallo involved a co-employee who was operating a conveyor belt. Believing plaintiff Fallo to be in danger, the co-employee left his post to go to Fallo's aid. However, as a result of the co-employee's leaving his post, the conveyor belt continued to run and rolled a pipe over Fallo's leg. The court of appeal reversed the trial court's summary judgment for the defendant, stating that the defendant possibly "should have

100. Id. at 480.
101. Id. at 481 (emphasis added).
102. Id. (emphasis added).
103. W. Prosser, supra note 41, at 31-32.
104. 444 So. 2d 621 (La. 1984).
known" that the injury would occur. The supreme court reversed and stated the Bazely rule, which requires that the defendant "know," or "should have known," to a substantial certainty that the harmful consequences would occur. Thus, a summary judgment was proper because it would be illogical to conclude that the co-employee went to the aid of Fallo while being substantially certain that doing so would result in Fallo's being crushed by a pipe.

"Substantially certain" merely prescribes the known degree of likelihood or chance of the occurrence of the result. Prosser states that mere knowledge or appreciation of a risk is not sufficient. In Hood v. South Louisiana Medical Center, the court of appeal stated that the actor "must have known that the injury . . . was inevitable."

Although not emphasized in Bazely, the "result" which must be consciously desired or known to a substantial certainty refers to the requirements of the particular intentional tort alleged. For instance, in a battery, a contact which is harmful or offensive, not the injury, is the "physical result," which must be intended. The case of Caudle v. Betts is an excellent illustration of the importance of distinguishing what physical results must be intended.

In Caudle, several employees at a Christmas party were jokingly administering a slight shock to one another with an electric automobile condenser. The company's president, Betts, shocked Caudle by applying the condenser to the back of his neck. Caudle developed severe nerve damage which required surgery and later resulted in numbness of the right side of his head.

The lower courts concluded that the employer intentionally shocked the employee Caudle without his consent but, because the severe injury was neither foreseeable nor intentional, no intentional tort had occurred. The supreme court concluded that by administering a shock to Caudle's neck, Betts intended a harmful or offensive contact, and therefore had committed a battery, entitling Caudle to a civil remedy. Betts' liability was then defined to include unforeseen and fortuitously more severe injuries based on the rationale that such losses should fall upon the wrongdoer rather than the innocent victim.

In summary, the worker's compensation "intentional act" exception to the exclusive remedy rule adheres to traditional tort principles for determining when recovery is available outside of the Act. The "con-

105. Fallo v. Tuboscope Inspection, 435 So. 2d 1033 (La. App. 5th Cir. 1983).
106. 517 So. 2d 659 (La. App. 1st Cir. 1984).
107. Id. at 671.
108. 512 So. 2d 389 (La. 1987).
109. Id. at 392. See also Pitre v. Opelousas Gen. Hospital, 530 So. 2d 1151 (La. 1988) ("clear tendency to give greater causal effect to an intentional fault . . . ."); W. Prosser, supra note 41.
sequences” required of the particular intentional tort alleged must be either “consciously desired” or “known to a substantial certainty” for an intentional tort to occur. For the second definition to be applicable, the actor must have “known” to a substantial certainty that such consequences would occur.

As the reader has probably observed, many issues are present in litigation concerning personal insurance and worker’s compensation which are closely related to the issues presented by the intentional injury exclusion in liability insurance found in Breland. A comparison of the jurisprudence pertaining to personal insurance and worker’s compensation with the Breland opinion fosters a better understanding of the policy behind each and the effect of Breland upon these other areas of the law.

C. Comparison and Effect

Personal and liability insurance both involve contractual interpretation and similar public policies and thus are very analogous. For instance, the “mistaken identity” assertion is recognized in both areas. When discussing the similarities and possible effects of the jurisprudential exclusions found in personal and liability insurance, one should keep in mind the purpose of each type of insurance. Personal insurance indemnifies the insured for injuries which he has received, while liability insurance indemnifies the insured for liability resulting out of injuries inflicted upon another.

Schonberg’s requirement that the death be unforeseen, unexpected, and extraordinary before recovery is allowed under a life or accident

110. For personal insurance, see Brooks v. Continental Cas. Co., 13 La. App. 502, 128 So. 183 (1930); for liability insurance, see Sabri v. State Farm Fire and Casualty Co., 488 So. 2d 362 (La. App. 3d Cir. 1986) (plaintiff was allowed to recover from liability policy of insured where insured shot her in the mistaken belief that she was a burglar).

Interestingly, Mitchell’s, 406 So. 2d at 777, refusal to allow a motive of self-defense to vitiate intent in the personal insurance field has not been completely embraced in the area of liability insurance. In Brasseaux v. Girouard, 269 So. 2d 590 (La. App. 3d Cir. 1972), the third circuit on rehearing refused to allow the insured’s mistaken belief that his actions were justified by self-defense to preclude application of the exclusion and coverage was barred. However, in Langlois v. Eschet, 378 So. 2d 189 (La. App. 4th Cir. 1979), Judge Lemmon for the fourth circuit stated in reversing a summary judgment that an insured who in good faith believed (albeit unreasonably) that the use of force was necessary “might be said to have not intended the injury . . . in which case the insurance policy might be held to provide coverage . . . .” Id. at 191. See also Johnson v. Hitchens, 518 So. 2d 1154 (La. App. 4th Cir. 1987) (citing approvingly the above quoted language). But see Coleman ex rel. Mathews v. Moore, 426 So. 2d 652 (La. App. 4th Cir.), writ denied, 433 So. 2d 149 (1982) (court refused to allow coverage but did not directly address issue of self-defense).
insurance policy is arguably too stringent a requirement. This is evidenced by O’Toole’s impliedly narrowing this rule and requiring that the insured actually have an intent to cause death or an anticipation of death. Under O’Toole, death need not be unforeseen, only unintended. At issue in these instances, as in Breland, is the intent of the insured. If the insured did not intend his death, then his death should be considered “accidental.” In determining what injuries or death were “intended” in the context of a life or health insurance policy, the Breland rule should govern by analogy.

For example, Joe is an insured under a health insurance policy which excludes coverage for self-inflicted injuries. He becomes angry at work one day and slams his fist down on his desk. The wooden desk cracks and splinters, causing severe lacerations to Joe’s hand and wrist. The tendons and arteries are so severely damaged that surgery is required to regain full use of the hand. By slamming his fist into his desk, Joe did intend some trauma to his hand. However, the injury intended was nominal compared to the injury which resulted. Under a reasonable layman’s interpretation, the more severe resulting injury (complications involving nerves and tendons) would not be excluded from coverage under the health insurance policy. Under the same reasoning, however, such injuries of the above nature should be excluded if they were the result of an insured punching through a glass window. Under these different circumstances, an insured should be substantially certain that severe injuries—injuries of the nature resulting—would occur.

The intentional injury exclusion found in personal insurance policies should be construed more narrowly than its counterpart in liability insurance policies for the reason that, in the personal insurance context, the intentional acts are not being performed by the insured but by a third party. The insured is not trying to consciously control the risk insured against. In addition, the public policy of not indemnifying one for liability resulting from his own wrongful acts is not present in situations involving personal insurance. However, a broad interpretation of Cummings runs contrary to this suggestion, for there the court did not require that the death be intended but merely that it result from an act which was intended to injure. A better approach would have been to adopt a rule similar to Breland’s. If the assailant intended only minor injuries but death resulted, then the beneficiaries should be entitled to the life insurance proceeds. However, if the assailant intended severe injuries and death resulted, then the exclusion should apply. As in Breland, this rule would conform with a reasonable insurance purchaser’s interpretation.

Because personal insurance policies are also contracts, the reasoning of Breland can be applied analogously in many instances. However, the worker’s compensation provision exists in the form of a statute. The broad interpretation given to this exception by the courts greatly benefits
the victim as it allows him to seek a more lucrative traditional civil remedy. However, concern for the victim is not the sole basis for this broad interpretation. This exception is statutory and is accompanied by legislative history which indicates that it was to be applied in instances involving intentional torts by a co-employee or employer. An employer is held liable for unintentional injuries, as in Caudle, because public policy dictates that these losses should be borne by the wrongdoer rather than the innocent victim.

For these reasons an employer or co-employer is held liable for fortuitously occurring, more severe injuries resulting from his intentional tort. These same injuries, however, might not be excluded from his liability coverage because of the rules of contractual interpretation and different public policies. Thus under today's guidelines, Caudle could collect for his nerve injuries from Betts' liability insurer.

The dicta in Breland stating that intentional tort theory uses an objective inquiry would—if it were not dicta—effectively overrule Fallo. An objective inquiry would re-open the door to arguments that a co-employer or employer “should have known” that the plaintiff would suffer injuries as a result of his act. Thus, Fallo would be decided differently today, if Breland's dicta were followed, as the co-employee defendant should have known that Fallo would suffer injuries as a result of leaving his post.

Although Breland is final, it is—at least in theory—limited to the particular wording of the provision at issue. Because the policy is a contract, the insurer can attempt to circumvent the decision by properly rewriting the provision. Some suggestions may prove helpful.

V. MODIFICATIONS WHICH MIGHT BETTER SERVE THE INSURER'S PURPOSE

When reviewing how effective alternatively worded provisions would prove in excluding liability coverage in instances such as Breland, the objective which must be achieved should be kept in mind. The objective is twofold: first, the exclusion must by its language exclude coverage for the injuries at issue; secondly, a reasonable insurance purchaser must be able to interpret the provision as excluding such injuries.

The best modifications to the standard intentional act exclusion in liability policies would appear to be those suggested or tested by the courts. The Breland court emphasized that the insurer might prove more successful if it used language similar to that found in the worker's compensation statute, which excludes injuries resulting from an “intentional act.” Indeed, some current liability insurance policies do use such phraseology.111
However, such a revision will probably not prove successful for several reasons. One should remember that the words "intentional act" in the worker's compensation statute are in statutory form. Fortuitously more severe injuries in worker's compensation cases were included within the exception not because of the presence of the words "intentional act" but because these words were equated with "intentional tort" due to the statute's legislative history. Left unqualified, the phrase "intentional act" is incomplete and begs the question of what must be intended for an insured's act to qualify as an "intentional" one. An act is only "intentional" if the results produced by the act were consciously desired or known to a substantial certainty to follow from it. The confusion usually arises out of a belief that by labeling an act an "intentional act," one has added an air of malice to an otherwise merely "voluntary" act. By failing to state what must be intended for a voluntary act to be an "intentional act" within the exclusion, the language poses the same dilemma to the courts as did the worker's compensation exception. The legislative history clarified the exception by equating the words "intentional act" with "intentional tort," thus answering the question of what must be intended. The insurance provision cannot be clarified in the same manner. Thus, in an exclusion which reads "injuries resulting from an intentional act," the only logical "result" on which the court should focus is the injury suffered by the victim. If the injury was not intended, then it did not result from an intentional act. Thus the insurer is faced with the same burden of proof. The revision might also prove ineffective because it may not change a reasonable insurance purchaser's interpretation of the exclusion. The exclusion would still refer to "injuries" and "intent." Confronted with sufficient facts, the court on another day could rule that such language is ambiguous and proceed under the same rationale as it did in deciding Breland.

Also, the Breland court seems to have forgotten that it equated "intentional injuries" with "injuries resulting from an intentional act" in Pique. A more accurate and perhaps better version of this alternative would exclude "injuries resulting from an act intended to injure." This

---

Ins. Co., 527 So. 2d 524 (La. App. 3d Cir.), writ denied, 532 So. 2d 157 (1988). The provisions exclude "bodily injury which may reasonably be expected to result from an intentional act." Note that the exclusion contractually provides for the objective or reasonable man standard for the resulting injury, but nonetheless requires an "intentional act," which requires a determination of the insured's state of mind.

112. Pique v. Saia, 450 So. 2d 654, 655 (La. 1984). In Pique the supreme court stated, "[a]n injury is intentional, i.e. the product of an intentional act, only when . . . ." Interestingly, in Breland the court stated that a jury charge was arguably more favorable to the insurer than was required. The charge the court referred to was the above excerpt from the Pique opinion. Breland v. Schilling, 550 So. 2d 609, 614 (La. 1989).
wounding states what must be intended—merely an injury, not necessarily the resulting injury.

Another alternative is to modify the exclusion to preclude coverage for injuries resulting from intentional tort, i.e., battery, assault, etc. Such a change would truly mirror the language of the worker's compensation statute, as that statute is interpreted in this manner. Such wording has proven successful in Louisiana courts; however, the cases do not present facts such as those in Breland which would sufficiently test the provision.

The most obvious problem with this wording is the reasonable layman's interpretation of it. More than a few freshman law students have spent weeks trying to comprehend these terms only to have the exam remind them of how little they actually knew. Surely a court would not expect more from a reasonable insurance purchaser after only a cursory reading of the provision. Undoubtedly, a court would find the terms ambiguous.

Another version of the exclusion provides that coverage will not be afforded for "bodily injury or property damage intentionally caused by an insured." However, other jurisdictions have held that the wording is ambiguous and have required the insurer to prove that the insured intended the injury, thus posing the same burden as the Breland exclusion. One Louisiana court of appeal decision declared the wording of this alternative "vague and uncertain;" however, another decision found the language "clear and unambiguous." Although technical legal definitions of "causation" would not be useful, the wording may still convey a broader meaning to this version than that found in Breland. A reasonable insurance purchaser could possibly realize that he need only "cause" the injury rather than actually "intend" it. Obviously a reasonable insurance purchaser's concept of cause would be much narrower than that recognized in tort law; however, injuries of the nature occurring in Breland might possibly be excluded nonetheless.

116. Brasseaux, 269 So. 2d at 595.
In *Lamkin v. Brooks*,\(^{118}\) the Louisiana Supreme Court interpreted an intentional injury exclusion which may offer the most effective wording. The exclusion applied to "claims ... arising out of the willful, intentional or malicious conduct of any Insured."\(^{119}\) The most attractive aspect of this wording is that the *Lamkin* court held that it precluded recovery from injuries of the exact nature as those in *Breland*. The facts involved a police officer who punched the plaintiff one time in the face. The blow broke several bones, and the plaintiff required surgery and hospitalization. The court concluded that the officer's conduct clearly fell within the exclusion. Arguably, *Breland* overruled the result in *Lamkin*. However, the *Breland* court repeatedly emphasized that its opinion was based on the proper interpretation which should be given to the language of the particular exclusion at issue. The *Lamkin* exclusion uses much broader language as it excludes not just "intended injuries" but "claims ... arising out of intentional or malicious conduct." This broader language should indicate to a reasonable insurance purchaser that he is not afforded liability coverage for any responsibility resulting from his aggressive acts. Perhaps the only problem with this exclusion is its use of the incomplete phrase "intentional conduct." It does not state what must in fact be intended. The courts may use this ambiguity to interpret the clause as excluding claims arising out of injuries intended by the insured. This result could be avoided by simply modifying the provision to exclude claims arising out of acts intended to injure.

In summary, the best alternatives for modifying the policy language focus on liability which results from an act by the insured which is intended to injure. The insurer is not required to prove the insured's intent to inflict the resulting injury or any similar injury for the provision to take effect.

V. Conclusion

The facts of *Breland* allowed the Louisiana Supreme Court to formulate an approach to be used prospectively in determining the scope of the standard exclusion from liability coverage for "injuries expected or intended from the standpoint of the insured."\(^{118}\) The court adopted a two part rule. The first step requires determination of what injury the actor subjectively intended. The second step involves a reasonable layman's interpretation of the exclusion. If the resulting injury is so much more severe than the injury intended that a reasonable insurance purchaser would consider it as not "intended," then the resulting injury is not excluded from the insurer's liability coverage. The second step is

\(^{118}\) 498 So. 2d 1068 (La. 1986).
\(^{119}\) Id. at 1071.
basically a comparison—through a reasonable insurance purchaser’s eyes—
of the resulting injury and the injury determined in step one to have
been intended. The decision aligns Louisiana with other jurisdictions
which interpret the exclusion as requiring more than a mere intent to
injure to exclude coverage. However, *Breland*’s application of the rule
is unprecedented and leads to an extremely narrow interpretation of the
exclusion. The decision is not confined to liability insurance issues but
can be used effectively by analogy in other areas such as life and health
insurance.

The application of the rule in *Breland* requires either that the court
reconsider its position or that the insurer rewrite the exclusion if the
purpose behind the provision is to be achieved. Until one or the other
is done, it would seem that in Louisiana, an insured can act wrongfully
and know that he will *not* have to “pay the piper” for the resulting
damages.

*Leland Redding Gallaspy*