HOMEOWNERS INSURANCE: A WAY TO PAY FOR CHILDREN'S INTENTIONAL—AND OFTEN VIOLENT—ACTS?

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INTRODUCTION

It almost seems to be an everyday occurrence. A child, often a young child, shoots another child or sets fire to a home or store. The stories from 1998 alone stun and horrify most Americans. In Jonesboro, Arkansas, boys, ages eleven and thirteen, fired shots in a schoolyard killing and injuring classmates and a teacher.[1] In Dallas, three boys, ages seven, eight, and eleven, were arrested and charged with sexual assault of a three-year-old girl.[2] In Chicago, a five-year-old boy was beaten by two children, one of whom was only nine years old.[3] The list goes on and on.

These tragic stories are a reflection of reality. Statistics show that crimes committed by minors are steadily increasing. Researchers at the U.S. Department of Justice estimate that the number of juvenile crime arrests will double by the year 2010 if population and arrest-rate-increases continue at their current pace.[4] Population growth is expected to continue, with the number of teenagers between fifteen and nineteen years old growing an additional 23% by the year 2005.[5] Just as disturbing as the projected increase in the number of crimes committed by minors is that the minors committing crimes are increasingly younger. Between 1985 and 1993 the number of homicides committed by fourteen- to seventeen-year-old boys increased 165%.[6] The number of homicide arrests for boys twelve years and younger doubled during approximately the same time period.[7] Also,

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1. *See* Peter Annin & Jerry Adler, *Murder at an Early Age*, NEWSWEEK, Aug. 24, 1998, at 28, 28; John Cloud, *For They Know Not What They Do? When and How Do Children Know Right from Wrong? And How Can We Devise a Punishment to Fit Their Crimes?*, TIME, Aug. 24, 1998, at 64, 64.

2. *See* Annin & Adler, *supra* note 1, at 28.

3. *See* Cloud, *supra* note 1, at 64.

4. *See* Julie Good, *Preventing Violence: From Tragedy to Solutions*, U.S.A. TODAY, May 1, 1998, at 46, 47; *see also* Robert L. Jackson, *Juvenile Arrest Rate for Violent Crimes Declines 9.2%*, L.A. TIMES, Oct. 3, 1997, at A25 (reporting that in 1996, there were 464.7 violent crime arrests for every 100,000 youths between 10 and 17 years old).

5. *See* James Alan Fox & Glenn Pierce, *American Killers Are Getting Younger*, U.S.A. TODAY, Jan. 1, 1994, at 24, 25.

6. *See* Good, *supra* note 4, at 47. *But see* Jackson, *supra* note 4, at A25 (noting that arrests of youths, between ages 10 and 17, declined 10.7% for murder in 1996).

7. *See* Good, *supra* note 4, at 47 (stating that homicide arrests doubled for boys 12 years old and younger between 1985 and 1992). *But see* Annin & Adler, *supra* note 1, at 28 (stating that the number of children younger than 10 years old charged with murder is small and not increasing

rape arrests for children under twelve years of age have more than doubled.[8] While juvenile crime has decreased in recent years, experts warn that as the youth population increases over the next few years, youth crime could reach "record proportions."[9]

The criminal justice and juvenile court systems work to punish the minor attacker, thereby addressing the public policy goal of deterrence. However, these systems do not adequately address another significant public policy goal: compensation to the victim(s) of the attack. One way to achieve victim compensation is for the victim, or his parents, to bring a civil suit against the attacker for his intentional act. The minor attacker, who is often an insured under his parents' homeowners insurance policy, then claims protection from financial responsibility because insurance coverage is in place. In many cases, the primary, or only, compensation for a victim's injury is from a liability insurance policy.[10] However, case law is inconsistent with regard to whether homeowners insurance policies cover intentional acts committed by minor insureds.[11] Varying factual situations and ambiguity in policy language have led to inconsistent and evolving law.[12]

Part I of this Note reviews the homeowners insurance policy: its purpose, policy language, and applicable exclusions. Part II describes the tests used to determine if an intentional act is covered by homeowners liability insurance. Part III outlines recent applications of the tests to four major types of acts committed by minors: shootings with BB guns, shootings with firearms, physical assaults, and arson and the impact of a minor's age on decisions of coverage. Sexual molestation of children by other minors is not covered in this Note because it is discussed extensively in several recent law review articles and case decisions.[13] This Note concludes by discussing whether coverage for intentional

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significantly; only 17 were charged in 1996 compared to an average of 13 charged each year in the 1980s).

8. *See* Annin & Adler, *supra* note 1, at 28 (stating that between 1980-1996, the number of rape arrests for children under 12 increased 250% from 222 to 553).

9. Jackson, *supra* note 4, at A25.

10. *See* John Dwight Ingram, *The "Expected or Intended" Exclusion Clause in Liability Insurance Policies: What Should It Exclude?*, 13 WHITTIER L. REV. 713, 713 (1992).

11. *See* Bilbo v. Shelter Ins. Co., 698 So. 2d 691, 694 (La. Ct. App. 1997).

12. *See id.*

13. *See* Country Mut. Ins. Co. v. Hagan, 698 N.E.2d 271 (Ill. App. Ct. 1998).

> Although a clear majority of courts in other jurisdictions infer intent when the insured is an adult, the courts are evenly split with respect to the extension of this inference to minors. While a slight majority of courts are willing to infer as a matter of law that a minor insured who sexually abuses another minor does so intentionally, almost as many jurisdictions have refused to extend the presumption of intent to minor insureds.

Id. at 276 (citations omitted); *see also* Fire Ins. Exch. v. Diehl, 545 N.W.2d 602, 607 (Mich. 1996); David S. Florig, *Insurance Coverage for Sexual Abuse or Molestation*, 30 TORT & INS. L. J. 699, 737 (1995); Carolyn L. Mueller, *Ohio Homeowners Beware: Your Homeowner's Insurance Premium May Be Subsidizing Child Sexual Abuse*, 20 U. DAYTON L. REV. 341, 351-55 (1994);

acts by minors has expanded in recent years and advocates excluding shootings, assaults, and arson committed by minors from insurance coverage.

I. THE HOMEOWNERS INSURANCE POLICY

The overall purpose of a homeowners insurance policy is to "protect [an] insured from financial loss resulting from his legal liability for injuries to [] property or person[s]" from events beyond his control.[14] The policy is designed to cover an insured when legal "liability result[s] from unintentional and unexpected injuries."[15] To accomplish this overall purpose, policies are generally written on an occurrence basis.[16] An occurrence is typically defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[17] Although the word "accident" is not usually a defined term within the policy, courts have defined it as "occurs unexpectedly or by chance," or "happens without intent or through carelessness."[18] Thus, a homeowners policy, through the definition of occurrence, excludes intentional acts that result in intentional injuries or damage.

In recent years, insurance companies have also added a separate policy exclusion reinforcing the occurrence definition.[19] Typically, the policy exclusion states that personal liability coverage does not apply to bodily injury or property damage which is either expected or intended by an insured.[20] This exclusion applies to all insureds regardless of age. Some insurance companies vary the exclusion language slightly. For instance, Allstate Insurance Company sometimes includes the word "reasonably" and therefore does not cover bodily injury that may *reasonably* be expected to result from intentional acts of an insured person.[21] The impact of adding the word "reasonably" to the policy

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Danne W. Webb, *Intentional Acts and Injuries for Purposes of Insurance Coverage*, 52 J. MO. B. 41, 41-42 (1996).

14. Ingram, *supra* note 10, at 713.

15. *Id.* at 714.

16. *See* Michael F. Aylward, *Does Crime Pay? Insurance for Criminal Acts*, 65 DEF. COUNS. J. 185, 185-86 (1998).

17. *Id.* at 185-86 (quoting Giddings v. Industrial Indem. Co., 169 Cal. Rptr. 278, 280 (Cal. Ct. App. 1980)).

18. *Id.* at 186 (quoting *Giddings*, 169 Cal. Rptr. at 280); *see also* Farmers Alliance Mut. Ins. Co. v. Salazar, 77 F.3d 1291, 1297 (10th Cir. 1996) ("[T]he words, 'accident' and 'accidental' have never acquired any technical meaning in law, and when used in an insurance contract, they are to be construed and considered according to common speech and common usage of people generally." (quoting United States Fidelity & Guar. Co. v. Briscoe, 239 P.2d 754, 756 (Okla. 1951))).

19. *See* Aylward, *supra* note 16, at 186.

20. *See* Western Mut. Ins. Co. v. Yamamoto, 35 Cal. Rptr. 2d 698, 701-02 (Cal. Ct. App. 1994); Shelter Mut. Ins. Co. v. Williams, 804 P.2d 1374, 1376 (Kan. 1991).

21. *See* Allstate Ins. Co. v. Dillard, 859 F. Supp. 1501, 1502 (M.D. Ga. 1994), *aff'd*, 70 F.3d 1285 (11th Cir. 1995); *see also* Allstate Ins. Co. v. Stamp, 588 A.2d 363, 364 (N.H. 1991).

language is to require the use of an objective test, a reasonable person standard, in determining whether the result was expected. Another modification, viewing intentional acts from the standpoint of the insured, can change the required test from an objective to a subjective standard. Courts interpreting the clause, "[t]his policy does not apply . . . to bodily injury or property damage which is either expected or intended from the *standpoint of the insured*"[22] look at the intent of the insured in determining whether the intentional acts exclusion applies.[23]

Language commonly found in insurance policies effective prior to the 1980s excluded bodily injury or property damage *caused intentionally by* or *at the direction of* the insured.[24] Some courts find there is no significant difference between the language most commonly used today and the older "caused intentionally" language.[25]

The policy exclusion language currently used supports numerous public policy goals. It supports societal interests against shielding a person from the consequences of intentional acts he or she commits.[26] For instance, a major consequence of an intentional act is payment to the victim. Public policy supports making the individual responsible for the financial consequences of his or her own intentional act.[27] In turn, by placing financial responsibility on an insured rather than on the insurance company, the public partially achieves its objectives of punishing and deterring those acting against societal interests.[28]

Other, perhaps less important, public policy goals are also met. Excluding intentional acts from insurance coverage meets the reasonable expectations of the contracting parties, especially where no intention or expectation was expressed.[29] In addition, the exclusion puts insureds on notice that an otherwise compensable loss will not be covered if the insured intentionally commits an act that causes injury.[30] Finally, an intentional acts exclusion serves to keep the financial burden from being levied against the general public.[31]

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22. Bell v. Tilton, 674 P.2d 468, 470, 477 (Kan. 1983) (emphasis added).

23. *See id.*; *see also* State Farm Fire & Cas. Co. v. Muth, 207 N.W.2d 364, 365-66 (Neb. 1973).

24. *See* Hartford Fire Ins. Co. v. Wagner, 207 N.W.2d 354, 355 (Minn. 1973); *see also* Hawkeye Sec. Ins. Co. v. Shields, 187 N.W.2d 894, 897 (Mich. Ct. App. 1971); Connecticut Indem. Co. v. Nestor, 145 N.W.2d 399, 400 (Mich. Ct. App. 1966).

25. *See* Ingram, *supra* note 10, at 715 ("These courts reason that making a distinction between the legal consequences of these two terms would be inconsistent with a layman's reasonable expectations."); *see also* Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 887 n.3 (Minn. 1978).

26. *See* Ingram, *supra* note 10, at 713.

27. *See* Shelter Mut. Ins. Co. v. Williams, 804 P.2d 1374, 1382 (Kan. 1991).

28. *See* Ingram, *supra* note 10, at 720.

29. *See* Prosser v. Leuck, 539 N.W.2d 466, 467-68 (Wis. Ct. App. 1995).

30. *See* Miller v. Fidelity-Phoenix Ins. Co., 231 S.E.2d 701, 704 (S.C. 1977) (Littlejohn, J., dissenting).

31. *See* Ingram, *supra* note 10, at 720 ("[W]hen an insurer is required to pay certain claims, the burden ultimately comes to rest on the public generally, since such costs are inevitably passed

On the other hand, commonly used policy language does not satisfy other public policy goals. By denying insurance coverage for intentional acts, innocent victims may not be compensated, especially if the insured lacks personal financial resources.[32] Also, the goal of spreading the risk and cost of injuries to all insurance policyholders is not realized by excluding intentional acts from insurance coverage.[33]

When minors commit intentional acts, the societal goals of punishment and deterrence through the imposition of financial consequences may have little impact on minors' anti-social conduct.[34] Children rarely have the financial resources to compensate victims. Public policy goals of reasonable and consistent expectations between contracting parties and notice to insureds are also less likely to be achieved. While minors are insureds, they are usually covered under their parents' insurance policies. Consequently, they may be unaware of the reasonable coverage expectations between their parents, the insurance company, and third parties. In addition, minors, because they are not named insureds, are also not typically provided direct notice of insurance policy language.

In addition to the compensation of victims and spread of risk goals that support coverage for intentional acts, society also values protecting young children from the consequences of their conduct.[35] Hence, public policy goals supporting coverage for minors' intentional acts may outweigh societal interests in excluding coverage.

II. TESTS USED TO DETERMINE IF AN INTENTIONAL ACT IS COVERED

Most of the tests used to determine if an intentional act is covered by a homeowner's insurance policy center on the insured's intent. This is particularly at issue in claims involving minors. One argument for allowing coverage is that minors cannot understand the consequences of their actions and are not sufficiently mature to form intent.[36] Some courts conclusively presume that a

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on to the buyers of insurance and most people are insured.").

32. *See id.* at 719; *see also* James M. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 96-99 (1990) (discussing the reasons for the increased significance of the intentional acts exclusion and the dominance of the compensatory goal).

33. *See* Ingram, *supra* note 10, at 719.

34. Some courts have excluded the financial risk to parents whose child has committed an intentional act by finding separate insurance coverage for negligent supervision claims against parents. *See* Aylward, *supra* note 16, at 190 ("In most cases, the resolution of such claims will turn on whether operative exclusions apply to 'the' insured or 'any' insured. Where exclusions are specifically limited to harm that was expected or intended by 'the' insured, courts often have found coverage.").

35. *See* Lisa Perrochet & Ugo Colella, *What a Difference a Day Makes: Age Presumptions, Child Psychology, and the Standard of Care Required of Children*, 24 PAC. L.J. 1323, 1330 (1993).

36. *See* Aylward, *supra* note 16, at 195.

child under a certain age cannot form intent. For example, in *Carey v. Reeve*,[37] the court did not discuss the issue of whether the act may have been intentional because of a conclusive presumption that children under six years of age cannot form the intent to harm others.[38] For the most part, the presumption is applied in cases of children who are younger than eight years old.[39]

However, the majority of courts do not conclusively presume a lack of intent in children of particular ages,[40] but rather use tests to determine the child's intent. Even courts that apply a conclusive presumption utilize a variety of tests to determine intent in children above certain ages. These tests are the same tests used to determine intent in adults. The test used by the majority of courts requires that two conditions be satisfied in order to trigger the intentional acts exclusion: (1) the insured intended to do the act that caused the injury, and (2) the insured intended to cause some kind of injury.[41] Typically, the second part of the test is the main issue when determining if coverage exists under a homeowners insurance policy.[42]

Intent can be actual or inferred.[43] Actual intent to cause injury is determined either by an objective or a subjective standard.[44] An objective standard invokes a reasonable person test: "whether a reasonable person, standing in the shoes of the insured, would have expected or intended the injuries to occur."[45] A subjective standard focuses on the specific insured and whether she intended to

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37. 781 P.2d 904 (Wash. Ct. App. 1989).

38. *See id.* at 907 n.3 (finding no intent to harm others where a four-and-one-half-year-old child participated in an act in which another young child was burned).

39. *See* Bartoletti v. Kushner, 231 S.E.2d 358, 358-59 (Ga. Ct. App. 1976) (holding that a child one month short of 12 years of age is under the age of criminal responsibility and immune from a tort suit); Scarboro v. Lauk, 210 S.E.2d 848, 850 (Ga. Ct. App. 1974) ("The defendant child being six years of age at the time of the alleged tort was, as a matter of law, not liable therefore even though wilful."); Queen Ins. Co. v. Hammond, 132 N.W.2d 792, 793 (Mich. 1965) (precluding liability to children under seven years of age for intentional torts); DeLuca v. Bowden, 329 N.E.2d 109, 112 (Ohio 1975) ("[C]hildren under the age of seven also should not be held liable for intentional torts."). *But see* Horton v. Reaves, 526 P.2d 304, 307 (Colo. 1974) (applying an intent test requiring commission of an intentional act and an intent to make harmful contact to a three and four-year-old who admitted to dropping a baby that resulted in crushing the baby's skull); Seaburg v. Williams, 161 N.E.2d 576, 577 (Ill. App. Ct. 1959) (finding that whether a six-year-old who set a fire had intent is a fact question). For a summary of states decisions, see Donald Paul Duffala, Annotation, *Modern Trends as to Tort Liability of Child of Tender Years*, 27 A.L.R. 4th 15, 15 (1981).

40. *See* Duffala, *supra* note 39, at 15.

41. *See* Amco Ins. Co. v. Haht, 490 N.W.2d 843, 845 (Iowa 1992).

42. *See id.*; *see also* Farmer in the Dell Enters., Inc. v. Farmers Mut. Ins. Co. of Del., Inc., 514 A.2d 1097, 1100 (Del. 1986); Physicians Ins. Co. v. Swanson, 569 N.E.2d 906, 911 (Ohio 1991).

43. *See Haht*, 490 N.W.2d at 845.

44. *See* Aylward, *supra* note 16, at 186.

45. *Id.*

cause harm.[46] Age is a factor in determining intent under both the objective and subjective intent standards.[47]

Intent can also be inferred as a matter of law.[48] It may be inferred both from the nature of the act and the accompanying foreseeability of harm.[49] For example, many jurisdictions infer intent as a matter of law in cases of sexual molestation of children, regardless of whether the act is committed by an adult or minor,[50] because the act of sexual molestation is inherently harmful.[51] Ohio courts have also extend the inferred intent rule to gunshots at point blank range.[52]

Once a court finds actual or inferred intent to cause injury, most consider differences in magnitude or character between the actual injury and the intended injury immaterial in determining whether insurance coverage exists.[53] For example, in *Hartford Fire Insurance Co. v. Wagner*,[54] a fifteen-year-old boy shot his friend to cover up some burglaries they had committed together.[55] The boy only intended to wound his friend by shooting him in the stomach but the bullet hit his friend's heart and he died.[56] The court found the act of shooting was intended but the actual, more serious, injury was not.[57] However, the court held that even though only a wound, rather than death, was intended, the intentional acts exclusion in the homeowners insurance policy applied, excluding insurance compensation.[58] The two-part majority test, containing both the actual and inferred intent standards, is "well-established, well-reasoned, consistent with the parties' reasonable expectations, and consistent with public policy."[59]

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46. *See id.*

47. *See id.*

48. *See id.*

49. *See* Amco Ins. Co. v. Haht, 490 N.W.2d 843, 845 (Iowa 1992). *But see* Gouger v. Hardtke, 482 N.W.2d 84, 89 (Wis. 1991) (outlining a somewhat different test for inferred intent; whether the act is intentional and substantially certain to cause injury).

50. *See* Country Mut. Ins. Co. v. Hagan, 698 N.E.2d 271, 276-77 (Ill. App. Ct. 1998).

51. *See id.* at 276.

52. *See, e.g.*, Michigan Millers Ins. Co. v. Anspach, 672 N.E.2d 1042, 1048 (Ohio Ct. App. 1996).

53. *See, e.g.*, Parkinson v. Farmers Ins. Co., 594 P.2d 1039, 1041 (Ariz. Ct. App. 1979) ("Although the exclusion is inapplicable when the perpetrator acts without any intent or expectation of causing injury, it is applicable when he acts with an intent to cause injury but the actual injury differs from the one intended or expected.") (citations omitted); *Haht*, 490 N.W.2d at 845; Easley v. American Family Mut. Ins. Co., 847 S.W.2d 811, 814 (Mo. Ct. App. 1992) (holding that insured's desire to limit the victim's injury to a bloody nose instead of the serious cuts he received was of no consequence; all that was required was insured's intent to injure the victim).

54. 207 N.W.2d 354 (Minn. 1973).

55. *See id.* at 355.

56. *See id.*

57. *See id.*

58. *See id.*

59. Paige E. Fiedler, Case Note, 42 DRAKE L. REV. 921, 924 (1993).

The test used by a minority of courts follows classic tort doctrine.[60] It looks to the "natural and probable consequences of the insured's act."[61] The minority view is similar to the majority view's inferred intent test in that both tests focus on the act itself and the probability or foreseeability of harm. Intent is not needed to determine whether insurance coverage applies under either the majority or minority test. Just as with the inferred intent standard in the majority test, age is not considered when applying the natural and probable consequences test. It is arguable that an injury resulting from a negligent act is often a natural or probable consequence of the act and thus, not covered by insurance under the minority view. Thus, the minority view has been criticized because it only allows insurance coverage for acts when the insured is not negligent.[62]

Another view that has received little support[63] requires that the insured has specific intent to cause the type of injury suffered.[64] New Hampshire courts adhere to this view.[65] Although they recognize their approach represents a minority view, the New Hampshire courts, adhering to the principle of stare decisis, refuse to overrule previous decisions.[66] They put the onus on insurance companies to draft a carefully written exclusion in order to avoid the specific intent test.[67]

These three tests are applied to both the homeowners policy's definition of occurrence and the intentional acts exclusion.[68] An insurance company may argue to exclude an act under both the policy's definition of occurrence and the intentional acts exclusion. Alternatively, an insurance policy may be written on an occurrence basis but may not contain an intentional acts exclusion. In these cases, courts have treated the occurrence definition and the intentional acts exclusion as establishing essentially the same limits on liability insurance coverage.[69] The Ohio Supreme Court compared an insurance policy containing the intentional acts exclusion with another policy limiting coverage to accidents and declared "the 'effect of both policies is the same' and they should be treated 'in like manner.'"[70]

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60. *See, e.g.*, Pachucki v. Republic Ins. Co., 278 N.W.2d 898, 901 (Wis. 1979).

61. *Id.*

62. *See* Fiedler, *supra* note 59, at 924.

63. *See id.*

64. *See Pachucki*, 278 N.W.2d at 901.

65. *See* Providence Mut. Fire Ins. Co. v. Scanlon, 638 A.2d 1246, 1247-48 (N.H. 1994).

66. *See id.* at 1248.

67. *See id.*

68. *See, e.g.*, Physicians Ins. Co. v. Swanson, 569 N.E.2d 906, 908 (Ohio 1991); Willis v. Campbell, No. 97-CA-57, 1998 WL 46685, at *3 (Ohio Ct. App. Feb. 6, 1998).

69. *See Swanson*, 569 N.E.2d at 908.

70. *Id.* (citation omitted).

III. Recent Applications of the Tests to Intentional Acts Committed by Minors

A. Shootings with BB Guns

Although a BB gun is not considered a firearm, it is capable of shooting a pellet with enough force to cause severe injury.[71] Courts are divided on whether shootings involving BB guns are excluded from insurance coverage.[72] The decisions in the majority of cases hinge on the subjective intent of the minor shooter to cause injury, although two cases infer intent due to the certainty of the injury.[73] In *Bell v. Tilton*,[74] an eleven-year-old boy participated in a game where he shot at other children from approximately thirty feet away as they raced across an open doorway. The shooter aimed directly at the children as they ran from side to side.[75] A BB hit one of the children in the eye causing a severe injury.[76] The court stated, "the act of shooting another in the face with a BB pellet is one which is recognized as an act so certain to cause a particular kind of harm it can be said an actor who performed the act intended the resulting harm. . . ."[77] Thus, the minor's act was not covered by insurance.[78]

A more recent decision broadens the circumstances under which intent can be inferred. In 1992, the Court of Appeals of Iowa found intent to cause bodily injury when a person shoots a BB in the direction of another person.[79] The court stated that intent can be inferred as a matter of law because of the inherent harm

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71. *See* Bell v. Tilton, 674 P.2d 468, 476 (Kan. 1983). Approximately 33,000 people are injured each year by BB or pellet guns. *See Health Updates*, Salt Lake Trib., Aug. 17, 1995, at C1. Eighty percent of these injuries are to children between the ages of five and nineteen. *See id.* Over 2000 of the injuries require hospitalization. *See id.*

72. Decisions that find insurance coverage applies include *State Farm Fire & Casualty Co. v. Muth*, 207 N.W.2d 364 (Neb. 1973); *Providence Mutual Fire Insurance Co. v. Scanlon*, 638 A.2d 1246 (N.H. 1994); *Physicians Insurance Co. v. Swanson*, 569 N.E.2d 906 (Ohio 1991). Decisions holding insurance coverage does not apply include *American Family Mutual Insurance Co. v. Wubbena*, 496 N.W.2d 783 (Iowa Ct. App. 1992); *Bell v. Tilton*, 674 P.2d 468 (Kan. 1983); *Chapman v. Wisconsin Physicians Service Insurance Corp.*, 523 N.W.2d 152 (Wis. Ct. App. 1994).

73. *See Bell*, 674 P.2d at 477; *Wubbena*, 496 N.W.2d at 785.

74. 674 P.2d 468, 470 (Kan. 1983).

75. *See id.*

76. *See id.*

77. *Id.* at 477. However, in this case, the court did not find that the 11-year-old had aimed directly at the victim's face. Instead of inferring intent, the court applied a subjective test and excluded the act from insurance coverage by finding that the minor had either the desire to cause the consequences of his act or believed the consequences were substantially certain to result. *See id.*

78. *See id.*

79. *See* American Family Mut. Ins. Co. v. Wubbena, 496 N.W.2d 783, 785 (Iowa Ct. App. 1992).

found in the act of shooting a BB gun and the foreseeability of the harm accompanying such an act.[80] The case involved a fifteen-year-old boy who, with friends, was shooting BB pellets at cans.[81] The boys began to scuffle and the fifteen-year-old told his friend, "I'm going to get you."[82] He then fired two shots in the direction of his friend from eighty to ninety feet away, striking his friend in the eye.[83] The court broadened the decision in *Bell* by inferring intent to injure not only when the shooter aims directly at his victim's face, but also when shots are fired in the direction of the victim from a substantial distance.[84]

Another recent decision did not infer intent as a matter of law, but reached the same result by looking at the subjective intent of the minor shooter.[85] The case involved a fourteen-year-old boy who was playing a BB gun war game with friends.[86] During the game he aimed in the general direction of his friend, from approximately seventy-five feet away, and fired, injuring his friend in the eye.[87] He did not take careful aim nor could he see his friend clearly as he fired.[88] The minor insured believed the shot would cause a sting but nothing more serious.[89] The court applied the majority view test and found intent to injure because the minor insured knew injury (a sting) would result from the shot.[90] It did not matter that the resulting injury to the eye was different from the intended sting injury.[91] In general, courts that believe that a BB gunshot is likely to injure find intent regardless of the age of the shooter and whether the shot is aimed directly at the victim.

On the other hand, a New Hampshire decision specifically found that the act of shooting with a BB gun is not certain to result in some type of injury.[92] The court applied a subjective intent standard to find the sixteen-year-old had not intended injury.[93] The sixteen-year-old boy participated in a "game" where he and other boys shot at each other from about fifty feet away.[94] During the game,

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80. *See id.*

81. *See id.* at 783.

82. *Id.*

83. *See id.*

84. *See id.* at 785.

85. *See* Chapman v. Wisconsin Physicians Serv. Ins. Corp., 523 N.W.2d 152, 154 (Wis. Ct. App. 1994); *see also* Bell v. Tilton, 674 P.2d 468, 477 (Kan. 1983).

86. *See Chapman*, 523 N.W.2d at 153-54.

87. *See id.* at 154.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*; *see also* State Farm Fire & Cas. Co. v. Muth, 207 N.W.2d 364, 366 (Neb. 1973); *supra* text accompanying notes 49-59. *But see* Providence Mut. Fire Ins. Co. v. Scanlon, 638 A.2d 1246, 1247-48 (N.H. 1994) (holding the intentional acts exclusion is met only if the insured actually intended the particular injury).

92. *See Scanlon*, 638 A.2d at 1249.

93. *See id.*

94. *See id.* at 1247.

which lasted about an hour, three boys were hit by BB pellets without incurring injury. However, a later shot by the sixteen-year-old, from a distance of eighty to ninety feet, hit another boy in the eye.[95] In deciding that intent could not be inferred and that the minor insured did not intend to cause injury, the court relied heavily on the fact that three previous shots had not caused an injury.[96]

The Ohio Supreme Court has also found that injury from a BB gun shot is not substantially certain to occur.[97] Thus, intent to injure was not inferred and the court looked at the minor's subjective intent.[98] A teenage boy responding to a previous unfriendly encounter with a group of young adults shot his BB gun three times in the direction of the group.[99] A member of the group was hit and subsequently lost his right eye.[100] The teenage boy was approximately seventy to one-hundred feet away from the group and testified that he was aiming at a sign about fifteen to twenty feet away from the group.[101] He also testified that his objective in shooting was to scare the group of young adults.[102] While the court (applying the majority-view subjective test) found the act intentional, the court was persuaded that the insured did not intend to injure the victim. Thus, the court held the intentional acts exclusion did not apply.[103]

Finally, the Nebraska Supreme Court also held that a minor's act of firing a BB gun, from a slow moving car, in the direction of the victim is not excluded from insurance coverage.[104] The trial court found that the minor did not take careful aim and that he fired only to scare someone.[105] However, the court distinguished between types of acts that by their nature will likely cause harm and other acts where harm is unexpected, and placed this BB gun shooting in the latter category.[106] The court then employed the subjective intent to injure standard and held that the minor did not intend to injure based on the trial court findings.[107]

Although age can be a factor in determining subjective intent, none of the courts specifically address age as an issue. Instead, courts seem divided over whether a BB gun is substantially certain to cause injury. Courts who accept that

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95. *See id.*
96. *See id.* at 1249.
97. *See* Physicians Ins. Co. Ohio v. Swanson, 569 N.E.2d 906, 911 (Ohio 1991).
98. *See id.*
99. *See id.* at 907.
100. *See id.*
101. *See id.*
102. *See id.*
103. *See id.* at 911.
104. *See* State Farm Fire & Cas. Co. v. Muth, 207 N.W.2d 364, 366 (Neb. 1973).
105. The court did not state that the trial judge's findings were incorrect but hinted that in reviewing the evidence they might have come to a different conclusion. *See id.* There was conflicting evidence presented from which the trial court could have found that the minor aimed at the car's occupant and intended to hit him. *See id.* at 365.
106. *See id.* at 367.
107. *See id.* at 366.

a BB gun pellet is likely to harm hold the intentional acts exclusion applies. Courts that do not accept the substantial certainty proposition delve into the insured's subjective intent and are willing to find insurance coverage for shooters who only intend to scare their victims or where previous shots fired from a BB gun have not resulted in injury.

B. Shootings with Firearms

Even more dangerous than shooting a BB gun is shooting a firearm. Most courts recognize the foreseeability of causing harm by shooting a gun, and while applying different tests, courts utilize either the occurrence definition or the intentional acts exclusion to exclude such acts from homeowners insurance coverage. In two recent cases, insureds have appealed lower court judgments in favor of insurance carriers contending that the shootings were within the policy's definition of occurrence.[108] In *Farmers Alliance Mutual Insurance Co. v. Salazar*,[109] a sixteen-year-old boy gave a friend his gun. Later, the boy and his friend instigated a dispute with some other youths.[110] The argument escalated and the insured's friend fired at least one shot into another youth's vehicle, killing the vehicle owner. The victim's mother brought a wrongful death suit against the minor insured, alleging negligent entrustment of the minor's gun to his friend.[111] The minor's insurance carrier then initiated a declaratory judgment action to determine whether it had an obligation to defend or indemnify the minor insured.[112] On appeal, the circuit court ruled in favor of the insurance company.[113] In its decision, the court held that the insured's participation in the intentional murder of the victim by the insured's friend was not an accident and therefore not within the policy's occurrence definition.[114] The court defined "an accident as an event from an unknown cause, or an unexpected event from a known cause."[115] In so ruling, the court appears to have adopted an inferred intent test—the act of shooting where a death occurs is not unexpected or unforeseeable, and thus intent is inferred.[116]

Similarly, in shootings involving injury other than death, courts are still

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108. *See* Farmers Alliance Mut. Ins. Co. v. Salazar, 77 F.3d 1291, 1294 (10th Cir. 1996) (applying Oklahoma law); Worrell v. Daniel, 698 N.E.2d 494, 497 (Ohio Ct. App. 1997).

109. *See id.* at 1294.

110. *Salazar*, 77 F.3d at 1293.

111. *See id.* at 1293 n.1.

112. *See id.* at 1293.

113. *See id.* at 1297.

114. *See id.*

115. *Id.* (quoting United States Fidelity & Guar. Co. v. Briscoe, 239 P.2d 754, 756 (Okla. 1951)).

116. *Accord* Worrell v. Daniel, 698 N.E.2d 494, 499 (Ohio Ct. App. 1997) (relying on the analysis used in *Farmers Alliance Mutual Insurance Co. v. Salazar*, the court held that any claims resulting from a minor's killing of his victim by shooting and striking her with a brick are precluded from coverage because the act was intentional and did not constitute an occurrence).

unwilling to find insurance coverage. This is true whether the insured fires directly at the victim[117] or fires at the victim's car.[118] Applying the majority view test and using an objective standard, a Georgia court found that a reasonable thirteen-year-old should have anticipated that intentionally aiming and firing a revolver near a person's head would result in a bullet wound.[119] Hence, insurance did not cover the injury because it was a reasonably expected result of an intentional act.[120] The court was required to apply an objective standard because the policy would not "cover any bodily injury which may *reasonably* be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person."[121]

The same court also applied a subjective standard under the majority view test and still found no coverage for the shooting.[122] In its discussion, the court considered the minor's age but, nevertheless, found that the act was intentional because of the boy's statements prior to the shooting and his careful aim when shooting.[123] In conjunction with the intentional act, the court held that the thirteen-year-old's statements showed his appreciation of the probable and foreseeable results of his intentional act.[124] The two elements of the majority view test, intent to do the act and intent to cause injury, were satisfied. Therefore, under both the objective and subjective intent to injure standards, the court held that the homeowner's insurance policy excluded injury resulting from the thirteen-year-old's act of shooting directly at a victim.[125]

Similarly, an Ohio court applied the majority view test and found a fourteen-year-old's act of shooting at a car was substantially certain to cause injury and, thereby, excluded from homeowners coverage.[126] The fourteen-year-old boy

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117. *See* Allstate Ins. Co. v. Dillard, 859 F. Supp. 1501 (M.D. Ga. 1994), *aff'd*, 70 F.3d 1285 (11th Cir. 1995).

118. *See* Willis v. Campbell, No. 97-CA-57, 1998 WL 46685, at *1 (Ohio Ct. App. Feb. 6, 1998).

119. *See Dillard*, 859 F. Supp. at 1504.

120. *See id.*

121. *Id.* at 1502, 1503 (emphasis added).

122. *See id.*

123. *See id.* The boy asked the other kids he was playing with before the shooting, "[W]hich one of you wants to feel what it's like to be shot." *Id.* at 1502 (quoting from the Trial Transcript, p. 36).

124. *See id.* at 1503.

125. *See id.* at 1504; *see also* Western Mut. Ins. Co. v. Yamamoto, 35 Cal. Rptr. 2d 698, 700, 704 (Cal. Ct. App. 1994) (holding that a minor who shot a person, who was within six or seven feet of the minor, several times hitting him in both arms acted with intent to commit great bodily injury). *But see* Putnam v. Zeluff, 127 N.W.2d 374, 376 (Mich. 1964) (holding that a minor's act of shooting at a dog whom the minor considered wild, with only the intent to protect himself from attack, was covered by insurance).

126. *See* Willis v. Campbell, No. 97-CA-57, 1998 WL 46685, at *3 (Ohio Ct. App. Feb. 6, 1998).

fired a number of rifle shots at a car and injured another boy.[127] Both boys testified that the minor insured was aiming at the car, not the victim, and the injury to the other boy was accidental. However, the court held that a reasonable person knows that firing a rifle four or more times into an occupied car is substantially certain to result in injury to the occupants.[128]

The Supreme Court of New Hampshire hinted at an exception to labeling shooting with a firearm as an intentional act in *Allstate Insurance Co. v. Stamp*.[129] This court found a minor's act of aiming and firing a loaded firearm directly at a police officer is reasonably expected to cause injury.[130] However, the court intimated that the first part of the majority view test, intent to do the act, might not be met if the minor acted unconsciously or involuntarily.[131]

Intent is also frequently at issue in cases involving mentally ill persons.[132] There are two conflicting lines of authority as to whether an act by an insured suffering from a mental illness is intentional and, thus, excluded from insurance coverage.[133] The first line of cases holds that the intentional acts exclusion does not apply to the act and its resulting injury if the insured suffers from a mental illness.[134] This body of cases finds insurance coverage for acts by mentally ill persons. The underlying public policy consideration is that a mentally ill person, who is unable to conform his conduct to acceptable standards, will not perform an act solely because insurance will not cover the resulting injury.[135] Therefore, applying the intentional acts exclusion is inappropriate because it does not deter a mentally ill person from engaging in anti-social conduct.[136] This position also reinforces society's interest in compensating victims.[137]

The second line of cases excludes a mentally ill person's act from insurance coverage if the person understands the nature and consequences of his acts and had the intent to cause the injury.[138] An act by a mentally ill person can be excluded even if the insured is found criminally insane[139] or incapable of distinguishing right from wrong.[140] This line of authority broadens the definition

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127. *See id.* at *1.

128. *See id.* at *3.

129. 588 A.2d 363, 365 (N.H. 1991).

130. *See id.*

131. *See id.*

132. *See* Shelter Mut. Ins. Co. v. Williams, 804 P.2d 1374, 1381 (Kan. 1991).

133. *See id.*

134. *See id.*

135. *See id.*

136. This same logic could be applied to children as well, although it is arguable whether children are able to conform their conduct to permissible standards.

137. *See Williams*, 804 P.2d at 1382.

138. *See id.* at 1381.

139. *See* Economy Preferred Ins. Co. v. Mass, 497 N.W.2d 6, 9 (Neb. 1993).

140. *See Williams*, 804 P.2d at 1381-82 (holding that a 14-year-old mentally ill boy's act of firing a rifle several times in school, thereby wounding teachers and students and killing the principal, was not covered by insurance because the boy understood the nature and quality of his

of intentional act, thereby excluding some acts by mentally ill persons from insurance coverage.[141] Both lines of authority formulate an exception to the general rule excluding firearm shootings from insurance coverage. However, the exception is limited in its application to mentally ill minors, and in some cases only to mentally ill minors who do not intend to cause injury.[142]

The cases consistently show that shootings with firearms are excluded from insurance coverage if the minor is a teenager who shoots in the victim's direction. A very limited exception may exist when the insured is mentally ill.[143] Still unanswered is whether firearm shootings by younger minors, between seven and twelve years old, will be excluded from insurance coverage. Whether an eight-year-old child intends injury to result from shooting a gun has yet to be decided on appeal. A decision involving another type of intentional act sheds some light on the question. In 1983, the Kansas Supreme Court held that an eleven-year-old who aims and shoots a BB gun at another intends to cause injury.[144] Using the subjective standard under the majority view test, the court found the eleven-year-old intended to injure when he aimed directly at the victim from thirty feet away.[145] The court decided that a BB gun pellet can injure and that an eleven-year-old can understand and intend injury when shooting a BB gun.[146] Applying this decision to firearm shootings, it is reasonable to infer that an eleven-year-old can intend to injure when shooting a gun.

If eleven-year-olds can form the intent to injure, then can younger minors likewise form that intent? None of the BB gun or firearm cases involve seven to ten-year-olds. However, an older court decision found a seven-year-old boy had committed a wilful battery when he shot an arrow in the general direction of a five-year-old girl and severely injured her eye.[147] The court considered a number

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acts and intended to cause injury).

141. A third view is outlined by the Minnesota Supreme Court in *State Farm Fire & Casualty Co. v. Wicka*, 474 N.W.2d 324 (Minn. 1991). The court held, for the purpose of applying the intentional act exclusion in the homeowners insurance policy, that

> an insured's acts are deemed unintentional where, because of mental illness or defect, the insured does not know the nature or wrongfulness of an act, or where, because of mental illness or defect, the insured is deprived of the ability to control his conduct regardless of any understanding of the nature of the act or its wrongfulness.

Id. at 331.

142. This exception also applies to mentally ill adults. *See* Aylward, *supra* note 16, at 193-94.

143. Another possible exception is self defense. *See* Fire Ins. Exch. v. Berray, 694 P.2d 191, 193 (Ariz. 1984) (holding, in a case involving an adult, that the insured's act of shooting a .357 Magnum firearm was committed in self defense and, thus, not an intentional act within the meaning of the insurance policy's exclusion).

144. *See* Bell v. Tilton, 674 P.2d 468, 477 (Kan. 1983).

145. *See id.*

146. *See id.*

147. *See* Weisbart v. Flohr, 67 Cal. Rptr. 114, 116 (Cal. Ct. App. 1968).

of factors in making its determination.[148] Several of the factors relate to intent to injure. The boy knew it was wrong to point an arrow at another person (his father had warned him never to shoot an arrow at anyone); he also knew a bow and arrow could be dangerous if used improperly.[149] These factors, along with the probability of injury when a gun is fired, can be used to determine a child's intent to injure when shooting a firearm at another person. Today, with the prevalence of media reports of shootings and television shows displaying violence, it would be difficult to prove that a young minor does not understand what will happen if he aims and shoots a gun directly at another person.[150] It is likely that a court, applying these factors coupled with the high probability of injury, will ultimately exclude firearm shootings by younger minors from insurance coverage.[151]

The other issue that has not been clearly decided by the courts involves random firearm shootings. Rather than just firing directly at a person, a minor shoots into the air or in the victim's general vicinity merely to scare him. Two of these BB gun cases center on the minor's intent to scare rather than to injure.[152] Both of the courts distinguished acts where injury was substantially certain to occur from acts where injury was less likely to occur.[153] Because injury was not substantially certain to occur, the courts applied other tests to determine intent to injure.[154] However, it is more probable that injury will result from shooting a firearm, even randomly, than from shooting a BB gun. Still, even with a greater likelihood of injury, courts may find a younger child less likely to understand that a gunshot fired in the air or aimed at the wall has the potential to injure, and thus find insurance coverage for the intentional act.

C. Physical Assaults

Similar to acts involving firearms, physical assaults—punches—by teenagers are usually excluded from insurance. Regardless of which test is applied to determine intent to injure, the outcomes are consistent: a teenager intends to injure her victim whether she punches him many times, twice, or only once. Many of the cases, regardless of the number of punches infer intent as a matter

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148. *See id.* at 119.

149. *See id.*

150. *See* Perrochet & Colella, *supra* note 35, at 1351 ("Research in child psychology now suggests that chronological age alone is an insufficient measure of a child's capacity to foresee the consequences of action and to . . . refrain from harming others.").

151. The same analysis can be applied to younger children who shoot BB guns, causing injury. However, courts are less certain as to the probability of injury when the act involves a BB gun. *See supra* text accompanying notes 71-107.

152. *See* State Farm Fire & Cas. Co. v. Muth, 207 N.W.2d 364 (Neb. 1973); Physicians Ins. Co. v. Swanson, 569 N.E.2d 906 (Ohio 1991).

153. *See supra* text accompanying notes 71-107; *see also* Willis v. Campbell, No. 97-CA-57, 1998 WL 46685, at *3 (Ohio Ct. App. Feb. 6, 1998).

154. *See supra* text accompanying notes 71-107.

of law because of the nature of the act and the accompanying foreseeability of harm.

The Iowa Supreme Court addressed the issue of repetitious blows in *American Family Mutual Insurance Co. v. De Groot.*[155] A thirteen-year-old babysitter became upset when a five-month-old child would not stop crying.[156] The babysitter struck the child's head on the floor three times and the baby died. The court applied the majority view test and held that the repetitive nature of the act (three blows) supported an inferred intent to injure.[157] As a result of the court's decision, insurance did not cover the babysitter's act or compensate the parents of the dead child.[158]

Similarly, two punches may also infer an intent to injure. A minor's act of punching another boy two times, causing bones to fracture in the victim's face, convincingly shows an intention to cause bodily harm.[159] The court stated, "[p]unches or blows are intended to put the other person in pain and/or fear."[160] The court also addressed the extent of the injury. The minor argued that he did not intend to fracture bones in the victim's face.[161] However, just as in cases involving BB guns[162] and firearms,[163] the court held that even though the extent of the injury was greater than intended, the insurance policy's intentional acts exclusion still excluded coverage for the act of punching.[164]

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155. 543 N.W.2d 870 (Iowa 1996).

156. *See id.*

157. *See id.* at 872; *see also* State Farm Fire & Cas. Co. v. Bullock, No. 387111, 1997 WL 309584, at *5 (Conn. Super. Ct. May 30, 1997) (holding that the very nature of the act—pushing the victim to the ground, striking him multiple times, and causing him to lose consciousness—shows the harm to the injured party must have been intended). The Connecticut court also justified its decision based on reasonableness; a reasonable insured could not expect his insurance policy to pay for the injuries resulting from such a "fierce and brutal beating of another individual." *Id.* at *7 (citation omitted). In addition, the court discussed the public policy rationale; if these types of acts are covered, the liability policy could be used as a "license to wreak havoc at will." *Id.* (citation omitted). *See also* Allstate Ins. Co. v. Boonyam, 597 N.Y.S.2d 131, 132 (N.Y. App. Div. 1993) (upholding summary judgment for the insurer because the harm caused by repeatedly striking a 15-year-old in the head with a hammer and stabbing him in the chest is not within the insurance policy's coverage provisions).

158. The babysitter was covered under a farm liability policy. The policy's intentional acts exclusion language is identical to the typical language found in a homeowners policy. *See De Groot*, 543 N.W.2d at 870-71.

159. *See* Simpson v. Angel, 598 So. 2d 584, 585-86 (La. Ct. App. 1992).

160. *Id.* at 585.

161. *See id.*

162. *See supra* text accompanying notes 71-107.

163. *See supra* text accompanying notes 108-53.

164. *See Simpson*, 598 So. 2d at 585; *see also* Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 887 (Minn. 1978) (holding a 16-year-old's striking of another boy's head, which resulted in a continuing epileptic condition, was not covered by insurance even though the actual injury was more severe than the intended injury).

The majority of cases center around acts involving only one punch. Although the Louisiana court distinguishes two punches from one punch,[165] several courts have inferred intent to injure from just one blow.[166] The cases all involve surprise attacks. In *Fire Insurance Exchange v. Altieri*,[167] a fifteen-year-old boy put on a boxing glove, walked up behind a ninth grade boy, grabbed the boy's hair in his left hand, and punched the boy in the mouth with his right hand.[168] Although the boys had previously exchanged "words," the fifteen-year-old had left only to return later and punch the younger boy. A similar situation occurred in *Jones v. Norval*[169] where an eighteen-year-old had "words" with a twelfth grader. When the twelfth grader tried to leave, the minor insured struck him with his fist, breaking the twelfth grader's jaw and knocking him unconscious.[170] Finally, in *Clark v. Allstate Insurance Co.*, one high school student tapped another high school student, whom he did not know, on the back.[171] As the boy turned around, the student struck him in the face, crushing the boy's cheekbone.[172]

All three courts held that the nature of the acts inferred intent to injure.[173] Although the attackers each said they did not intend to seriously hurt their victims, the courts nevertheless found the acts inherently harmful.[174] The courts echoed the Nebraska Supreme Court's holding that, "[w]here an 18-year-old man intentionally hits another person in the face with his fist, with force enough to knock the person unconscious, an intent to cause bodily injury can be inferred as a matter of law, and the subjective intent of the actor is immaterial."[175]

Courts that do not infer intent as a matter of law often find intent to injure under either the objective or subjective standard used in the majority view test. In *Cavalier v. Suberville*,[176] a teenager, who had previously argued with a former friend, grabbed the friend from behind, turned him around, and punched him in the face. The punch broke several bones. The insurance policy's intentional acts exclusion included the word "reasonably" in its language and the court applied an objective standard.[177] The court held that any person would reasonably expect injury to result from the teenager's act and, thus, the intentional acts provision

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165. "One punch, arguendo might be unintentional, but two punches certainly indicate an intention to cause bodily harm to the victim." *Simpson*, 598 So. 2d at 585-86.

166. *See, e.g.*, Clark v. Allstate Ins. Co., 529 P.2d 1195 (Ariz. Ct. App. 1975); Fire Ins. Exch. v. Altieri, 1 Cal. Rptr. 2d 360 (Cal. Ct. App. 1992); Jones v. Norval, 279 N.W.2d 388 (Neb. 1979).

167. 1 Cal. Rptr.2d 360 (Cal. Ct. App. 1992).

168. *See id.* at 362.

169. 279 N.W.2d 388, 389 (Neb. 1979).

170. *See id.* at 389-90.

171. *See Clark*, 529 P.2d at 1196.

172. *See id.*

173. *See id.*; *Altieri*, 1 Cal. Rptr. 2d at 365; *Jones*, 279 N.W.2d at 391.

174. *See Clark*, 529 P.2d at 1196; *Altieri*, 1 Cal. Rptr. 2d at 362; *Jones*, 279 N.W.2d at 390.

175. *Jones*, 279 N.W.2d at 392.

176. 592 So. 2d 506 (La. Ct. App. 1991).

177. *See id.* at 507.

excluded insurance coverage for the punch.[178]

Even when using a subjective standard under the majority view test, the Missouri Court of Appeals held the insured's act of one punch is excluded from insurance coverage.[179] In *Easley*, two boys fought during a high school basketball practice.[180] After practice one of the boys waited outside for the other boy and hit him on the chin as he walked out of the school building. The boy fell backward and seriously injured his ear, nearly severing it from his head. The court found the minor attacker had acted wilfully and deliberately with intent to injure his victim.[181] As in previous cases,[182] the attacker's intent only to bloody the boy's nose or blacken his eye was of no consequence; intent to cause even a slight injury was all that was required.[183]

Exceptions to the general rule excluding acts of punching from insurance coverage also revolve around the insured's intent to injure. In cases of self-defense the intentional acts exclusion may not apply.[184] In a South Carolina case, two high school boys engaged in a fist fight.[185] One of the boys was injured and sued the other participant. The court found that the victim provoked the fight and that the attacker was reacting to the victim when he struck him in the face.[186] Because the attacker only intended to protect himself and not to inflict a specific injury on the victim, the court cited self-defense and held that the intentional acts exclusion did not apply.[187]

A recent case highlights the level of intent needed to cause an injury. In *Amco Insurance Co. v. Haht*,[188] an eleven-year-old boy struck another child with a baseball after a neighborhood game. The ball hit the child in the temple, causing death. The court applied the majority view test and held that the eleven-year-old's intent to hurt his playmate did not rise to the level of intent needed to

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178. *See id.*; *see also* Pendergraft v. Commercial Standard Fire & Marine Co., 342 F.2d 427, 429 (10th Cir. 1965).

179. *See* Easley v. American Family Mut. Ins. Co., 847 S.W.2d 811, 814 (Mo. Ct. App. 1992).

180. *See id.* at 811.

181. *See id.* at 814.

182. *See supra* text accompanying notes 54-58, 85-91.

183. *See id.*; *see also* James E. Berger, Note, *Liability Insurers Get a Fair Deal;* Easley v. American Family Mutual Insurance Co., 59 MO. L. REV. 209 (1994) (discussing Missouri law before and after the *Easley* decision and outlining the public policy goals that are advanced through use of the subjective standard).

184. *See* Vermont Mut. Ins. Co. v. Singleton, 446 S.E.2d 417 (S.C. 1994).

185. *See id.* at 419.

186. *See id.* at 420.

187. *See id. But see* Nationwide Mut. Fire Ins. Co. v. Mitchell, 911 F. Supp. 230, 234 (S.D. Miss. 1995) (discussing the case of a 16-year-old boy hitting a woman who had pushed his mother). The court stated that "[i]t appears that the majority view does not allow self-defense as an exception to a policy's intentional-act exclusion when a punch, as here, is thrown with a purpose to injure." *Id.* at 231.

188. 490 N.W.2d 843, 844 (Iowa 1992).

cause bodily injury.[189] The court stated that, "[a]n eleven-year-old boy, animated by an obscure playground snit, lacks the same capacity to formulate an intent to injure that is possessed by an adult, or even a youth of more maturity."[190]

The dissent in *Haht*[191] takes issue with the majority carving out an exception for eleven-year-olds who injure others in playground disputes.[192] Justice Snell argues that the majority's opinion results in a specific intent test: the insured must intend the specific injury suffered in order to apply the intentional acts exclusion.[193] The dissent points out that the majority's view promotes compassion for the victim but does not adhere to stare decisis.[194] Additionally, the dissent stresses that the decision leads to uncertainty as to what insurance companies are insuring against.[195]

Courts find intent to injure when a teenager punches another. The nature of a punch is so certain to cause injury that intent to injure can be inferred or found through either the objective or the subjective tests. This is especially true when the punch is a surprise to the person who was hit and applies even when there were previous altercations between the parties.[196] In a very limited exception, when an insured minor hits another only to protect himself, the court may then find insurance coverage for injury.

Less clear is whether younger children, ages seven through twelve, form an intent to injure when punching or throwing an object at another child. The *Haht* court carved out an exception that could conceivably be applied to younger children.[197] The court found that younger children do not have the same capacity

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189. *See id.* at 845; *see also* American Ins. Co. v. Saulnier, 242 F. Supp. 257, 261 (D. Conn. 1965) (finding that the intentional acts exclusion did not apply when a 13-year-old boy threw a Coke bottle and hit another child because he only intended to frighten rather than injure); Walker v. Kelly, 314 A.2d 785, 788 (Conn. Cir. Ct. 1973) (holding that a five-year-old did not wilfully or maliciously intend to injure another child when she threw a rock at him); Hawkeye Sec. Ins. Co. v. Shields, 187 N.W.2d 894, 901 (Mich. Ct. App. 1971) (holding under an insurance policy excluding acts for bodily injury caused intentionally or at the direction of the insured, that the exclusion did not apply when the insured minor hit the young man in the shoulder and/or chest area while another boy kicked him in the testicles and the injury suffered by the young man was to his testicles). *But see* Waters v. Blackshear, 591 N.E.2d 184, 185 (Mass. 1992) (finding that a minor less than 10 years old intended harmful contact when he placed a fire cracker in a seven-year-old's shoe).

190. *Haht*, 490 N.W.2d at 845.

191. *See id.* at 846 (Snell, J., dissenting); *see also* Paul B. Ahlers, Note, Amco Insurance Co. v. Haht*: Iowa's Definition of Insurance Intent*, 79 IOWA L. REV. 203 (1993) (questioning the validity of the court's decision).

192. *See Haht*, 490 N.W.2d at 847 (Snell, J., dissenting).

193. *See id.* at 846.

194. *See id.* at 847-48.

195. *See id.* at 846.

196. *See supra* text accompanying notes 165-83.

197. *See Haht*, 490 N.W.2d at 845.

to formulate an intent to injure as is possessed by a more mature youth.[198] Most children know that a hit, either by using a fist or by throwing an object, is going to hurt because they have received such a hit at one time or another. But whether a younger child understands that a physical injury is likely to occur, as a result of the hit or throw, is questionable. Unlike punches by teenagers where intent is often inferred,[199] the younger minor's intelligence, maturity, past experiences and conduct, and the circumstances surrounding the hit may assist in determining whether intent to injure exists. However, public policy may offset such considerations.[200] Social norms support the belief that anti-social conduct should not be rewarded.[201] All people, even young children, should face the consequences of their actions.

D. Arson

Unlike the cases in the other categories that caused bodily injury, virtually all the cases involving arsons resulted only in property damage. Perhaps this is one of the reasons the case decisions are split fairly evenly between not insuring[202] and insuring[203] intentional acts of setting fires. Age also appears to be a more significant factor in determining intent to injure.

As in some of the firearm shooting cases,[204] an Ohio appellate court excluded a fire set by a high school student from insurance coverage by applying the occurrence definition.[205] A high school student used a lighter to set fire to a

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198. *See id.*

199. *See supra* text accompanying notes 155-83.

200. *See supra* text accompanying notes 29-35.

201. *See supra* text accompanying notes 26-28.

202. Cases which exclude acts of setting fires from insurance coverage include: *United States Fidelity & Guaranty Co. v. American Employers' Insurance Co.*, 205 Cal. Rptr. 460 (Cal. Ct. App. 1984); *Home Insurance Co. v. Aetna Life & Casualty Co.*, 663 A.2d 1001 (Conn. 1995); *Farmer in the Dell Enterprises, Inc. v. Farmers Mutual Insurance Co. of Delaware, Inc.*, 514 A.2d 1097 (Del. 1986); *Farmers Automobile Insurance Ass'n v. Medina*, 329 N.E.2d 430 (Ill. App. Ct. 1975); *City of Newton v. Krasnigor*, 536 N.E.2d 1078 (Mass. 1989); *Metropolitan Property & Casualty Insurance Co. v. Ham*, 930 S.W.2d 5 (Mo. Ct. App. 1996); *Aetna Casualty & Surety Co. v. Cigany*, No. 73230, 73242, 1998 WL 655495 (Ohio Ct. App. Sept. 24, 1998); *Unigard Mutual Insurance Co. v. Argonaut Insurance Co.*, 579 P.2d 1015 (Wash. Ct. App. 1978).

203. Cases in which insurance covers acts of setting fires include: *Seaburg v. Williams*, 161 N.E.2d 576 (Ill. App. Ct. 1959); *Allstate Insurance Co. v. Sparks*, 493 A.2d 1110 (Md. Ct. Spec. App. 1985); *Connecticut Indemnity Co. v. Nestor*, 145 N.W.2d 399 (Mich. Ct. App. 1966); *Michigan Millers Insurance Co. v. Anspach*, 672 N.E.2d 1042 (Ohio Ct. App. 1996); *Eisenman v. Hornberger*, 264 A.2d 673 (Pa. 1970); *Miller v. Fidelity-Phoenix Insurance Co.*, 231 S.E.2d 701 (S.C. 1977); *Prosser v. Leuck*, 539 N.W.2d 466 (Wis. Ct. App. 1995).

204. *See supra* note 108 and accompanying text.

205. *See* Aetna Cas. & Sur. Co. v. Cigany, No. 73230, 73242, 1998 WL 655495, at *3 (Ohio Ct. App. Sept. 24, 1998).

teddy bear located in the school's storage area.[206] The fire spread and caused over $500,000 in property damage. The court construed the word "accidental" in the occurrence definition to mean "an unexpected happening without intention or design."[207] In applying the definition, the court found the insured intended to cause property damage, and thus his actions were not accidental and were outside of the occurrence definition.[208]

Under the intentional exclusion clause, intent to cause injury, in the form of property damage, can be inferred as a matter of law.[209] Three youths broke into an unattended junior high school and set numerous small fires, including lighting matches in boxes of library books in several different locations.[210] The youths then left without attempting to extinguish the fires. Approximately $1.3 million in property damage resulted from the fires.[211] The court found that the insured youth intended to cause property damage to the school.[212] In inferring intent, the court considered the nature of the act—setting fires in an unattended building—and the foreseeability of the fire spreading.[213]

Other courts have applied the majority view test but used an objective standard.[214] The Delaware Supreme Court decided that a juvenile's act of starting a fire in a trash pile and moving it close to a building, subsequently destroying the building, is excluded from insurance coverage under the intentional acts exclusion.[215] It did not matter that the minors only intended to damage the trash pile because it was entirely foreseeable that moving burning trash close to a building would damage the building.[216]

Similarly, in a Missouri case, a fourteen-year-old helped set fire to a juvenile detention center in order to escape.[217] The court rejected the minor's argument that the act should be covered by insurance because she only intended to create a diversionary fire and did not intend to damage the entire building.[218] The court

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206. *See id.* at *1.

207. *Id.* at *2 (citation omitted).

208. *See id.* at *3; *see also* Unigard Mut. Ins. Co. v. Argonaut Ins. Co., 579 P.2d 1015, 1018 (Wash. Ct. App. 1978) (defining "accident" to require a result that is unforeseen, involuntary, unexpected, and unusual and finding an 11-year-old's deliberate act of setting a fire in a school building voluntary).

209. *See* City of Newton v. Krasnigor, 536 N.E.2d 1078, 1081 (Mass. 1989).

210. *See id.* at 1080.

211. *See id.* at 1080-81.

212. *See id.* at 1082.

213. *See id.* at 1081 n.7.

214. *See* Farmer in the Dell Enters., Inc. v. Farmers Mut. Ins. Co. of Del., Inc., 514 A.2d 1097, 1099 (Del. 1986); Ash/Ramunno Assocs., Inc. v. Nationwide Mut. Fire Ins. Co., No. 95C-11-158 SCD, 1996 WL 658819, at *1 (Del. Super. Ct. Oct. 22, 1996); Metropolitan Prop. & Cas. Ins. Co. v. Ham, 930 S.W.2d 5, 7 (Mo. Ct. App. 1996).

215. *See Farmer in the Dell Enters., Inc.*, 514 A.2d at 1099-1100.

216. *See id.* at 1100.

217. *See Metropolitan Prop. & Cas. Ins. Co.*, 930 S.W.2d at 6.

218. *See id.* at 7.

found that the destruction of the building was a natural and probable consequence of the act and, therefore, not covered by insurance.[219]

The majority of courts hold that only the intent to harm, not the extent of harm, matters.[220] However, a recent Wisconsin case distinguishes intent to cause some harm from harm that occurred, by requiring the resultant harm to be substantially certain to follow.[221] Rather than using a foreseeability or probable consequence standard, the court broadened insurance coverage by excluding only acts where the resultant harm is substantially certain to follow.[222] In *Prosser*, a thirteen-year-old and his friends broke into a warehouse and found a gasoline can and a lighter.[223] The boys poured a couple of small drops of gasoline on a concrete window sill and lit them. While the drops were burning, one of the boys sprinkled more gasoline on the drops. Flames rose causing the boy to drop the burning gasoline can.[224] The boy then kicked it through a hole in the floor. The fire spread throughout the warehouse and caused extensive damage. The court applied the majority view test, but limited intent to injure to only cases where the resultant harm was substantially certain to follow.[225] The court concluded that the expected harm of a stain resulting from lighting small drops of gasoline on the window ledge insufficient to satisfy the intent to cause injury requirement.[226] The court's rationale is similar to the *Haht* decision, which held that the act of an eleven-year-old hitting his playmate with a baseball did not rise to the level of intent needed to cause injury.[227] In both cases, the likelihood of injury is too far removed from the act to satisfy the required intent.[228]

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219. *See id.*; see also *United States Fidelity & Guaranty Co. v. American Employers' Insurance Co.*, 205 Cal. Rptr. 460 (Cal. Ct. App. 1984) for application of the majority view test using the subjective standard.

220. *See United States Fidelity & Guar. Co.*, 205 Cal. Rptr. 460 at 468; *Farmer in the Dell Enters., Inc.*, 514 A.2d at 1100; City of Newton v. Krasnigor, 536 N.E.2d 1078, 1081 (Mass. 1989); Aetna Cas. & Sur. Co. v. Cigany, No. 73230, 73242, 1998 WL 655495, at *3 (Ohio Ct. App. Sept. 24, 1998).

221. *See* Prosser v. Leuck, 539 N.W.2d 466, 469 (Wis. Ct. App. 1995).

222. *See id.*

223. *See id.* at 467.

224. *See id.*

225. *See id.* at 469. *But see* Pachucki v. Republic Ins. Co., 278 N.W.2d 898, 903-04 (Wis. 1979).

226. *See id.*; *see also* Michigan Millers Ins. Co. v. Anspach, 672 N.E.2d 1042, 1048-49 (Ohio Ct. App. 1996) (holding the resulting bodily injury from a robbery and fire to cover up the robbery was not excluded from insurance coverage because the insured only intended property damage, did not know the building was occupied, and could not have reasonably expected bodily injury).

227. *See* Amco Ins. Co. v. Haht, 490 N.W.2d 843, 845 (Iowa 1992). *But see* Westfield Ins. Co. v. Blamer, No. 98AP-1576, 1999 WL 680162 (Ohio Ct. App. Sept. 2, 1999) (holding that the finding of coverage in *Michigan Millers Insurance Co. v. Anspach* not maintained under the law today because the bodily injury "flowed from" the intentional acts of others directing the robbery who knew that the house was occupied).

228. *See supra* text accompanying notes 188-200.

Other courts finding insurance coverage for intentional acts have looked at the nature of the act to determine if injury is expected; the act of setting a fire compared with a fire occurring incidental to another intentional act. In a Maryland case, a mill was burned after boys ignited gas fumes with a cigarette lighter they were using to illuminate their attempt to steal gas. The court held that the boys did not intend to cause property damage.[229] Similarly, an earlier decision by a Pennsylvania court held that a seventeen-year-old who broke into a home to steal liquor did not intend to cause property damage when a match he lit to find his way around the house smoldered and subsequently caused a fire.[230] The Pennsylvania court also discussed possible overriding public policy considerations that would preclude insurance coverage but found none.[231] Because the insurance policy was not purchased to cover the crime, the policy obviously did not promote the crime, did not serve as a deterrent to the crime, and did not save the insured from the effects of his unlawful act.[232]

An act involving a younger boy setting a fire was also covered by insurance.[233] A ten-year-old boy set fire to a home primarily as a prank; he wanted the excitement of seeing the fire trucks come.[234] The court found that the boy had no conscious intent to cause property damage.[235] However, the dissent pointed out that the minor had broken into the home and set separate fires in two rooms by lighting papers and pictures.[236] Although the majority did not identify age as a factor in their decision, it is reasonable to infer that age indeed was a deciding factor.[237] If an average fifteen-year-old had set these fires as a prank, it is doubtful the court would find a lack of conscious intent to cause damage.[238] In addition, the case was decided in 1977. A ten-year-old's actions and intent might be viewed differently today—more than twenty years later.

An earlier case yielded similar results. An eight-year-old set fire to a neighbor's home causing significant property damage.[239] The child testified that he started the fire to frighten the neighbor's children because he was angry with

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229. *See* Allstate Ins. Co. v. Sparks, 493 A.2d 1110, 1113 (Md. Ct. Spec. App. 1985).

230. *See* Eisenman v. Hornberger, 264 A.2d 673, 674 (Pa. 1970).

231. *See id.* at 675.

232. *See id.*

233. *See* Miller v. Fidelity-Phoenix Ins. Co., 231 S.E.2d 701 (S.C. 1977).

234. *See id.* at 702.

235. *See id.*

236. *See id.* at 703 (Littlejohn, J., dissenting).

237. In its decision, the court cited an earlier case, *Connecticut Indemnity Co. v. Nestor*, 145 N.W.2d 399, 401 (Mich. Ct. App. 1966), which specifically held age as the reason for not finding intent to cause damage. *See id.* at 702.

238. *Cf.* Willis v. Campbell, No. 97-CA-S7, 1998 WL 46685, at *1 (Ohio Ct. App. Feb. 6, 1998) (finding a reasonable thirteen-year-old should have anticipated injury when firing a gun near a person's head); Chapman v. Wisconsin Serv. Ins. Corp., 523 N.W.2d 152, 154 (Wisc. Ct. App. 1994) (finding a fourteen-year-old intended to injure when shooting a BB gun).

239. *See* Connecticut Indem. Co. v. Nestor, 145 N.W.2d 399, 400 (Mich. Ct. App. 1966).

them, but that he did not intend to burn the house.[240] The court held the child intentionally set the fire, but because of his "tender age", he did not intend to damage the house.[241] Finally, an Illinois case involving a five- and one-half-year-old who set a fire used the same rationale to find insurance coverage for the act.[242] The court stated, "Based upon the evidence of defendant's age, capacity, intelligence and experience, we conclude that he lacked the mental and moral capacity to possess the intent to do the act complained of."[243]

Although these cases are more evenly split between including and excluding the acts from insurance coverage, the inclusions basically fall into two categories. The first category centers on acts which do not specifically involve setting fires—the fire and its resultant property damage were not intended. Fires incidental to other intentional acts, such as stealing, are covered by insurance. The second category is age specific. Younger children, due to their age, lack intent to cause property damage even though they commit an intentional act by setting a fire. Fires set by older minors are, for the most part, excluded from insurance coverage.

CONCLUSION

Through the years, courts have continued to broaden the intentional acts exclusion and the occurrence definition in insurance policies. The result has been to deny insurance coverage for minors' intentional acts. In cases involving shootings with firearms and physical assaults, almost all of the courts have found no insurance coverage. However, courts are less certain to exclude insurance coverage for acts involving shooting with BB guns or arson. A major reason for distinguishing shooting with BB guns from shooting with firearms or punching someone is the certainty of injury. A punch or a bullet is substantially certain to cause some type of injury whereas a BB gun pellet may "sting" a person without causing injury. When an act is not certain to cause injury, then the question of the actor's intent is more crucial in determining insurance coverage.

Courts are less willing to exclude acts of arson from insurance coverage. Although a fire is almost certain to cause property damage, if not bodily injury, courts are reluctant in some cases to exclude the act of setting a fire from insurance coverage. The courts' reluctance centers on one of two major factors: the act itself or the age of the actor. When the fire is incidental to the intended act, then the courts do not apply the intentional acts exclusion. The actor's age is also central to determining intent to injure. Courts have found minors under the age of eleven do not form intent to injure where they claim to have set the fire for reasons other than to cause property damage.

Age does not appear to be a major factor in the other types of intentional acts. Courts infer intent or find actual intent, regardless of the minor's age, in

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240. *See id.*

241. *Id.* at 401.

242. *See* Seaburg v. Williams, 161 N.E.2d 576 (Ill. App. Ct. 1959).

243. *Id.* at 578.

cases involving shootings with firearms, shootings with BB guns, and physical assaults. However, the cases raised on appeal usually involve teenage insureds. As a child ages and matures, age will become less of a factor in determining intent, both objectively and subjectively. If projections hold true and the minor population increases with younger children committing more crimes, it will be interesting to see if the courts begin to cite age as a major factor in ascertaining intent to injure.

Exceptions to finding intent to injure are fairly limited. The exceptions, while not discussed in each intentional act category, can probably be applied to all categories. Mental illness, self-defense, unintentional act, and uncertainty of injury are defenses used by insureds to argue for insurance coverage. However, these defenses have high public policy hurdles to clear before the courts will accept them and find that insurance companies should pay for the victim's injury.

The primary function of insurance coverage is to protect insureds from financial responsibility incurred as a result of events beyond their control. Insurance is not designed to protect insureds from intentional acts and expected injuries. By finding insurance coverage for intentional acts and resulting injuries, courts alter the function of insurance. Such a change then defeats one of the primary public policy considerations underlying the function of insurance: it allows the insured to escape financial responsibility for actions that she can control. Insurance then facilitates the insured's intentional action rather than deterring it.

For minors, underlying public policy considerations may not be as strong. It is doubtful that the existence of an insurance policy impacts a minor's decision to commit an intentional act. Financial responsibility to the victim probably does not enter into the minor attacker's mind. However, regardless of its impact on an individual minor, society must deter minors, including younger children, from intentional acts that cause bodily injury or property damage. Punishing minor attackers through the criminal justice system is just one way to accomplish society's overriding goal. Another way is to exclude intentional acts from insurance coverage and to require the minor attacker to take financial responsibility for compensating his victim. Although this way may not send a message to the individual minor, it does send a message to parents of minors, as well as to society as a whole. Shootings, assaults, fires—acts where someone can get hurt or something can get damaged—will not be condoned no matter what age the attacker.